

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF MARYLAND

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5  
6 PUBLIC HEARING ON PROPOSED AMENDMENTS  
7 TO THE FEDERAL RULES OF CIVIL PROCEDURE  
8

9  
10 DECEMBER 7, 1998  
11 COURTROOM 1-A  
12 101 WEST LOMBARD STREET  
13 BALTIMORE, MARYLAND  
14 9:00 a.m.

15 BEFORE:

16 THE HONORABLE PAUL V. NIEMEYER, CHAIRMAN  
17 THE HONORABLE JOHN L. CARROLL  
18 THE HONORABLE RICHARD H. KYLE  
19 THE HONORABLE LEE H. ROSENTHAL  
20 THE HONORABLE SHIRA ANN SCHEINDLIN  
21 PROFESSOR EDWARD H. COOPER  
22 PROFESSOR RICHARD L. MARCUS  
23 PROFESSOR THOMAS D. ROWE, JR.  
24 SHEILA L. BIRNBAUN, ESQUIRE  
25 MARK O. KASANIN, ESQUIRE  
MYLES V. LYNK, ESQUIRE  
ANDREW M. SCHERFFIUS, ESQUIRE  
SOL SCHREIBER, ESQUIRE  
THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER

Gail A. Simpkins, RPR  
Official Court Reporter

P R O C E E D I N G S

1  
2 JUDGE NIEMEYER: This is the first public hearing  
3 on the proposed civil rules. We have sent out a public  
4 notice, a printed version of the rules. They came out  
5 in August. The proposals are in there, the proposals  
6 to amend Rules 4, 5, 12, 14, 26, 30, 34 and 37 and in  
7 addition, to amend Admiralty Rules B, C and E.

8 These proposed changes essentially fall into  
9 three categories. One is a service rule to provide  
10 additional time for response in situations where the  
11 government is called on to defend. The second is a  
12 package of proposed discovery rules, which I think most  
13 of you probably are here for, and the third is a  
14 revamping of some admiralty rules.

15 We have provided you with notice of these. We've  
16 received written comments and we also have a list of  
17 some of you who wish to speak orally here before the  
18 committee.

19 Our plan is to hear you out and then to continue  
20 with hearings in January in San Francisco and in  
21 Chicago. Once we finish those hearings and receive all  
22 the comments by February 1, we will then take counsel  
23 and meet in April to consider your comments. We have a  
24 meeting planned in Oregon in April.

25 Then the Committee will make its final

1 recommendations to the Standing Committee in June.  
2 That will be, we don't know where that meeting is, but  
3 that meeting will be probably in the middle part of  
4 June.

5 If the Standing Committee approves of the  
6 recommendations of the Civil Rules Committee, then it  
7 goes on to the Judicial Conference of the United States  
8 for consideration at its fall meeting in September in  
9 Washington.

10 That is the last approval by a legislative type  
11 of enactment. It then goes to the Supreme Court and  
12 the Supreme Court, if it is enamored with it, sends it  
13 over to Congress. If Congress doesn't see much wrong  
14 with it, it will become a law, if all this happens, on  
15 December 1, the year 2000.

16 Why don't we, unless there is any further comment  
17 or questions here, why don't we begin then with our  
18 hearing. I am going to allow you basically ten  
19 minutes. There will be a little bit of looseyness, of  
20 loosey-gooseyness at the edges of that, but I would  
21 like you to think in those terms, and we will go from  
22 there.

23 We have a list of the people who have signed up  
24 for comment this morning. I am just going to go down  
25 that list in the order in which you are listed and

1 begin with Robert E. Scott, Defense Research Institute.

2 It would be helpful, if you are willing, if you  
3 happen to represent someone else, to express some other  
4 body or interest that you represent. If you are here  
5 just for yourself, you need not do that, but that will  
6 probably be helpful to us.

7 Mr. Scott.

8 MR. SCOTT: Thank you, Judge Niemeyer. I am  
9 Robert Scott. I am with the law firm of Semmes, Bowen  
10 & Semmes, with its principal offices here in Baltimore,  
11 but I am here today as President of the Defense  
12 Research Institute, the nation's largest organization  
13 of lawyers who defend civil cases. We have over 21,000  
14 individual members and more than 300 corporate and  
15 insurance company members.

16 In addition to enhancing the skills, the  
17 effectiveness and professionalism of defense civil  
18 trial lawyers, DRI is committed to anticipating and  
19 addressing issues that are germane to improving and  
20 seeking the balance in the civil justice system.

21 I want to thank you for the opportunity to appear  
22 today before the Advisory Committee to endorse  
23 uniformity in discovery rules, limiting the discovery  
24 scope, and achieving a more focused discovery based on  
25 the claims and defenses of the parties rather than the

1 subject matter of the pending action.

2 DRI will be submitting a more detailed written  
3 statement before the conclusion of the period for  
4 public comment, but I do want to address today a few of  
5 the proposed amendments.

6 DRI has previously expressed general support for  
7 the proposed revisions of the discovery rules under  
8 consideration by the Committee at this time. They  
9 reflect significant progress towards reaching  
10 objectives outlined in the DRI Working Group Report,  
11 which was submitted to this Committee back in September  
12 of 1997. I would like to begin --

13 JUDGE NIEMEYER: Is that part of the Boston  
14 College Conference?

15 MR. SCOTT: That is correct, Your Honor.

16 I would like to begin with a few words about the  
17 process that has brought us here today and then to  
18 discuss the discovery reform package which we endorse.

19 I doubt that this Advisory Committee has ever had  
20 the benefit of the amount of accumulated wisdom that it  
21 now has before it. In the past, your predecessors had  
22 to consider rule changes with only the observations of  
23 a few judges and lawyers and the law review  
24 commentaries of academics. This time, however, you  
25 have had the input of an assembly of scholars and

1 practitioners representing the entire spectrum of  
2 clients, as well as a massive amount of empirical  
3 research.

4 Several years ago, following the passage of the  
5 Civil Justice Reform Act, Professor Linda Mullenix  
6 argued that rationality had been absent from the  
7 discovery reform process. Instead, she said, reforms  
8 were aimed at a problem, discovery abuse, that was  
9 really just a myth.

10 According to Professor Mullenix, at the time the  
11 CJRA was conceived, there was no empirical evidence  
12 that proved the existence of excessive litigation costs  
13 and delay attributable to discovery. Instead, she  
14 said, discovery reform was based solely on anecdotes.

15 Professional Mullenix predicted failure for the  
16 CJRA. She said that the CJRA Advisory Committee could  
17 not uniformly define discovery abuse based upon their  
18 own definition. Some said it was a problem, while  
19 others concluded that it did not exist.

20 She also said that local committees also lacked  
21 the social science expertise to evaluate the results of  
22 their plans.

23 But a key component of the CJRA was the  
24 commissioning of a comprehensive study of its effect by  
25 the RAND Institute, which report was released in 1996,

1 as well as a companion study of the Federal Judicial  
2 Center, which was completed in 1997. If there was  
3 little information available prior to the CJRA, there  
4 is abundant information today.

5 RAND concluded that the discovery cutoff dates  
6 significantly decreased the disposition time of cases  
7 and the cost and lawyer work hours, without any change  
8 in attorney satisfaction or views of fairness.

9 The Federal Judicial Center found in a survey of  
10 lawyers who litigated a random sample of closed cases  
11 the following:

12 Half of total litigation costs are attributable  
13 to discovery. Half of all parties encountered a  
14 problem in discovery. Most often 44 percent related to  
15 document production, 37 percent in mandatory  
16 disclosure, 27 percent in expert disclosure and 26  
17 percent in depositions.

18 Unnecessary discovery amounted to four percent of  
19 total litigation cost per client, and mandatory  
20 disclosure was correlated with a shorter disposition  
21 time.

22 According to RAND, discovery cutoff dates were  
23 the only policy conclusively found to reduce costs and  
24 delay, but they can't be imposed by rule. They are  
25 part and parcel of early, firm trial dates that can be

1 set only in jurisdictions with uncrowded, undelayed  
2 dockets.

3 However, the rule changes that you proposed  
4 reducing the permissive scope of discovery are somewhat  
5 analogous and should also reduce discovery expenses  
6 substantially.

7 Meanwhile, the Federal Judicial Center survey has  
8 given us some numbers with which to evaluate discovery  
9 problems.

10 We know that discovery expenses are too high in a  
11 significant minority of cases and that document  
12 discovery is often the culprit. In light of these  
13 findings, the discovery reform package the Committee  
14 proposes is a major step in the right direction.

15 JUDGE CARROLL: Mr. Scott, let me ask you a  
16 question. Can you describe a case for me wherein this  
17 difference in the relevant standard would make a  
18 difference?

19 MR. SCOTT: In a place case I would have to think  
20 about it, Your Honor, but in most cases, if you are  
21 limiting your discovery to the claims and defenses, you  
22 are certainly narrowing the scope as opposed to the  
23 subject matter of the case before you.

24 JUDGE CARROLL: Can you give me an instance where  
25 the subject matter and the claims and defenses would be

1 different?

2 MR. SCOTT: I could not at this time, but I would  
3 give thought to it later and provide the panel with  
4 information on that.

5 Another positive step is the explicit recognition  
6 of cost bearing for burdensome discovery documents that  
7 are only tangentially related to the case. This gives  
8 litigants the opportunity to obtain items to which they  
9 are not entitled by right under Rule 26(b)(2) by paying  
10 the cost of document production.

11 Your amendment to Rule 34(b) will not shift the  
12 cost of document discovery related to the core  
13 allegations or crucial matters in the case. It simply  
14 recognizes that a court should not, by default, allow  
15 expansive discovery on tangential matters.

16 Our strong preference has been to eliminate  
17 mandatory pre-discovery disclosure entirely in all  
18 district courts. And while we would have preferred  
19 sequential discovery by which the plaintiff first  
20 provides materials supporting its claims and the  
21 defendant thereafter provides materials supporting its  
22 defense, we are pleased that under your proposed rule  
23 disclosure is required only of the identity of the  
24 witnesses and documents that support the disclosing  
25 party's position. We expect that this will reduce

1 cost, while not sacrificing the attorney-client or  
2 work-product privileges.

3 Thus, the discovery rule changes that you have  
4 promulgated represent, not an untested gamble, but  
5 rather the product of long years of debate,  
6 experimentation and expertise. Most importantly, the  
7 process has been opened to public participation from  
8 the beginning.

9 We are very happy that DRI was able to provide  
10 input and that our suggestions were carefully  
11 considered. We are also pleased that other segments of  
12 the bar contributed their thoughts because this process  
13 has been truly rigorous in the intellectual debate that  
14 has occurred.

15 I would close by saying that although we are  
16 happy with this package of proposed amendments, we hope  
17 this will not end, be the end of the Committee's  
18 discovery reform efforts. In our view, two major  
19 problems are among those remaining to be addressed.

20 First, there should be some persuasive time  
21 limits placed on discovery of documents and electronic  
22 materials. There is a huge cost associated with  
23 maintaining and searching for old forgotten documents.  
24 We hope the Committee will further study this issue.

25 Second, you have not acted on the issue of

1 preserving privilege assertions as to voluminous  
2 documents. Tremendous costs are generated by the need  
3 to create privilege logs, particularly in product  
4 liability cases.

5 This DRI Working Group Report that was submitted  
6 last September includes proposals on both these areas,  
7 which we would encourage the Committee to revisit.

8 I want to thank you for allowing me to appear  
9 this morning. Thank you, Judge.

10 JUDGE NIEMEYER: Thank you, Mr. Scott.

11 I also want to thank the DRI for its assistance.  
12 You did appear at the Boston College. That was, as you  
13 know, a helpful conference, and we do appreciate your  
14 remarks today.

15 I might comment generally that we have had  
16 several comments already about the discovery of  
17 electronic data. I can say that we recognize the  
18 difficulty of that problem and that it needs to be  
19 addressed. It is not being addressed by this package.  
20 We have it on a long-term study agenda.

21 But the difficulty of handling data, as it  
22 increases, literally every computer on every desktop in  
23 every large corporate entity has access to the entire  
24 information of the world. If you are going to request  
25 documents that provide discovery into everything, you

1 can see the problems that that gets us to quickly.  
2 That is one thing that we are aware of and will be on  
3 the long-term agenda.

4 The other question that you had indicated was the  
5 privilege question, which is also a very complex  
6 problem.

7 As you know, the Federal Rules draw on state  
8 privilege rules, and in a sense they are considered  
9 substantive. The extent to which they can be modified  
10 for purposes of federal litigation procedural matters  
11 is a difficult question, and that has not been buried.  
12 It is still in our study, if there is anything that can  
13 be done there, but it is not quite as simple as it  
14 first might appear. When you start getting into the  
15 debate on it, you find that it is a conundrum that will  
16 take some study.

17 Thank you very much.

18 Mr. Black.

19 PROFESSOR ROWE: Mr. Chairman, might I ask Mr.  
20 Scott one question?

21 JUDGE NIEMEYER: Yes, sir.

22 PROFESSOR ROWE: If I heard you correctly and  
23 read your statement correctly, you didn't address  
24 directly the deposition length limit. You said your  
25 organization endorsed the general package.

1 I wondered if you had thoughts or a position  
2 specifically with regard to the idea of a limit and the  
3 form of the limit being stated as seven hours.

4 MR. SCOTT: Yes. There are two comments that I  
5 would like to make on that. One is the concern with  
6 having the deponent also giving consent for the  
7 increase in the length of time. As it currently reads,  
8 the parties and deponent can agree to a further  
9 increase in length of time for deposition or you can go  
10 back before the Court and receive court order.

11 PROFESSOR ROWE: Are you saying that a nonparty  
12 deponent should be compelled to go beyond the seven  
13 hour limit just by the stipulation of the parties?

14 MR. SCOTT: I believe you get into situations,  
15 specifically in the scientific field, where you are  
16 taking depositions and oftentimes seven hours may not  
17 be sufficient in order to discover the necessary bases  
18 for expert opinions, as well as the methodology that  
19 has been employed by that particular expert and under  
20 Daubert standards, whether or not that methodology is  
21 scientifically sound.

22 Sometimes seven hours is not sufficient. In that  
23 instance, asking the deponent, who may not have an  
24 interest in coming back, could create a problem;  
25 although, the option is available for the parties to go

1 before the court to receive a court order to allow for  
2 the extension of time.

3 Also, I think that in the run-of-the-mill or the  
4 routine case, seven hours is probably sufficient;  
5 although, it is recognized that in some cases, again,  
6 specifically scientific and in engineering cases and  
7 other complex cases, sometime seven hours is not  
8 sufficient. Hopefully --

9 JUDGE NIEMEYER: That's usually when the attorney  
10 hasn't done his homework.

11 MR. SCOTT: Oftentimes that is, Your Honor, but  
12 oftentimes, if this individual has never been deposed  
13 before, you don't have the benefit of prior depositions  
14 or prior information you can use to hone in on the  
15 specific facts, it sometimes takes longer.

16 I think that with the admonition that the courts,  
17 we want the courts, the trial courts to be more active  
18 at an early stage in the discovery process, hopefully  
19 in setting appropriate pretrial procedures, those  
20 issues can be addressed.

21 But we are not opposed to the time limits for  
22 depositions and the one day, seven-hour rule. We just  
23 recognize there could be some issues, but we will  
24 address those issues later. It seems to be some of  
25 these need to be addressed by the panel which, at a

1 later time, can make recommendations.

2 MR. KASANIN: Mr. Chairman --

3 JUDGE NIEMEYER: Yes.

4 MR. KASANIN: -- can I just offer some  
5 information?

6 JUDGE NIEMEYER: Yes.

7 MR. KASANIN: On Judge Carroll's question about  
8 the difference between subject matter and claims and  
9 defenses, I just received a package from the  
10 Administrative Office on Friday which contained the  
11 monograph from the American College. That does set  
12 forth examples.

13 JUDGE CARROLL: It does. I question, though,  
14 whether they are good examples or not.

15 (Laughter.)

16 JUDGE NIEMEYER: All right.

17 JUDGE SCHEINDLIN: Mr. Chairman.

18 JUDGE NIEMEYER: Yes.

19 JUDGE SCHEINDLIN: I also had a question.

20 JUDGE NIEMEYER: Yes.

21 JUDGE SCHEINDLIN: I want to know what you  
22 thought of the two-tier approach in terms of limiting  
23 the scope of discovery. The attorney-managed discovery  
24 goes to the claims and defenses, but then people can  
25 come to the court and say there is good cause, you

1 should get into the subject matter.

2 Do you think that every case is going to be  
3 coming to this court anyway and we are only going to  
4 end up in long disputes about what is good cause and we  
5 are going to end up getting back to the subject matter  
6 inevitably anyway and thereby burdening the courts with  
7 a lot of additional litigation?

8 MR. SCOTT: Well, our preference would be to  
9 limit it to the attorney-managed discovery standards  
10 and not have to go back before the court to show good  
11 cause to expand it. We feel that limiting discovery to  
12 the claims and defenses is the appropriate way to go,  
13 and we would endorse that.

14 We are hopeful that if the good cause provision  
15 remains, that courts will exercise a lot of discretion  
16 and hopefully, judicial restraint, and not looking at  
17 it as a way to open up Pandora's box and get back to  
18 some of the problems which we are experiencing today.

19 JUDGE SCHEINDLIN: Thank you.

20 MR. SCHREIBER: My Chairman, may I ask a  
21 question?

22 JUDGE NIEMEYER: Yes.

23 MR. SCHREIBER: Mr. Scott, as a defense counsel  
24 representing clients who have problems with costs in  
25 discovery, why wouldn't you bring on a cost-bearing or

1 cost-shifting motion in many of your cases so you can  
2 provide your client with an opportunity of reducing  
3 their cost as such? How would you make the  
4 distinction?

5 MR. SCOTT: Well, most of the times we are faced  
6 with plaintiffs who would not be able to bear that  
7 expense. We see that the whole issue of cost bearing  
8 usually falls disproportionately on the defendant. In  
9 situations where you have impecunious plaintiffs or  
10 plaintiffs with limited resources, you are just not  
11 going to see those individuals having the cost placed  
12 on them.

13 It is almost like the English rule, the loser  
14 pays. We don't see where that would probably, in the  
15 United States, be something that really would work out  
16 in fairness to both parties.

17 MR. SCHREIBER: Well, if the plaintiff can't get  
18 it because he doesn't have enough money, wouldn't you  
19 in effect be able to knock the case out?

20 MR. SCOTT: I see. You're saying that if the  
21 plaintiff then does not have the means to pay --

22 MR. SCHREIBER: Yes.

23 MR. SCOTT: -- then the plaintiff would be  
24 precluded from the discovery.

25 MR. SCHREIBER: Particularly, say, in employment

1 and civil rights cases, how would you make the  
2 distinction?

3 MR. SCOTT: Well, I personally would be opposed  
4 to a carte blanche refusal. I think that what is  
5 necessary is that if in fact the request is going for  
6 the documents and information related to the claims and  
7 defenses, that that should be, those documents can and  
8 should be discoverable.

9 But it is when you go beyond that to talking  
10 about the subject matter of the litigation, which opens  
11 up literally millions of documents in most instances  
12 and which only a couple thousand or hundreds might be  
13 ultimately used in the case, those are the tremendous  
14 costs that we find that --

15 JUDGE NIEMEYER: Well, I think the rule says the  
16 proposal is not to shift costs even when you go to  
17 subject matter. I think the only time that cost  
18 bearing would be implicated is when you bump up against  
19 the limitations of proportionality, duplication --

20 MR. SCOTT: Right.

21 JUDGE NIEMEYER: -- peripheral discovery.

22 All right. Thank you, Mr. Scott.

23 Mr. Black.

24 MR. BLACK: Good morning. My name is Alan  
25 Black. I am a lawyer in private practice in

1 Philadelphia, Pennsylvania. I am not the president of  
2 anything. I am here speaking just as a practicing  
3 lawyer.

4 Like Mr. Scott, I address my remarks to the  
5 discovery package in the rules. I am embarrassed to  
6 note that I failed to note that limitation in my  
7 written submission. It looked as though I was  
8 addressing all of the proposals and really, that was  
9 intended to be addressed in the discovery part of it.

10 I would like to make two general points and two  
11 more specific ones. My first general point is that in  
12 my experience, and from my reading of the empirical  
13 materials that were presented in Boston at least, in  
14 September of '97, I see no crying need for the proposed  
15 changes in the discovery rules that are now before the  
16 Committee, with perhaps the exception of the initial  
17 disclosure rules, to make those uniform nationwide.

18 I think that Mr. Scott and I disagree on what the  
19 empirical evidence shows. It kind of proves that  
20 beauty is in the eye of the beholder. But even the  
21 specific instances that Mr. Scott cited do not support  
22 these proposed discovery changes.

23 The RAND study, Mr. Scott pointed out, said that  
24 a firm discovery date and a firm trial date is what  
25 reduces the expense of litigation and the expense of

1 discovery. There is nothing there about cutting back  
2 on the scope of discovery or any of these other  
3 proposals that are now before the Committee.

4 Similarly, the Judicial Conference study, Mr.  
5 Scott pointed out, concluded that four percent of  
6 discovery was unnecessary or something along that.  
7 Well, that strikes me as a pretty small percentage.

8 In my experience, and the view that seemed to be  
9 expressed universally in Boston, was that the four  
10 percent problem comes in the big mega cases where if  
11 there is a need, that is the only need.

12 So it would really be attacking with a  
13 blunderbuss where we need a rifle shot to adopt a  
14 package of rule changes that affects every single case  
15 in the federal, civil case in federal courts.

16 I am somewhat concerned that -- you know, these  
17 projects, I would hope would not take on a life of  
18 their own, that all of us, having invested so much time  
19 and energy in getting to this point, there is sort of a  
20 natural human tendency to say well, you know, gee, it  
21 would be horrible to conclude all of this by deciding  
22 that nothing is necessary; but I honestly believe that  
23 if the Committee goes back and reviews the evidence and  
24 what is really happening out there in the real world,  
25 that ought to be the conclusion.

1           JUDGE SCHEINDLIN: But you mentioned that you  
2 support the uniformity. Then how would you get to  
3 that?

4           MR. BLACK: I think the current proposal is fine  
5 on that. Likewise, you know, I think the current  
6 proposal on the deposition limitations is fine.

7           Frankly, I mean this is not within the scope of  
8 these amendments, but I think that if we could find  
9 some way to draw some reasonable limits on the length  
10 of trials and simply --

11           You know, if Congress would adopt a statute that  
12 would say that no federal trial shall exceed one month  
13 in time, period, good lawyers would be able to figure  
14 out a way to present their case in two weeks, no matter  
15 how complicated it is.

16           JUDGE NIEMEYER: You would like to practice in  
17 the Eastern District of Virginia.

18           JUDGE CARROLL: It is not the good lawyers we  
19 have trouble with.

20           MR. BLACK: I think we've gotten to the point  
21 where we have slipped just a little step by little step  
22 into the expectation that it is perfectly all right to  
23 have a six-month trial or a nine-month trial or a year  
24 trial, and that, I think, is basically insanity.

25           I think any good lawyer can prepare a case that

1 is, no matter how complex, in a relatively reasonable  
2 period of time, but I am off my point.

3 My second general observation or point would be  
4 to implore the Committee to move the work on  
5 information stored in electronic form up to the front  
6 burner, the near-term study, the let's-get-it-done mode  
7 rather than the long-term study. This, I think, is the  
8 most crying need that we have.

9 When I prepared my written statement, I went back  
10 and I looked at the rules. I was shocked. I was  
11 absolutely shocked at how archaic they are. They are  
12 designed for the --

13 JUDGE NIEMEYER: They are designed for documents  
14 or other physical things.

15 MR. BLACK: Yeah.

16 JUDGE NIEMEYER: The question is how do you  
17 define a document? You certainly want data, don't you,  
18 in your cases?

19 MR. BLACK: Yes, Your Honor. We are forced to do  
20 it by defining a document now. We shouldn't be. We  
21 should have rules, as we go into the 21st century, we  
22 should have rules that are at least in the 20th century  
23 and that address directly electronic information.

24 Now I am too old to understand the technology or  
25 to be able to advise or recommend what the rules ought

1 to be, but there have got to be some young folks out  
2 there who understand all this stuff perfectly well and  
3 who can come up with some rules that make some sense in  
4 terms of defining what has to be produced in discovery,  
5 what doesn't, how far you have to go in dealing with  
6 material that has been "deleted" from a system that  
7 isn't really deleted.

8 I mean is it technologically possible to take a  
9 snapshot of a computer system on the day when the  
10 discovery request is served and allow the computer  
11 system thereafter to just, you know, work? I don't  
12 know, but if it is, it sounds to me that maybe  
13 something like that ought to be done.

14 But we really need to do something in that area.  
15 It is just shocking to me --

16 JUDGE NIEMEYER: I think we recognize the need.  
17 The real question is not a lot of people are writing in  
18 about the good ideas on how to do it.

19 MR. BLACK: Well, we've got to find them. That  
20 is why you're paid the big bucks. You guys have to  
21 find those people.

22 (Laughter.)

23 On more specific points, I think it would be a  
24 really serious mistake to tamper at this point with the  
25 scope of discovery.

1           JUDGE CARROLL: Let me ask you this question. It  
2 is the reverse of the question that I asked Mr. Scott.

3           The defense bar in their comments complain  
4 subject matter is too broad a category. The plaintiff  
5 bar complains the claim or defense is too restrictive.

6           Can you give me an example of where the claim or  
7 defense would restrict discovery that you would get  
8 otherwise under subject matter?

9           MR. BLACK: Sure, sure. In fact, I think I  
10 mentioned one in my written materials.

11           Take a case, sort of a contract case, where the  
12 party who feels that he or she has been victimized  
13 thinks that there may well have been fraud involved  
14 here, but you don't really know enough to know for  
15 sure.

16           Under the current rules, you file a contract  
17 claim and you take discovery about what happened to see  
18 if you have a fraud claim. I think that works better  
19 and makes more sense than pushing the plaintiff's  
20 lawyer into treading as close as he possibly can or she  
21 possibly can, or maybe even a little over the other  
22 side, to file a fraud claim so that you can get  
23 discovery about that. That is an example.

24           JUDGE CARROLL: Do you think that --

25           Most fraud, most breach of contracts I see also

1 have a fraud claim attached. Of course, that may be an  
2 Alabama practice.

3 (Laughter.)

4 MR. BLACK: I don't know about that.

5 JUDGE CARROLL: I mean is that not a --

6 Do you honestly think that is a normal practice,  
7 is to file a breach of contract where there's a  
8 possibility of fraud?

9 MR. BLACK: No, but that is an example of where  
10 it would make a difference.

11 I'll tell you where it would make an enormous  
12 difference. There are two places it would make an  
13 enormous difference.

14 One of them is that we would have people running  
15 into court, you know, we would have an explosion of  
16 litigation over what this new standard means.

17 Everybody now knows what the subject matter means  
18 and pretty much there is not much litigation over  
19 relevance issues in discovery, at least in my  
20 experience. You would have a lot of, you would have a  
21 lot of litigation over what is the claim or defense  
22 scope.

23 And sure, that would settle down after 25 years,  
24 but do we need 25 years of litigation over it? I think  
25 not because I think you are probably right, Judge

1 Carroll. It probably isn't going to make a whole lot  
2 of practical difference in the real world, except that  
3 cutting back on the scope of discovery is going to  
4 send, as Arthur Miller said in Boston, a monumental  
5 message to the profession and it is going to say it is  
6 okay to read discovery requests even more narrowly than  
7 you do now, and you would have the President quibbling  
8 even more about what the word is means.

9 In my view, one of the major problems in  
10 discovery is that there is a culture that it's okay to  
11 read things as narrowly as you possibly can, not as  
12 narrowly as you can within the bounds of common sense,  
13 but as narrowly as you possibly can.

14 Therefore, the requesting party writes a request  
15 that defines what a document is for six pages  
16 single-spaced, which nobody reads, and the requests are  
17 all, you know, ridiculously detailed. The response is  
18 given with an equally narrow eye, an equally narrow  
19 reading. To me, that's a problem even today.

20 But if the Federal Rule, if the scope of  
21 discovery is reduced, it is going to become ever more  
22 of a problem. And to me, that is the major, the really  
23 major serious problem with that proposal.

24 The other specific proposal that I would ask you  
25 to reject is the cost-shifting proposal which, again, I

1 think is going to involve a whole new layer of  
2 litigation about who has to pay and how much and  
3 etcetera, etcetera.

4 The rule and the proposal, there is no standard  
5 for the judge to apply in deciding. It is just sort of  
6 well, if I think it is -- do I think that the other  
7 side ought to have to pay? There really is no standard  
8 at all, even in the proportionality part of the rule  
9 which says well, is the cost and burden outweighed by  
10 the likely usefulness of the discovery?

11 Well, how is a district judge supposed to decide  
12 these things, on what record? Are we going to have a  
13 hearing? Are we going to take evidence about how long  
14 it is going to take, how much it is going to cost, what  
15 are the hourly rates of the lawyers who are going to  
16 be, you know, doing the search or reviewing for  
17 privilege?

18 On the other side of the equation --

19 JUDGE CARROLL: Let me ask more questions about  
20 this because I think you raise a very interesting  
21 point. Obviously, in the area of electronic discovery,  
22 it seems to me that this cost-bearing provision is  
23 where it will have a great deal of effect.

24 For example, a plaintiff says we don't believe  
25 that what we have gotten thus far indicates that there

1 is really the communication that we expect between  
2 lower level people and management people on e-mail. We  
3 want to network your e-mail system, for example, to  
4 find out really what was going on. You have a hearing  
5 and you determine that the cost is going to be about a  
6 hundred thousand dollars to do that.

7 So the question for you, as a judicial officer,  
8 is who bears the cost of this? Should it be the  
9 company that has the data? Should we force them to  
10 spend a hundred thousand dollars and retrieve it or  
11 should the plaintiff? I mean the purpose is to allow a  
12 judge to make some sort of determination about how  
13 relevant that is.

14 Now I agree that it is standardless, but there  
15 are lots of other things that are standardless that we  
16 do on a daily basis.

17 The point that you make, though, is that this is  
18 unfair to poor litigants, but life isn't fair, and  
19 aren't poor litigants generally disadvantaged?

20 MR. BLACK: Well, I think it would be really an  
21 awful thing if we said officially that in our civil  
22 justice system, access to information depends on how  
23 much you can pay.

24 JUDGE CARROLL: Well, access to expert witnesses  
25 depends on how much you can pay.

1 MR. BLACK: Pardon me?

2 JUDGE CARROLL: Access to expert witnesses,  
3 access to depositions. I mean there are a lot of cost  
4 issues that make a difference that we don't do anything  
5 about, so why should we show particular concern that  
6 this is another disadvantage?

7 MR. BLACK: Well, I think we should not go  
8 further to do anything more in that direction than we  
9 already do.

10 PROFESSOR ROWE: You say this would be going  
11 further. Do you take the position that federal  
12 district judges are now without authority to impose any  
13 cost bearing for discovery that violates the standards,  
14 excessiveness, disproportionality of 26(b)?

15 MR. BLACK: No, I don't think so.

16 PROFESSOR ROWE: Then what is this? Then why is  
17 this amendment such a problem since this is what it  
18 does?

19 MR. BLACK: Then --

20 PROFESSOR BLACK: It writes it explicitly into  
21 the rule, an authority that you concede already  
22 exists.

23 MR. BLACK: Well, then the amendment is not  
24 needed, is it?

25 But I think the practical effect is, of course, a

1 federal judge has the authority to assign costs or  
2 shift costs. I think cost bearing is almost too cute.  
3 Let's call it what it is. It is cost shifting.

4 I think, of course, a federal judge has the  
5 authority to do that and under today's standards, she  
6 or he does it occasionally. But my sense is that the  
7 whole purpose of this amendment would be to encourage  
8 judges to do it much more routinely, and I think that  
9 would be, I think that would be a mistake.

10 JUDGE NIEMEYER: All right. Thank you, Mr.  
11 Black.

12 MR. BLACK: Thank you.

13 JUDGE NIEMEYER: Mr. Arenson.

14 MR. ARENSON: Good morning. I am Gregory  
15 Arenson. I am with the firm in New York of Caplan,  
16 Kilsheimer & Fox, LLP, but I am really here as a  
17 representative of the New York State Bar Association,  
18 Commercial and Federal Litigation Section. For those  
19 of you who don't know, this section has about 1,950  
20 members and hope to be about 2,000 shortly.

21 As far as this report goes, which we have  
22 submitted to you, and I hope that each of you have had  
23 an opportunity at least to receive it, if not to review  
24 it, it was adopted unanimously by our section.

25 Now in practice, I will be honest, that means

1 that about 40 litigators in complex commercial matters,  
2 and that is primarily what they do, adopted it  
3 unanimously, both with the committee that I chair that  
4 drafted the bulk of the report, as well as in the  
5 section itself. That gets to the results that we came  
6 with or the recommendations that we have, and I would  
7 like to review them briefly before going through them.

8 First, we support narrowing the scope of  
9 discovery so that it is just information relevant to  
10 the claim or defense of any party. However, we oppose  
11 having a second level or second standard for discovery  
12 under the current standard which is relevant to the  
13 subject matter of the action if someone can show a good  
14 cause.

15 We also oppose the other discovery proposals,  
16 which is the adoption of uniform mandatory initial  
17 disclosure. We oppose a presumptive limit of a  
18 seven-hour, one-day deposition under Rule 30(d)(2), and  
19 we oppose incorporating explicitly into Rule 34(b) a  
20 reference to what is already in Rules 26(b)(2) and  
21 26(c).

22 PROFESSOR ROWE: Mr. Arenson.

23 MR. ARENSEN: Yes, sir.

24 PROFESSOR ROWE: Could you say whether the group  
25 that you've described as being the ones who voted on

1 this is primarily plaintiff, primarily defense or quite  
2 a mix?

3 MR. ARENSON: It is a mix of both.

4 PROFESSOR ROWE: Of both?

5 MR. ARENSON: Right. It represents the views  
6 unanimously of both plaintiff and defendant lawyers and  
7 that was with both in the committee itself that drafted  
8 the report, as well as in the section itself which  
9 adopted the report.

10 Now our comments or recommendations are really  
11 based on a couple of fundamental principles. First, it  
12 is based on the empirical studies by the Federal  
13 Judicial Center, which Mr. Willging is the principal  
14 author of apparently, as well as on the RAND study that  
15 resulted from the CJRA, and that is that the ordinary  
16 case is not the source of the discovery problems. It  
17 is the high stakes, complex, contentious cases that are  
18 the source of the problems of cost and delay.

19 Therefore, if you are going to make a change, you  
20 are going to make it directed towards these cases  
21 which, again, the group that I am representing here  
22 today deal with primarily.

23 JUDGE NIEMEYER: We found that a majority, a  
24 pretty good large majority of the cases, there was  
25 three hours or less discovery.

1           MR. ARENSON: That's right. I think the RAND  
2 study said in half the cases that they studied there  
3 wasn't any discovery at all.

4           JUDGE NIEMEYER: Yeah, forty percent with no  
5 discovery and then there is another percentage which  
6 was three hours or less, which means that what we are  
7 doing isn't going to effect those cases one way or the  
8 other.

9           MR. ARENSON: That's right, but you shouldn't  
10 have to make a change, Your Honor, in order to effect  
11 those cases.

12           Then the question becomes, what should the change  
13 be, if there should be any change at all, to effect the  
14 complex, high stakes, contentious cases? We submit  
15 that the particular changes --

16           JUDGE NIEMEYER: I think a lot of the cases in  
17 which there is a lot of discovery aren't high stakes  
18 cases and are not complex. It just happens to be cases  
19 where attorneys decide to use discovery. We found that  
20 when attorneys decided to use discovery, we start  
21 getting into the, what the RAND called it, was the  
22 anecdotal horrors that are described.

23           MR. ARENSON: Right. But on the other hand, if  
24 you look at the empirical study that the Federal  
25 Judicial Center did, and this Committee authorized and

1 asked them to do, that showed that in the overwhelming  
2 majority of cases the discovery was proportionate to  
3 the amount that was at stake in the case.

4 So that indicates that even in those cases where  
5 you go beyond three hours of discovery, whatever that  
6 amount of discovery is, it made sense in the context of  
7 the case for the most part. Again, all you are  
8 addressing here are those, I want to call them abuses,  
9 but let's call them problems.

10 Again, going back to our fundamental principle,  
11 the way to address the fundamental problems of  
12 discovery, if there are any, is to narrow the scope of  
13 discovery and to involve judicial officers in those  
14 cases that probably demand it anyway, and that you  
15 should not make this particular proposal because they  
16 may in fact be counterproductive.

17 Now since 1989, the New York State Bar  
18 Association, Commercial and Federal Litigation Section,  
19 has urged the narrowing of the scope of discovery to  
20 get information relevant to the claims and defenses  
21 asserted in the action. We believe that this standard  
22 is distinguishable.

23 I know, Professor Carroll, you've asked the two  
24 previous people about this, and so I will jump over and  
25 deal with my own personal case.

1 JUDGE CARROLL: How many is of serious concern?

2 MR. ARENSON: I think the Section, and we have  
3 been conferring this for almost ten years now, believes  
4 that there is a difference. I will talk about my  
5 personal case first.

6 It's an antitrust case. It involves a particular  
7 market. There are no allegations in the complaint, but  
8 in fact one might argue that there is a pattern of  
9 activity that some of the defendants engaged in in  
10 other markets that may relate to the market in issue.

11 JUDGE CARROLL: Isn't that an evidentiary  
12 question though?

13 MR. ARENSON: Well, but the question is is it an  
14 evidentiary question or is it something that should be  
15 resolved in advance as to whether you should permit the  
16 plaintiffs to go and take evidence in all of those  
17 different markets that may or may not be --

18 JUDGE CARROLL: For example, that happens all,  
19 that happens all the time in Title 7 cases, employment  
20 discrimination cases, where the defendant is doing bad  
21 things --

22 MR. ARENSON: Right.

23 JUDGE CARROLL: -- allegedly doing bad things in  
24 other places. Can you discover that? That is really a  
25 relevance question, though, using almost a trial

1 relevance standard rather than ruling subject matter,  
2 claim or defense.

3 MR. ARENSON: Right. But I think what we are  
4 proposing is that if you use a narrower scope of  
5 discovery, those issues will surface earlier and get  
6 resolved and that they should be resolved because that  
7 is the way, if you are trying to cut down on the cost  
8 of discovery, that is what you have to do.

9 It doesn't affect the fairness of the eventual  
10 procedure because if in fact a plaintiff, let's take a  
11 plaintiff in this case, can demonstrate that there is  
12 some reason which is going to go to one of the claims  
13 or the defenses in the action, they should be permitted  
14 to take that discovery.

15 If they can't demonstrate that going in, then in  
16 fact that is where you should narrow it and you  
17 shouldn't permit it. That's why we think that there is  
18 some distinguishable characteristic here between the  
19 two standards. Because it will focus on what the court  
20 and the parties have to prove at trial, we think it  
21 makes sense.

22 Yes, Your Honor.

23 JUDGE ROSENTHAL: We heard some of the prior  
24 speakers suggest that in any case in which it would  
25 make a difference, the side seeking broader discovery

1 would be in there arguing that good cause was present  
2 and we would have an explosion of litigation to define,  
3 A, what difference it made and B, if it was restrictive  
4 than whether there was a basis for allowing a broader  
5 discovery.

6 From what I hear you saying, however, even if, as  
7 you propose, we did not have this second tier  
8 available, the court would still be struggling with  
9 trying to determine in any given case if this was  
10 claims or defenses discovery or subject matter  
11 discovery, and the availability of the second tier  
12 would not affect the likelihood of satellite litigation  
13 or the degree of it.

14 MR. ARENSON: Well, I disagree with a little bit  
15 of that conclusion, though. The predicate I think I do  
16 agree with, so let me deal with a couple of those  
17 issues.

18 First of all, initially, I am sure that the court  
19 and practitioners are going to have to sort of get the  
20 parameters down. I hope it won't take 25 years, but I  
21 think that --

22 JUDGE ROSENTHAL: We're fast.

23 MR. ARENSON: I agree, you're fast. You're on  
24 the uptake, no question.

25 So I think that that will have to be done

1 initially. Then the parties will understand.

2 I think having two levels in there in the rule is  
3 just going to confuse things because particularly with  
4 the comments in the draft note that it is hard to tell  
5 where the line is between the two of them, I don't  
6 think that is helpful at all.

7 But I think if we have one standard, and that's  
8 what everybody has to adopt and go with, it will in  
9 fact in the long run cut down, though it may in the  
10 short run increase it, as you have to determine whether  
11 or not it is in the case.

12 But again, let's go back to the good cause  
13 standard. That has been rejected once before. That  
14 was in the rules for document discovery prior to 1970,  
15 and it got thrown out for a good reason, because it was  
16 uncertain and erratic in practice.

17 So, therefore, you are going to now apply it  
18 again to document discovery and I think what you are  
19 also saying, Your Honor, is that it goes to a broader  
20 standard as well. So you are going to try and show  
21 good cause to get a broader standard of discovery in  
22 the complex cases, where you wanted to bring it in in  
23 the first place because, first of all, that is the  
24 usual case where you have the problem. That's where  
25 you are going to have the most contentiousness anyway

1 because that is where the stakes justify it.

2 Judge Scheindlin.

3 JUDGE SCHEINDLIN: Some of those who propose this  
4 change are worried about overpleading, the loss of  
5 notice pleading, and more Rule 11 litigation. Are you  
6 worried about that, that a plaintiff's lawyer who  
7 starts out drafting the complaint, eventually the  
8 defense lawyer who drafts the answer, is going to have  
9 to put more into those documents in order to raise a  
10 claim or defense to get the discovery that they want  
11 and then we are going to get caught hearing sanctions  
12 issues and more satellite litigation again?

13 MR. ARENSON: I don't know about more satellite  
14 litigation.

15 JUDGE SCHEINDLIN: I'm just worried about that.

16 MR. ARENSON: There is very bad tension. I think  
17 that there will be more of it because there will be  
18 some lawyers who will stay closer to the Rule 11 line,  
19 if I can call it that, to try to get more into the  
20 complaint or into the answer so that they can take  
21 discovery because they don't have the claim or a  
22 defense that they know about in advance.

23 I think the way to handle that is to make it  
24 clear in the Rule 16(b) conferences right up front that  
25 let's make sure we've got the claims and to establish

1 where those borders are, that discovery might have to  
2 take place, and to get it taken care of there.

3 JUDGE SCHEINDLIN: We have --

4 MR. ARENSON: Again, but it is that judicial  
5 involvement in this process that we would like to see.

6 JUDGE SCHEINDLIN: Sure. But we come after the  
7 pleadings are drafted.

8 MR. ARENSON: That's right. But I know it is  
9 still usually early enough in the case so that the  
10 judge and parties can address those kinds of issues  
11 without having to get into a pleading difficulty along  
12 the way.

13 But I agree, there is that tension. Yes, there  
14 is probably going to be a little more Rule 11  
15 litigation as a result of that.

16 JUDGE NIEMEYER: Well, you know, the message we  
17 heard in Boston and we heard in all the data and we  
18 heard from you today is that we need more judicial  
19 involvement. Both plaintiffs' lawyers and defendants'  
20 lawyers have indicated that we are going to save costs  
21 if we make the judges work a little harder.

22 So I think what you're -- we can't have it both  
23 ways. We can't have it say we are going to go before  
24 the judge and then say we are going to avoid the work.  
25 It is going to be more work for the judges, I think, if

1 the new design works its course so that the lawyers can  
2 receive more guidance.

3 MR. ARENSON: Your Honor, I agree with that. But  
4 again, it is a question of whether it is going to be  
5 quicker and less costly in the long run and in some  
6 cases it is going to be more costly as we adopt the  
7 system, but I think that generally it will in fact cut  
8 down on the costs and the delays because of the  
9 involvement.

10 If I can move on to a couple other points? I am  
11 probably running --

12 JUDGE NIEMEYER: You are already five minutes  
13 over. I'll give you two more minutes.

14 MR. ARENSON: Two more minutes. That's very  
15 difficult.

16 Let me just say that on the mandatory initial  
17 disclosure, our principle is that that is the problem  
18 in the high stakes, complex, contentious cases and yet  
19 the empirical study showed that in cases that the  
20 stakes are over \$500,000, 43 percent found problems  
21 with initial disclosure and in cases less than that, it  
22 was 16 percent that found problems. We think that, in  
23 fact, that is not the right solution.

24 Again, if you take a look at it logically, in a  
25 complex case you've got two different standards here.

1 A party has to first go through with the standard under  
2 the mandatory initial disclosure to find out whether  
3 documents, witnesses, or facts support a party's claims  
4 or defenses. Then you are going to have to do it again  
5 because it is a complex case and you know that your  
6 opponent is going to be asking because they don't  
7 believe that you produced everything in the first  
8 place.

9 So logically, it is going to increase the time  
10 you have to go through the process because it is a  
11 complex case and if you've got a corporate defendant,  
12 that's quite an imposition on their activities.

13 Also, because you've got differing standards  
14 here, you are going to end up with an opportunity in  
15 the contentious cases, which are, again, the ones we  
16 are really talking about, for more gamesmanship and  
17 more runs to the court. It is going to cause delay.  
18 It is going to cause resistance about people who have  
19 to be making the disclosure or responding to the  
20 discovery.

21 MR. KASANIN: Isn't the answer to the problem,  
22 though, the double layers, to take it out by  
23 stipulation?

24 MR. ARENSON: But if you are going to take it  
25 out, fine. As a matter of course, in the complex case,

1 because you are doing it really in the very early  
2 stages of the case, why do you have the rule in the  
3 first place?

4 MR. KASANIN: I think you can structure this so  
5 at the high end you can take it out.

6 MR. ARENSEN: Again, if you go back to the  
7 understanding, the underlying principle, that it is  
8 really in the complex, high stakes case where you've  
9 got the problems, why are you putting in a rule that  
10 you think is going to come out to try to effect those  
11 cases in the first place?

12 MS. BIRNBAUN: How would you separate the cases  
13 initially as to what discovery would go with one type  
14 of case and what discovery would go to the other if you  
15 didn't do it this way?

16 MR. ARENSEN: Well, again, if you don't have  
17 mandatory initial disclosure uniform across the  
18 country, and I don't think you should, then you are  
19 going to resolve that at the 26(f) conference among the  
20 lawyers and you are going to resolve it at the 16(b)  
21 conference when you've got court involvement, if in  
22 fact there is some dispute that has to be resolved at  
23 that time.

24 I think that's the time and the place to do it.  
25 You don't need a rule that shouldn't apply to this case

1 in the first place that really is going to have the  
2 greatest impact on this case and is going to provide an  
3 opportunity for some attorney zealously to advocate  
4 where you don't need it because the rule says it. So  
5 don't put that --

6 MS. BIRNBAUN: But if the mandatory rule works  
7 for the run-of-the-mill cases in which everyone knows  
8 what to expect and what to do, why would you then cause  
9 parties to go back to a rule where they are starting to  
10 have to draft discovery, etcetera? You just have it  
11 carved out for the cases that don't belong in there.

12 MR. ARENSON: Well, I am not sure that it works  
13 all that well in all of the run-of-the-mill cases,  
14 though the empirical evidence does seem to indicate  
15 that it doesn't work badly.

16 I guess I would say with respect to that, it  
17 still is something that is fundamentally different in  
18 the operation of the system that we've got.

19 JUDGE NIEMEYER: I suppose --

20 MR. ARENSON: Zealous advocates, this changes  
21 their role, that they've got to go out, even under the  
22 proposed modified standard, and produce documents  
23 voluntarily, explain to their clients why they have to  
24 do it. Again, I think --

25 JUDGE NIEMEYER: We've broken all limits and

1 bounds for you.

2 (Laughter.)

3 MR. ARENSEN: I appreciate it. I've got other  
4 things I would love to say. If you have any questions,  
5 I'll be happy to do it.

6 JUDGE NIEMEYER: Well, but we do, I do want to  
7 invite your comments and if you do want to submit more  
8 written material, we would be happy to receive it. We  
9 do review it. We do collect it, and I really do want  
10 to thank you for your conscientious response and effort  
11 on this. This will all be taken to heart.

12 MR. ARENSEN: Thank you, Judge. I wish I had  
13 more time.

14 JUDGE NIEMEYER: Right. Mr. Klein.

15 MR. KLEIN: Good morning, Judge Niemeyer, other  
16 distinguished members of the Advisory Committee. My  
17 name is Robert Klein. I practice law in Annapolis,  
18 Maryland at Wharton, Levin, Ehrmantraut, Klein & Nash.

19 It is a pleasure to be before you once again.  
20 The last time was at the symposium in Boston, when I  
21 had the always unique experience of serving on one of  
22 Arthur Miller's panels. It wasn't the first time I had  
23 been on a panel with Arthur, but certainly one of the  
24 more memorable times.

25 When I appeared in Boston, I appeared as an

1 individual practitioner who spent the last 20 plus  
2 years practicing as a defense lawyer in the product  
3 liability arena, serving a number of clients on a  
4 national basis, and literally dealing with discovery  
5 issues in almost every state in the union, in both  
6 federal and state courts, state courts who, by and  
7 large, pattern their scope of discovery rules and other  
8 procedures on the federal model.

9 So what we do today has implications, I would  
10 submit, far beyond the Federal Rules themselves. The  
11 state courts, by and large, look to this Advisory  
12 Committee as a leader. My colleagues on the Maryland  
13 Rules Committee will probably shoot me for saying that,  
14 but I think that is a fact of reality, because they  
15 like to think that they are ahead of the herd  
16 sometimes.

17 This morning, however, I have been asked to speak  
18 on behalf of an organization, of which I am proud to be  
19 a member and am a past president, Maryland Defense  
20 Counsel. We are a much more, much smaller organization  
21 than the others who have spoken so far. We are about  
22 561 individuals who hail from 110 Maryland law firms  
23 and 24 Maryland corporate law departments.

24 I would like to focus my remarks, first of all,  
25 solely on the federal discovery rules package that is

1 before us, and because of time constraints, on three  
2 particular areas; the scope rule, the document  
3 production amendments, and the initial disclosure  
4 proposal. I will save all further comments for written  
5 submission following today.

6 With respect to the scope issue, we believe that  
7 the two-tier approach, the attorney-managed, shifting  
8 the line between attorney-managed discovery and  
9 court-supervised discovery is a directionally correct  
10 step. Frankly, we would prefer further steps, but  
11 myself, serving on a Rules Committee, I recognize there  
12 are limitations to how much one can do at one time.

13 JUDGE NIEMEYER: It is as if we have the  
14 plaintiffs complain and we have the defendants  
15 complain, and we might have it right.

16 (Laughter.)

17 MR. KLEIN: Well, I've made that argument myself,  
18 Judge, when I've sat where you are sitting.

19 JUDGE NIEMEYER: Well, I'm not sure.

20 MR. KLEIN: Now, frankly, we would have preferred  
21 to have seen the further step of elimination or some  
22 change to the subject matter, what I call the one-two  
23 punch of the subject matter language, coupled with the  
24 reasonably calculated deleted admissible evidence  
25 discovery language.

1           And, Judge Carroll, I did bring a couple examples  
2 from the great State of Arkansas.

3           JUDGE CARROLL: Are they federal district courts  
4 in Arkansas?

5           MR. KLEIN: No, this is a state court, but it is  
6 under a rule that looks very much like the current Rule  
7 26, with one exception, though. This does not have  
8 subject matter language in it. I have the rule here.  
9 I anticipated this question.

10           Information relevant to the issues in the pending  
11 action is the way it is phrased, but there also is the  
12 reasonably calculated deleted discovery of admissible  
13 evidence language, but the subject matter language is  
14 in there.

15           Frankly, I don't know which -- I think it is the  
16 combination of the two that does the mischief and it  
17 has created a mind-set in our courts that have become  
18 numb to scorched earth. Anything goes.

19           These questions are from an asbestos action, so I  
20 would submit the subject matter is personal injury from  
21 exposure to asbestos.

22           Produce all documents that refer, relate or  
23 pertain to the policy, administration and operation of  
24 your company from 1920 to the present.

25           Produce all documents that are in the nature of

1 organization charts, diagrams, tables or descriptions  
2 which refer, relate or pertain to the corporate  
3 structure or organization of your company at anytime.

4 Produce all minutes, transcripts, etcetera --

5 JUDGE CARROLL: I mean are these document  
6 requests that the court said that the defendant had to  
7 answer?

8 MR. KLEIN: We haven't had a ruling on this yet,  
9 Your Honor.

10 JUDGE CARROLL: Well, I mean it would same to me  
11 that those documents --

12 JUDGE NIEMEYER: You don't want one today, do  
13 use?

14 (Laughter.)

15 JUDGE CARROLL: Even under the subject matter  
16 standard, those are bad discovery.

17 I mean I guess my question is does the federal  
18 district or magistrate judge dealing with discovery  
19 have adequate management tools under the subject matter  
20 discovery or does he need this additional management  
21 tool?

22 MR. KLEIN: Well, I think what the courts need is  
23 a message from the Rules Committee and from the rules  
24 themselves that the anything goes philosophy that seems  
25 to pertain today doesn't go anymore.

1           I guess I am jaded. I have been doing this too  
2 long.

3           JUDGE CARROLL: I hate to monopolize this issue,  
4 but it is very important to me. I just don't think  
5 that that philosophy exists, that anything goes. I  
6 don't think that throughout the country there are but a  
7 few, if there are any, federal district or magistrate  
8 judges that believe anything goes.

9           MR. KLEIN: Well, in --

10          JUDGE CARROLL: You would respectfully disagree.

11          MR. KLEIN: I think there are some. Frankly, in  
12 fairness to the federal bench, because there are so  
13 many state courts that follow the language of your  
14 rule, as applied by the state jurists, we have the same  
15 problem.

16          You know, I have to, anything you do, I have to  
17 view as having a domino effect in 50 states. Make no  
18 mistake about it. It happens. So anything I say is  
19 colored by that experience.

20          Some message needs to be sent because what is  
21 going on now is not right. I mean, frankly, I mean  
22 those requests that I just read, this person shouldn't  
23 have costs shifted to them, they should be shot; but I  
24 think that's beyond the scope of the rules enabling  
25 it.

1 (Laughter.)

2 If I may turn quickly to the subject of document  
3 request, we support the amendment that would add  
4 expressly to that rule what I believe is an overlooked  
5 policy of proportionality in cost benefits. I guess  
6 people don't read Rule 26(b)(2). Maybe that is an  
7 argument for not changing things.

8 But again, I think in the sense of re-awakening  
9 the parties and the judiciary to the existence of tools  
10 that ought to be applied, putting it in the place where  
11 I think it is most needed, in the document rule, from  
12 the corporate defendant perspective, document requests,  
13 I believe, are the most expensive,  
14 institutionally-disruptive aspect of discovery.

15 JUDGE SCHEINDLIN: Are you conceding, though,  
16 that it is not adding anything to what is already in  
17 the discovery rule, it is just saying it twice and it  
18 is not saying anything different?

19 MR. KLEIN: I think that one could make that  
20 argument, frankly. But I think if the message is not  
21 being heard, I would rather put it in a place where it  
22 could be heard.

23 On the subject of document discovery, by the way,  
24 I think it is a bit curious that the document  
25 discovery, the form of document discovery, in the

1 absence of a national rule presumptively limiting the  
2 number of document requests, that is the only form that  
3 the rule has proposed, would not allow local rule to  
4 impose a limit upon, as I read in particular Judge  
5 Niemeyer's frontispiece to the rules amendments.

6 I read this as saying you can't now impose what  
7 we do in Maryland. Our district rules limit to 30, the  
8 number of document requests, absent stipulation of the  
9 parties or court order. Frankly, I just as soon be  
10 able to do that by local rule.

11 I mean you allow, under the proposed rules  
12 amendments, limiting the number of requests for  
13 admissions.

14 JUDGE NIEMEYER: All you do is get 30 broader  
15 classifications rather than a reasonable number of  
16 rifle shots. It seems to me you have done nothing for  
17 any clever attorney, have you?

18 MR. KLEIN: What I think I would have done, the  
19 request that I was reading from Arkansas, there were 99  
20 requests in that set. I submit the questions that I  
21 read would not have been in that set had they been  
22 limited to 30.

23 JUDGE NIEMEYER: Why not?

24 MR. KLEIN: Because they would have focused on  
25 the ones that were more germane to the issues of the

1 case rather than the fishing expedition.

2 JUDGE NIEMEYER: Well, three for one, three for  
3 one in each one, you've got it down to 30.

4 PROFESSOR COOPER: On the Rule 34(b), cost  
5 bearing --

6 JUDGE NIEMEYER: I'm sorry. I didn't hear the  
7 beginning.

8 PROFESSOR COOPER: On the Rule 34(b), cost  
9 bearing, would there be any requirement expressing that  
10 instead in the Rule 26(b)(2) so it applies explicitly  
11 to other forms of discovery?

12 MR. KLEIN: I think I would like to think on that  
13 more, Professor. Particularly as I stand here not  
14 speaking as an individual, but on behalf of an  
15 organization, I would like to give that more thought.

16 JUDGE NIEMEYER: We have provided an alternative  
17 in the invitation to comment that has it in 26. We  
18 also set forth a few of the arguments, but we would  
19 welcome any comments.

20 MR. KLEIN: Prediscovery disclosure, initial  
21 disclosure, certainly we understand the rule for  
22 uniformity, the need for uniformity. We would have  
23 chosen the uniform rule abolishing prediscovery  
24 disclosure.

25 A number of courts, our own included here in

1 Maryland Federal District Court, have exempted a number  
2 of cases, the case categories in medical malpractice  
3 actions, product liability actions, etcetera, from  
4 this, the effects of the current Rule 26(a)(1).

5 This issue came before the Maryland Rules  
6 Committee a few years down the line after it came  
7 before this Committee. In the institutional memory of  
8 either institution, it was the first time that the  
9 Maryland Defense Association and the Maryland Trial  
10 Lawyers Association, the plaintiffs bar, joined in a  
11 joint white paper opposing pre-discovery disclosure.

12 What we were opposing, frankly, was something  
13 that looked very much like what is before us now, where  
14 you are disclosing that which supports your case as  
15 opposed to your opponent's case. In that sense, we do  
16 believe that the national rule that you propose is  
17 better than the current Rule 26(a)(1). We simply would  
18 have preferred to have no rule and have this experiment  
19 at an end.

20 PROFESSOR MARCUS: Can I ask a question about  
21 that? Does your organization take that position with  
22 regard to Rule 26(a)(1)(C) concerning damages  
23 information and (a)(1)(D) regarding insurance  
24 information?

25 MR. KLEIN: We took it as to all. We did not

1 differentiate among the categories. It was across the  
2 board.

3 JUDGE NIEMEYER: Was there anybody practicing  
4 this in any state court or any federal court  
5 practicing? In other words, what data did the two  
6 organizations get together and supply?

7 I am little surprised by that because places that  
8 -- for instance, Eastern District of Pennsylvania came  
9 up with a study from their people who practiced it and  
10 87 percent liked it.

11 MR. KLEIN: I don't know as I stand here. This  
12 is several years ago.

13 JUDGE NIEMEYER: I mean it is easy to look at it  
14 and say you don't like it; but if somebody has done it  
15 regularly and doesn't like it, that would be  
16 meaningful.

17 MR. KLEIN: The other aspect of the proposed  
18 change on initial disclosure that we are concerned with  
19 is the elimination from the current formulation of  
20 26(a)(1), the with particularity language. Without  
21 that link -- if I may cite an example that gives the  
22 concern.

23 Suppose you have a product liability case, such  
24 as a colleague of mine in California had -- this is in  
25 the days before disclosure -- and the complaint read

1 your RV, your recreational vehicle, unreasonably  
2 dangerous, defective. It did not specify the defect.  
3 It is a personal injury. The car went off the road.  
4 The RV went off the road.

5 Through discovery it was learned that the car was  
6 being, the occupants of the recreational vehicle were a  
7 couple from the Orient, the first time in the United  
8 States, never driven an RV before.

9 The wife is in the back making tea. The husband  
10 is driving. They are on an L.A. freeway. The pot  
11 boils. The wife announces the tea is ready. The  
12 husband sets the cruise control, gets up and goes back  
13 to join his wife for tea. An accident obviously  
14 ensues.

15 None of these facts are in the complaint, and you  
16 are in the position of simply having an unspecified  
17 defect claim. Now you are in the position of having to  
18 identify material that supports your position that your  
19 vehicle is not defective; although, you don't know any  
20 of this stuff yet. The suit was the first notice of  
21 the claim.

22 So without some kind of with particularity  
23 language kept in the initial disclosure rule, I don't  
24 know what my colleague in California would have been  
25 able to disclose. For that reason --

1           PROFESSOR ROWE: Excuse me. With the  
2 particularity requirement, once it is favorable  
3 information only, doesn't that destroy all disclosure  
4 because you are not required to controvert with  
5 particularity and you just don't do that, and there is  
6 no disclosure?

7           MR. KLEIN: Frankly, I am not following you,  
8 Professor.

9           PROFESSOR ROWE: The way the present disclosure  
10 rule is set up, the particularity is in there to let  
11 people trigger disclosure by controverting with  
12 particularity when they don't have to, and that is  
13 their way of getting the other side to have to produce  
14 the unfavorable information.

15           But if you are on the defense side and there is  
16 the particularity requirement for controverting before  
17 there is any disclosure obligation triggered, and you  
18 don't want to disclose, you don't have to controvert  
19 with particularity and you don't have to disclose  
20 anything.

21           MR. KLEIN: Well, that is not clear, I would  
22 submit, and I would suggest that the Committee note to  
23 the current form of the rule, make it clear that if the  
24 plaintiff has not pleaded with particularity, that your  
25 obligation to disclose is in proportion to the level of

1       specificity of the plaintiff's complaint, and under  
2       some circumstances there may not be an obligation to  
3       disclose at all.

4               The concern we have is that we are going to be  
5       left in the trap of guessing whether there is anything  
6       to be disclosed or not as opposed to -- again, it is a  
7       question of judicial mind-set and educating because  
8       this is still all new to a number of courts and  
9       jurists, that you can only disclose when you know  
10      something about the case that you are disclosing  
11      about.

12              JUDGE NIEMEYER: All right. Thank you, Mr.  
13      Klein. We gave you a little extra time, but not quite  
14      as much as New York. The states are different sizes.

15              PROFESSOR ROWE: To make sure I wasn't missing  
16      anything, am I right that you didn't have a prepared  
17      statement? To make sure I am not missing anything, am  
18      I right that you didn't submit a --

19              MR. KLEIN: That is right.

20              PROFESSOR ROWE: Fine.

21              JUDGE NIEMEYER: All right. Mr. Lenaghan.

22              MR. LENAGHAN: Thank you.

23              JUDGE NIEMEYER: We received a written comment  
24      from you. I think it has only been circulated this  
25      morning, so I don't know if we have all had a chance to

1 look at that, but obviously we will look at that too.

2 MR. LENAGHAN: Thank you, Judge Niemeyer. I  
3 appreciate the opportunity to speak before the Advisory  
4 Committee.

5 I would like -- first I want to say that I  
6 strongly support the changes proposed by the Advisory  
7 Committee in the rules and I am here to focus on a  
8 specific problem, and that is the duplication between  
9 judicial resources and administrative resources in  
10 large case matters.

11 First, turning to class actions, as you know,  
12 many class actions purport to involve class members 10  
13 and 20 years back. The discovery, whether it is  
14 certification discovery or merits discovery, goes to  
15 documents that are generated 10 to 20 years ago by a  
16 party.

17 The cost to the company or the party of getting  
18 those documents, collecting them, imaging them, coding  
19 them, putting them in an electronic database is  
20 enormous. It can be easily, for any large institution,  
21 be it governmental or corporate, in the millions of  
22 dollars, far exceeding any reasonable recovery or  
23 economic loss that the plaintiffs may claim or may have  
24 suffered.

25 In addition, this cost involves much judicial

1 time in managing and otherwise resolving disputes over  
2 what is discoverable, what costs should be, the party  
3 should have to bear, etcetera. These are sort of the  
4 classic secondary and tertiary costs of the system that  
5 are identified by --

6 JUDGE NIEMEYER: Have you explored using  
7 26(b)(2), proportionality rules in that kind of  
8 context?

9 MR. LENAGHAN: Yes, we have, Your Honor.

10 JUDGE NIEMEYER: Without success though.

11 MR. LENAGHAN: Yes. We still find that we still  
12 have to go through the process of going back through  
13 company records for these years and collecting them,  
14 and much of the cost really has nothing to do with  
15 legal work. It is technical work, sending out  
16 messages, imaging, coding, and paying out to  
17 third-party vendors. It has really created a major  
18 cottage industry.

19 In the case of a regulated industry, on the other  
20 hand, you have the insurance industry, for example,  
21 state departments of insurance regulate much of their  
22 activities. Sales, underwriting, claims and the like  
23 are, pricing, are all regulated by state departments of  
24 insurance.

25 Many complaints that come in in regulated

1 industries, the regulators both have the authority to  
2 and indeed, do resolve those complaints. Those  
3 complaints are, in a parallel track, the subject of a  
4 class action matter.

5 This is sort of a classic duplication, which is  
6 classic wasted economic resources in the system. If  
7 the administrative agency or body can actually solve  
8 the complaint, why should not the court at least  
9 consider staying or limiting extensive discovery until  
10 the administrative body has a chance to resolve the  
11 complaint?

12 In my written submission, I do propose a note to  
13 Rule 26(d) to make that point, which would both  
14 preserve the rights of the litigants in that they would  
15 be able to pursue their administrative remedies,  
16 whatever the agency may give them, and also prevent  
17 needless expenditures by the parties, needless judicial  
18 time in resolving discovery disputes over millions of  
19 documents that may be a total useless exercise in the  
20 end.

21 PROFESSOR ROWE: Mr. Lenaghan.

22 MR. LENAGHAN: Yes.

23 PROFESSOR ROWE: Does the Eleventh Circuit case  
24 that you cite in that proposed note on the second page  
25 of your submission, does it take the position that you

1 are urging us to advocate?

2 MR. LENAGHAN: Not, not, Professor, not as  
3 explicitly as I am advocating, no, it does not. It  
4 does take the position that federal courts have the  
5 responsibility, as you know, to limit sequence  
6 discovery in an intelligent matter and in a cost -- in  
7 an effective manner.

8 The two other cases cited in my materials talk  
9 about the fact that a factor against class  
10 certification should be considered the existence of an  
11 administrative remedy. That should weigh against class  
12 certification.

13 I would respectfully submit if that should weigh  
14 against class certification, it should weigh against  
15 pre-certification or merits discovery of millions of  
16 documents.

17 MR. SCHREIBER: Mr. Lenaghan, isn't it true that  
18 there are cases that are going the other way, that have  
19 said we will not delay class action during an  
20 administrative hearing, and why didn't you not cite  
21 those to us?

22 MR. LENAGHAN: It is true, Mr. Schreiber, that  
23 there are cases that have gone the other way. There  
24 are cases that have not adopted in whole cloth a  
25 primary jurisdiction sort of argument.

1           MR. SCHREIBER: Don't you think it would be more  
2           advantageous if this Committee had the cases going both  
3           ways rather than only those that you cite favoring your  
4           position?

5           MR. LENAGHAN: I will be happy to submit more  
6           authority on this subject. I would suggest that the  
7           reason that I am suggesting the note to Rule 26(d) is  
8           to advise the courts of factors that they might  
9           consider in administrative agency review and regulatory  
10          review before putting the parties, indeed the courts  
11          themselves, to all these expenditures. This would not  
12          limit the rights of any plaintiffs whatsoever.

13          Any other questions?

14          MR. SCHREIBER: No.

15          JUDGE NIEMEYER: All right.

16          PROFESSOR ROWE: One think I just point out, you  
17          suggest a note to 26(d). We don't usually just add  
18          notes without changing rules. There is a proposed  
19          amendment to 26(d), but it has to do with the  
20          disclosure.

21          So I wanted you to know that if nothing comes of  
22          this, it may be for a technical reason, which is we  
23          don't just amend notes without relevant changes to the  
24          rules, and there is no relevant change to the rule that  
25          is before us in this connection.

1           MR. LENAGHAN: I understand. Professor, I would  
2 submit that I think that the sequencing, the current  
3 rule, and with the sequencing requirements on the  
4 courts, does give enough discretion to support the  
5 note, enough language to support the note.

6           JUDGE NIEMEYER: All right. Thank you, Mr.  
7 Lenaghan.

8           Mr. Spector.

9           MR. SPECTOR: Good morning. My name is Brian  
10 Spector, and I appreciate and thank the Advisory  
11 Committee for the opportunity to comment on the  
12 proposed amendments published in August.

13           By way of introduction, I am an attorney in  
14 private practice in Miami, Florida. I have to admit  
15 that our firm goes both ways. We have both a plaintiff  
16 and defense practice in the complex business and  
17 commercial litigation area.

18           Our plaintiff practice is limited mostly to  
19 antitrust cases, mostly to cases which are MDL'd or in  
20 which we represent opt-outs. Our defense practice is  
21 more in the securities class action defense and the  
22 legal and accounting liability area.

23           I have had about ten years of experience on the  
24 Florida Civil Procedure Rules Committee, which I  
25 chaired, and I currently chair the Southern District of

1 Florida's Advisory Committee on Rules and Procedures;  
2 although, I am here this morning only in my individual  
3 capacity.

4 I have to admit that our district has opted out  
5 at every opportunity where we could opt out. We  
6 actually had an initial disclosure requirement under a  
7 local rule for about 10 or 15 years prior to the  
8 federally-mandated initial disclosure requirements.

9 We have also had for about 18 months now a  
10 limitation on depositions to six hours, which is why  
11 everywhere I go I carry my stopwatch to make sure that  
12 I do not run afoul of that limitation when we take  
13 breaks to go to the rest room or to the bathroom or for  
14 any other cessation in the inquiry.

15 With the exception of the following specific  
16 comments or recommendations, I favor the proposed  
17 amendments which were published back in August. My  
18 statement today is limited to four areas.

19 First, in view of the non-filing regimen  
20 contemplated by the proposed amendment to Rule 5(d), I  
21 suggest identification of the custodian of, and the  
22 conditions of retention for original discovery requests  
23 and responses generally, and deposition transcripts in  
24 particular, until such time as those materials need to  
25 be filed with the court, if ever.

1           Second, in view of the proposed elimination of  
2 the local rule opt-out provision in Rule 26(b)(2) and  
3 the proposed one-day, seven-hour limitation on  
4 depositions in Rule 30(d)(2), I propose amendments to  
5 Rule 16 to promote consensual modification of discovery  
6 limits where genuinely necessary and mutually  
7 recognized, and to ensure that these subjects are  
8 routinely considered by the court.

9           Third, I suggest additions to proposed Rule  
10 26(a)(1)(E) to increase the categories of cases exempt  
11 from initial disclosure under Rule 26(a)(1), and  
12 fourth, I ask the Committee --

13           JUDGE NIEMEYER: Did you provide us a list of the  
14 additional cases that you thought should be exempt?

15           MR. SPECTOR: They are, and they are in the  
16 proposed rule. I can make reference to the page in my  
17 written statement which has been submitted.

18           Fourth, I ask the Committee to consider revising  
19 Rule 33, to abandon the numerical limitation on  
20 interrogatories and to adopt a hybrid approach of the  
21 type used by the Southern District of Florida.

22           But if the Committee is not to do that or is  
23 going to stand on the 25 interrogatory numerical  
24 limitation, I suggest clarification of whether the  
25 numerical limitation on interrogatories applies to each

1 side of the case, as does the limitation on depositions  
2 under Rule 30(a)(2)(A) or to each party in the case,  
3 which the literal language of the rule seems to  
4 contemplate.

5 Moreover, if the 25 interrogatory limitation  
6 remains, I suggest amendment to Rule 26(a)(1)(A) to  
7 require the disclosing party to summarize the substance  
8 of the subjects on which an individual has knowledge.

9 Now for the sake of time, I am not going to  
10 address the first and the third points, just the second  
11 and fourth, on which I have made some proposals.

12 The proposed amendments to Rule 26(b)(2) and  
13 30(d)(2), in conjunction with the existing provisions  
14 of Rule 30(a)(2)(A) and 33(a), limit each side of a  
15 case to ten depositions, each one day of seven hours,  
16 and 25 interrogatories, including all discrete  
17 subparts; although, I do note in Note 2 on page five  
18 that the language of the rule seems to limit  
19 interrogatories, not to parties, excuse me, not to  
20 sides, but to the parties in the case. That is subject  
21 to abuse, and I will address that later.

22 These limitations are problematic as, for  
23 example, it is difficult, perhaps virtually impossible,  
24 to complete a deposition within seven hours in a  
25 variety of situations such as where, (a), multiple

1 parties with disparate interests, each represented by  
2 their own counsel, are on one side of a case, giving  
3 each attorney the right and indeed, probably the  
4 professional obligation to examine the deponent; (b),  
5 the examining attorney consumes virtually the entire  
6 day, leaving little or no time for cross-examination;  
7 (c), the witness requires an interpreter; and (d), the  
8 deposition is taken pursuant to Rule 30(b)(6) and there  
9 are multiple designees, each of whom must be examined  
10 to establish competence to testify on the designated  
11 subjects.

12 I also note on page five of my statement,  
13 Footnote 3, that with a one-day,  
14 seven-hour, ten-deposition limitation, there will  
15 undoubtedly be different views and increased conflict  
16 on whether the examination of three designees under  
17 30(b)(6) constitutes one or three depositions. This  
18 issue is one which the Advisory Committee --

19 JUDGE NIEMEYER: You have been practicing under  
20 the ten depositions for a while, haven't you?

21 MR. SPECTOR: We have.

22 JUDGE NIEMEYER: Do you have any problems?

23 MR. SPECTOR: We have had controversy about  
24 that. Now I know that the existing comment --

25 JUDGE NIEMEYER: You have not been able to

1 generally work that out? I mean most --

2 What I heard during these hearings that we have  
3 had leading up to these proposals was that experienced  
4 lawyers, plaintiffs' and defendants' lawyers usually do  
5 not have trouble with this type of a thing.

6 MR. SPECTOR: Perhaps 20 years has not provided  
7 me with enough experience yet.

8 But, for example, in a case in which a nationwide  
9 injunction was sought under a piece of federal  
10 legislation called the Satellite Home Viewer Act, where  
11 two of the networks, broadcast networks sued a  
12 satellite broadcaster, there were about 70 witnesses  
13 whose identities were disclosed as part of the initial  
14 disclosure. The plaintiffs refused to permit more than  
15 ten depositions and the plaintiffs also --

16 JUDGE NIEMEYER: You went, just went to court?

17 MR. SPECTOR: We did and we had it resolved that  
18 way.

19 JUDGE NIEMEYER: Yeah. Wasn't that an  
20 appropriate way? In other words, you had an  
21 exceptional case with an exceptional breadth, but I  
22 must say I haven't heard too much complaint about the  
23 ten-deposition limit.

24 I am wondering whether you really think that we  
25 ought to just lift it in order to meet a few cases

1 which, obviously, you have some very complex and  
2 widespread cases, but --

3 MR. SPECTOR: I am not suggesting that the  
4 ten-deposition limit be lifted. Rather, the cost of  
5 the use of 30(b)(6) and multiple designees being  
6 provided, that perhaps the existing Advisory Committee  
7 note, which does address that and views it as one  
8 deposition, perhaps that ought to be at least  
9 considered again.

10 I think you should have the ten-deposition limit  
11 and if the parties cannot work it out, they will go to  
12 court and seek relief.

13 It is not uncommon to require multiple sessions  
14 with a deponent, particularly where examination reveals  
15 the existence of documents --

16 JUDGE CARROLL: You just believe that lawyers  
17 will not cooperate on this issue if we stay with, I  
18 mean if we enact this limit of one hour? You just  
19 think that lawyers are going to take advantage of this  
20 and won't cooperate?

21 MR. SPECTOR: No, to the contrary. Our  
22 experience has been, living within the ten-deposition  
23 limitation --

24 JUDGE CARROLL: I am back to the seven-hour  
25 limit.

1 MR. SPECTOR: The seven hour.

2 JUDGE CARROLL: I thought you suggested the  
3 seven-hour limit was a bad idea.

4 MR. SPECTOR: No, no. We have been living with a  
5 six-hour limit. But what I am going to suggest --

6 JUDGE NIEMEYER: You are going to get an extra  
7 hour.

8 (Laughter.)

9 MR. SPECTOR: That's exactly right, but some of  
10 us are a more long-winded than others.

11 But actually, what I was going to suggest is  
12 that, and I will just get to it, if you look to page  
13 seven of the written statement which we submitted, I am  
14 going to suggest two proposed amendments, one in Rule  
15 16(b) and one in 16(c). These are based on local rules  
16 which have been existent in the Southern District of  
17 Florida.

18 What we are suggesting in 16(b) is that the  
19 scheduling order may also include any proposed use of  
20 the Manual for Complex Litigation and modifications of  
21 the limits on discovery imposed by these rules, such as  
22 the timing, number or length of depositions or the  
23 number of interrogatories, and that the same language  
24 appear in 16(c) as subjects to be considered by the  
25 court at the 16(b) conference.

1           JUDGE NIEMEYER: Let me ask you something. Those  
2 ideas are obviously good ideas and should be addressed  
3 in 16, Rule 16 conferences; but what we hear about is,  
4 you know, we are sort of saying the obvious.

5           It seems to me if you are in a complex case and  
6 you are in front of a judge, you could basically bring  
7 up, and you probably do bring up, everything that's on  
8 your mind and the parties talk about it and the judge  
9 addresses it. Isn't that what normally happens?

10          MR. SPECTOR: For the most part, but my  
11 experience has been that if the language that is  
12 helpful to either side of the case is found in the  
13 Advisory Committee Notes, by way of example, that it is  
14 given less weight.

15          Similarly, if there is no language in either the  
16 rule or in the Advisory Committee Notes, then you go  
17 to, have to rely upon the experience and judgment of  
18 the particular judge. By placing it in the body of the  
19 rule, it provides a road map to the judge that these  
20 are subjects which must be routinely considered.

21          It is probably stating the obvious to you or to  
22 me, but it is not necessarily obvious to everyone.

23          JUDGE NIEMEYER: Have you had a judge refuse to  
24 discuss a subject that you wanted to raise during these  
25 conferences?

1           MR. SPECTOR: Quite candidly, yes. Not everyone  
2 is going to sit there and say well, Your Honor, we  
3 think that the various provisions of the Manual for  
4 Complex Litigation should be considered here.

5           For example, we know, I will give you a specific  
6 example right now, a case in which a claim has been  
7 made for tortious interference and the alleged  
8 monitored relief are the commissions that would have  
9 been earned by 2,000 agents of a particular company.

10           Now issues of causation obviously exist for each  
11 of those 2,000 people. Am I going to take 2,000  
12 depositions? Are there going to be six, seven or a  
13 shorter period of time? Are we going to have test  
14 cases.

15           Well, to raise some of those issues, the judge  
16 can say you can come back to me later when a dispute  
17 arises. I would feel more comfortable, and our  
18 experience in the Southern District has been, that we  
19 are more comfortable by having these things in the body  
20 of the rule so that the judges know this is something  
21 they really do need to consider. Perhaps, perhaps, it  
22 is the obvious, but we would be more comfortable with  
23 it in the body in the rule.

24           PROFESSOR ROWE: Mr. Spector, one thing I wanted  
25 to check, I noticed on pages three and four, where you

1 talk about 5(d) and then, the filing and non-filing  
2 with the court, and then 30(f) you mentioned on page  
3 four, I wonder if you have very helpfully spotted a  
4 technical change that we need to make in Rule 30(f),  
5 which I take it from your presentation we haven't done  
6 anything with in the present package because isn't the  
7 non-filing requirement of proposed 5(a) inconsistent  
8 with the filing language presently in unchanged 30(f)?

9 MR. SPECTOR: Absolutely. If you look on page  
10 four, Rule 30(f)(1), the rule is written in the  
11 disjunctive. If the standard procedure is thou shall  
12 not file with the court, someone presumably, one of the  
13 parties' counsel will file discovery materials.

14 The way 30(f)(1) is presently written, there is  
15 some confusing language to the court reporter, which is  
16 why file it with the court in which the action is  
17 pending or would need to be deleted, whether or not the  
18 Committee decides that the language that I proposed for  
19 5(a) is worth consideration.

20 Turning now briefly then to the subject of  
21 interrogatories, I understand that it is probably too  
22 late at this juncture to suggest a wholesale revision  
23 of Rule 33 as part of this cycle. However, I do ask  
24 the Committee to consider revising Rule 33 to abandon  
25 the numerical limitation on interrogatories and to

1       adopt a hybrid approach of the type used by the  
2       Southern District.

3               As set forth above, in light of the proposed  
4       one-day, seven-hour limitation on depositions, which  
5       are already presumptively limited to ten, it seems  
6       logical that litigants would be more inclined to use  
7       interrogatories to obtain discovery, but for the  
8       numerical limitation imposed by Rule 33.

9               Now I readily acknowledge that prior to the 1993  
10       amendment to Rule 33, interrogatories were often used  
11       to harass. I also concede that answers to  
12       interrogatories authored by opposing counsel rarely  
13       provide prejudicial phrases of the type which sometimes  
14       roll off the lips of a deponent.

15              Nevertheless, a bright line numerical limitation  
16       on interrogatories may well prove too restrictive after  
17       limiting each side to 70 hours of deposition, so I ask  
18       this Committee to consider the approach taken by the  
19       Southern District.

20              Under the current, I expect but soon to be  
21       abandoned, local rule opt-out provision in Rule  
22       26(b)(2), the Southern District of Florida, by adoption  
23       of a local rule recommended by the court's Civil  
24       Justice Advisory Group, of which I was a member, has  
25       chosen a hybrid approach toward interrogatories.

1           As set forth in our local rule, which I have  
2 reproduced in my statement, interrogatories are not  
3 limited in number. Rather, initial interrogatories are  
4 limited in subject matter, with form interrogatories  
5 provided. Form interrogatories are Exhibit A to my  
6 statement.

7           Thereafter --

8           JUDGE NIEMEYER: You've got forms for a lot of  
9 different subjects?

10          MR. SPECTOR: No. In fact, what the form  
11 interrogatories do, not inconsistent with the initial  
12 disclosure requirements, interrogatory one is for the  
13 other side to identify the people who have, claim to  
14 have, or whom that party believes has knowledge  
15 relevant to the case, provide their names and  
16 addresses.

17          JUDGE NIEMEYER: We could explore the subject  
18 matter. We haven't abandoned that altogether. The  
19 idea is in, for certain types of cases, have some  
20 fundamental interrogatories that people would rely on  
21 as a crutch, and it might facilitate that.

22          Your idea is a little bit along the same line,  
23 but it goes more in stages, I gather.

24          MR. SPECTOR: Yeah. The problem that we have  
25 with the initial disclosures under 26(a)(1)(A) is that

1 it requires disclosure of the identity and the  
2 subjects, but not the substance.

3 Where you are going to be limited to ten  
4 depositions presumptively, and all you know is the  
5 subject on which that person may have knowledge, but  
6 not in any manner, shape or form what they are going to  
7 say, you are a little bit in the dark.

8 So either the proposal is to remove the 25  
9 interrogatory limitation and go with some sort of  
10 staged interrogatories, as we are suggesting here, or,  
11 if not to do that, to please do two things; one, to  
12 make clear, perfectly clear, whether the  
13 interrogatories are 25 per side or per party.

14 I think the rule is probably pretty clear now and  
15 it is 25 per party. So if you have a mass action  
16 against a single defendant or a single plaintiff  
17 against multiple defendants, one side of the case or  
18 the other is going to leverage their numbers to  
19 propound far in excess of 25 interrogatories. I think  
20 that is abusive.

21 However, if, again, we are going to live with the  
22 25 interrogatory limitation, I am suggesting on page 13  
23 of my written statement that the initial disclosures  
24 require a summary of the substance of the information  
25 on each subject.

1           I appreciate the opportunity to make these  
2 remarks this morning. I ask you only to consider these  
3 comments, some of which may be considered nitpicking,  
4 for inclusion in the rules, not in the Advisory  
5 Committee Notes which, I believe all too sadly, few  
6 judges and even fewer attorneys read. Thank you very  
7 much.

8           JUDGE NIEMEYER: Thank you, Mr. Spector.

9           PROFESSOR MARCUS: Judge, can I ask a question --

10          JUDGE NIEMEYER: Yes.

11          PROFESSOR MARCUS: -- on a topic Mr. Spector  
12 mentioned, but did not address, and that is the  
13 exemptions from initial disclosure?

14          You suggest a number of specific additions based,  
15 I gather, on experience in your district. They include  
16 land, on page ten of your statement, land condemnation  
17 cases, statutory interpleader actions, Labor Management  
18 Relations Act cases.

19          Is it your experience in your district that there  
20 is no discovery in those cases and for that reason they  
21 should be exempted from disclosure?

22          MR. SPECTOR: It was simply that based on the  
23 experience there was no need for initial disclosures  
24 and that the parties were able, without very much court  
25 involvement, to very satisfactorily move on with the

1 discovery which they needed from each other in the case  
2 and resolve those cases expeditiously.

3 PROFESSOR MARCUS: One other question. You have  
4 had for a long time disclosure in your district  
5 regarding supporting information?

6 MR. SPECTOR: Yes.

7 PROFESSOR MARCUS: Has that caused a problem in  
8 terms of distinguishing supporting information from  
9 other information?

10 MR. SPECTOR: No, it has not. Although I have to  
11 candidly admit, when 26(a)(1) first came out, and I  
12 looked at the heartburn provision, there was a large  
13 quantity of antacid that we all bought which --

14 JUDGE NIEMEYER: The heartburn provision?

15 MR. SPECTOR: The heartburn provision.

16 JUDGE NIEMEYER: Is that the other guy's stuff?  
17 Something tells me --

18 MR. SPECTOR: It hurts the other guy.

19 It was difficult enough in looking at what it was  
20 that you had to disclose that was relevant to the case  
21 and looking at the exclusionary part of, I guess, Rule  
22 37. It certainly is easier to figure out what helps  
23 you than what hurts the other side. We lived with that  
24 I think about ten years prior to the 1993 amendments.

25 Thank you very much.

1 JUDGE NIEMEYER: Thank you, Mr. Spector.

2 All right. Mr. Murphy.

3 MR. MURPHY: Good morning. My name is Kevin  
4 Murphy. Similar to what Mr. Black said earlier, I am  
5 not a bar president or representing any association. I  
6 am a civil litigation attorney. I practice in  
7 Washington, D.C., and in Maryland, and most recently I  
8 had an interesting experience taking a case to trial in  
9 the Eastern District of Virginia as well.

10 JUDGE NIEMEYER: Were you a defendant or a  
11 plaintiff?

12 MR. MURPHY: I was the defendant in that case,  
13 Your Honor. The bulk of my practice, I would say, is  
14 in defense; although, I do also have a number of cases  
15 where I am filing as plaintiff.

16 First let me say that although I would not  
17 personally advocate each one of the proposed  
18 modifications to the rules, as a whole I am very much  
19 in favor of the proposals. I say this not only based  
20 upon my own views and experience, but also based on  
21 views and experience that I've gathered from my  
22 colleagues and partners.

23 I'm in a firm with about 45 lawyers and we  
24 practice in all three of the jurisdictions that I  
25 mentioned, as well as nationally.

1           First, on the scope of discovery, in my  
2 experience, the currently-broad provisions regarding  
3 the scope of discovery have led to abuses and some  
4 scorched earth discovery tactics that I have seen.

5           Certainly many small and less complex cases are  
6 litigated in a reasonably efficient manner, as Judge  
7 Niemeyer referenced earlier, with a minimum of  
8 discovery, but I have also seen more complex cases with  
9 greater stakes that I have been involved in that have  
10 led to these, what I would call, abuses.

11           JUDGE CARROLL: Is the abuse because the judges  
12 aren't using the tools they have available or that the  
13 judges don't have the right tools?

14           MR. MURPHY: Your Honor, the experience I have  
15 had is that it is hit and miss. The judges, generally  
16 I would say I have had good results with, but there  
17 have been the cases where the judge either did not, in  
18 my view, apply reasonable breaks or reasonable limits  
19 to some discovery requests similar to what Mr. Klein  
20 read earlier. I've seen those types of requests be  
21 allowed.

22           JUDGE CARROLL: Primarily in state court?

23           MR. MURPHY: Well, both, both in state and  
24 federal. But I would agree with what Mr. Klein said  
25 earlier, that the state courts, at least in my

1 experience, often look to the federal guidance,  
2 especially in Maryland here, where the rule tracks to a  
3 large extent the federal rule.

4 The basic problem, as I see it, on the scope  
5 issue with regard to the current rules is that it is  
6 only human nature for one side to want to discover  
7 everything they can possibly discover about the other  
8 side.

9 Given that the current rules talk about in terms  
10 of subject matter discovery, human nature takes over  
11 and oftentimes you see these wide range in discovery  
12 requests.

13 If I could impart one thing, I believe that the  
14 limitation to claims and defenses does make a  
15 significant improvement in the rules in terms of giving  
16 at least some guideposts to both counsel and judges.

17 I think counsel will moderate their behavior to  
18 some extent. Maybe I am an optimist, but I think they  
19 will moderate their discovery practices and behavior  
20 with that kind of limitation and narrowing effect of  
21 the proposals.

22 Judge Carroll, you asked about examples. I think  
23 I have an example on point for the difference between  
24 the broader and the narrower scope.

25 I represented one of about seven defendants in a

1 case last year where a contractor struck a gas line.  
2 There was a very substantial explosion and damage.

3 One of -- and this is an interesting proposal or  
4 example because actually one of the defendants was  
5 guilty of, I think, going too far.

6 JUDGE CARROLL: Not the one that you represented,  
7 of course.

8 MR. MURPHY: Not at all, no.

9 One of the defendants decided to do, extend its  
10 exploratory discovery on whether or not the gas line  
11 had been mismarked in the first place, despite the fact  
12 that no witness had indicated this, despite the fact  
13 that all the other parties felt that this was a wild  
14 goose chase and unfortunately, the Court permitted it.

15 The case -- and this one defendant dragged eight  
16 attorneys through, I think, six or seven depositions,  
17 numerous hours of expense, and there was really no  
18 effective way to preempt it or limit it and, in fact,  
19 that party was eventually sanctioned at the end of the  
20 case.

21 JUDGE CARROLL: Did anybody move for a protective  
22 order during the process?

23 MR. MURPHY: There was a preliminary move for  
24 that and it was, in a rather unofficial manner,  
25 declined. In other words, the judge did not want to

1 deal with it.

2 Now that, I would grant you, was a state court  
3 case, but it was applying the same standard.

4 PROFESSOR: You said it was exploring a  
5 possibility of mismarking?

6 MR. MURPHY: Exactly.

7 PROFESSOR ROWE: But if there had been  
8 mismarking, would that have been relevant to the claims  
9 and defenses?

10 MR. MURPHY: But there was no, there was no  
11 claim, no defense, and no theory on that issue. It was  
12 a very, essentially an exploratory method that was  
13 used. No other party in the case, and that party did  
14 not have a claim or defense on that point.

15 I grant you if that point had been --

16 PROFESSOR ROWE: Then don't we get to the  
17 possibility that people will allege tenuous claims and  
18 defenses in order to be able to engage in discovery,  
19 and that is permitted under Rule 11 which says that you  
20 may plead things that you think will have support with  
21 an opportunity for discovery?

22 MR. MURPHY: Well, my understanding is, and maybe  
23 I am conservative on this, my understanding has always  
24 been you have to have some factual basis, some factual  
25 support for that, otherwise you run that risk of, as I

1 think another witness said earlier, skating too close  
2 to that Rule 11 line.

3 PROFESSOR ROWE: What is permitted is you have to  
4 say that the allegations and other factual contentions  
5 have evidentiary support, or if specifically so  
6 identified, are likely to have evidentiary support  
7 after a reasonable opportunity for further  
8 investigation or discovery.

9 That was added in '93. You don't have to have  
10 the factual support going in if you identify something  
11 as what you --

12 MR. MURPHY: As reasonably likely. This was a  
13 case where there was documentary evidence and  
14 photographic evidence on the marking of the line, and  
15 yet it was still explored at length in several  
16 depositions.

17 JUDGE SCHEINDLIN: In your example, wouldn't the  
18 party have gone to court anyway on the second tier and  
19 asked the court to allow the discovery because  
20 essentially you objected to it and the court permitted  
21 it? Under this approach the proposed rule has, the  
22 party would go to court, ask for it, say they have good  
23 cause, and probably get it anyway.

24 MR. MURPHY: Well, my hope is that based, based  
25 on the fact that no other party thought that this was a

1 reasonable exploration, there was no documentary  
2 evidence to support it --

3 JUDGE SCHEINDLIN: Somebody thought so. The  
4 party who wanted it thought so.

5 MR. MURPHY: Well, this party was eventually  
6 sanctioned for pursuing this. It was, it was out  
7 there.

8 JUDGE NIEMEYER: Well, maybe the system worked.

9 MR. MURPHY: Eventually it did, after a  
10 tremendous amount of cost and expense on everyone's  
11 part.

12 JUDGE NIEMEYER: Well, they gave you some of that  
13 expense back, didn't they?

14 MR. MURPHY: Not my party, no. It was only the  
15 one party that had been dragged, the party that  
16 allegedly supposedly mismarked it.

17 It has been, I just want to mention briefly, it  
18 has been suggested that the two-tier scope of discovery  
19 process that has been recommended would create a boom  
20 in litigation over trying to define what is related or  
21 relevant to a claim or for a defense.

22 Again, maybe I am an optimist, but I don't see it  
23 as a huge boom. I certainly think there will be  
24 litigation. There will certainly be efforts to define  
25 it, but I think, as I mentioned earlier, I think from

1 the practical standpoint, at least in the cases I have  
2 been involved in, counsel are generally reluctant to go  
3 in front of a judge over a discovery dispute, unless it  
4 is really significant, if it really means something to  
5 the case.

6 I think with the guideposts related or relevant  
7 to a claim or defense, people will generally moderate  
8 their behavior, as I said earlier. There will be  
9 litigation certainly, but I think it will be defined  
10 and focused.

11 On the initial disclosure provisions, I won't  
12 talk about that too much, except to say that I would  
13 support that and I think it's an improvement over the  
14 current practice.

15 I do have one relatively focused suggestion for  
16 changing the proposal on initial disclosures, and it  
17 deals with the third-party defendants or third party,  
18 the third-party issue, and it just is a question of  
19 timing.

20 The third parties are given 30 days from service  
21 to make their initial disclosures. In my experience,  
22 and this goes back to the case I referenced recently in  
23 the Eastern District of Virginia, in my experience that  
24 can be an extreme hardship on a party that is brought  
25 into the case.

1           The example in my case was we had one plaintiff,  
2 one defendant. Discovery, in that district discovery  
3 can proceed. There is no moratorium on discovery in  
4 the initial phase. So discovery was proceeding quickly  
5 in the first 30 days. Then parties were brought in,  
6 third parties. It was four third parties in the case.

7           If they had had to produce, which they didn't  
8 have to in this case, but if they had to produce  
9 initial disclosure information within 30 days, it would  
10 have been an extreme hardship because a number of these  
11 parties were corporate defendants who had to search  
12 down former employees, who had to search down archived  
13 information, and at the same time trying to answer and  
14 file preliminary motions. I think I would recommend a  
15 longer time frame for that.

16           JUDGE NIEMEYER: All right. Is that about it?

17           MR. MURPHY: It is, Your Honor.

18           The only question I wanted, issue I wanted to  
19 mention was the deposition limit discussion, and I  
20 would be in favor of that, of deposition limits which,  
21 in the areas I practice, haven't been applied in terms  
22 of hours or days, but I would be in favor of it.

23           But I think there needs to be guidance from the  
24 Advisory Committee on exactly how this would work  
25 because there are those witnesses that, when we have

1 several attorneys in the room questioning, clearly  
2 questioning can go on for more than seven hours, and  
3 you have witnesses who can't begin their deposition  
4 until three in the afternoon, if you have a one-day  
5 limit, what does that mean?

6 So there are a number of areas where I think the  
7 Advisory Committee would need to define that to some  
8 extent.

9 I thank you very much for the opportunity.

10 JUDGE NIEMEYER: Thank you, Mr. Murphy.

11 I think it would be a good time to take a brief  
12 break. Let's break until 11 o'clock. We will begin  
13 promptly at 11.

14 Mr. Bland, you are prepared to go ahead at 11?

15 MR. BLAND: Yes.

16 JUDGE NIEMEYER: Okay. Why don't we take a brief  
17 break till 11.

18 (A recess was taken.)

19 JUDGE NIEMEYER: All right. Mr. Bland.

20 MR. BLAND: Thank you, Your Honor.

21 JUDGE NIEMEYER: We will hear what you have to  
22 tell us.

23 MR. BLAND: All right. Thank you for giving us  
24 an opportunity to participate both here and at the  
25 Boston Conference. I don't have a prepared statement

1 at this time. We will be submitting greater remarks  
2 later or lengthier remarks later in writing.

3 While we endorse several of the proposed  
4 amendments, we're very --

5 JUDGE NIEMEYER: Are you speaking for the Trial  
6 Lawyers?

7 MR. BLAND: Yes, sir, yes, Trial Lawyers for  
8 Public Justice. It is a public interest law firm in  
9 Washington. We have 1500 members around the country.

10 While we endorse a number of the proposed  
11 amendments, there are several of them that give us very  
12 brief concern and because of the limited time, I would  
13 like to focus in on those.

14 The first point I want to talk about --

15 JUDGE NIEMEYER: We never hear the good things.

16 (Laughter.)

17 MR. BLAND: Well, we'll put them, we'll put them  
18 in the fine print.

19 JUDGE NIEMEYER: That's all right. We need to  
20 hear the problems.

21 MR. BLAND: I would like to start off with the  
22 issue of narrowing the scope of discovery under Rule  
23 26(b)(1).

24 We believe that the advisability of this proposal  
25 depends on the empirical evidence about the nature of

1 discovery abuse because this proposal has been before  
2 this Committee in the past. In 1978, when this  
3 Committee considered a proposal to narrow the scope of  
4 discovery and rejected it, the written explanation in  
5 the F.R.D. said the reason that they were rejecting the  
6 proposal was that there was not enough empirical  
7 evidence to support it, and it is essentially an  
8 empirical question.

9 The defense bar and the lobbyists and so forth,  
10 their principal argument is that the excessive requests  
11 for discovery are a major issue of discovery abuse.

12 The word discovery abuse itself, people have been  
13 acting as if that phrase necessarily means too many  
14 requests for information or request for too much  
15 information.

16 We believe, and we argued in Boston and we think  
17 there is a great deal of empirical evidence to support  
18 this argument, that the principal problem, the biggest  
19 problem with discovery abuse is stonewalling. It is  
20 people not answering questions, not producing relevant  
21 information, covering up facts. So that is the bigger  
22 problem.

23 Now if it were true that the biggest problem of  
24 discovery abuse was excessive request for information,  
25 then it probably would make sense to narrow the scope

1 of discovery. If that were true out there in the  
2 overall legal community, if the empirical evidence was  
3 to show that, not that people --

4 JUDGE NIEMEYER: We consciously tried not to  
5 address abuse, which I define is a misuse of the  
6 structural components of discovery. The idea was to  
7 look at the architecture of discovery and say, when it  
8 has been used properly, how does it lead on a case?

9 I think we are going to have abuse, no matter how  
10 we describe it. Lawyers for both sides are going to  
11 use discovery for ulterior purposes and are going to  
12 try to get around what the intent for discovery is.

13 We have purposely not tried to address all the  
14 abuse problems. They are usually on a case-by-case  
15 approach. I think we fully recognize that there is  
16 going to be abuse and there probably is abuse.

17 MR. BLAND: But I think the question of what type  
18 of abuse is most prevalent, and what the empirical  
19 evidence shows about the type of abuse that you see  
20 more often than others has a big impact under what  
21 policies you should be considering.

22 PROFESSOR ROWE: Excuse me. Might narrowing the  
23 scope actually reduce the justification for and the  
24 practice of stonewalling? In other words, stonewalling  
25 could be --

1           MR. BLAND: Well, eliminating causes of action so  
2 that no one could be sued will eliminate the cause of  
3 stonewalling as well, Your Honor. I mean if this is  
4 information that should be getting out that is not  
5 getting out, then to say well, we are just going to  
6 narrow what people are going to do, I think it is going  
7 to greatly increase stonewalling.

8           Because if people, if the signal is being sent --  
9 we've heard about five different people say well, the  
10 key thing is this Committee needs to send a signal that  
11 there is too much discovery being requested and we need  
12 to narrow it in, we need to punish the people asking  
13 for too much. If that's the signal this Committee is  
14 sending out, then I think that's going to encourage  
15 stonewalling.

16           Now the Federal Judicial Center study that was  
17 performed --

18           JUDGE CARROLL: Would you agree, though, that in  
19 the vast majority of the cases there is neither too  
20 much discovery nor stonewalling?

21           MR. BLAND: The vast majority? Well, let me give  
22 you the actual numbers that come out of the study.

23           In that study, when people were asked what  
24 discovery problems did you have in a case, 28 percent  
25 of the respondents said people were evasive. It is a

1 chart on page 574 of the Law Review, where the study is  
2 incorporated. It is Table 26.

3 Twenty-eight percent of the people said a party  
4 failed to respond adequately, so 72 percent apparently  
5 of the people did respond.

6 MS. BIRNBAUN: What would you, what would you do  
7 to change that in the rule?

8 MR. BLAND: What?

9 MS. BIRNBAUN: What would you do to change that?  
10 The rules already take care of those problems. We can  
11 go in and get motions to compel, protective orders.

12 MR. BLAND: We had a number of specific proposals  
13 in our proposed, in our paper at the Boston  
14 Conference. Since none of them were suggested, none of  
15 them are on the table right now, I don't want to spend  
16 a lot of time on them, but we suggested --

17 Frequently people withhold documents on the  
18 grounds --

19 Your Honor, if I could, we put out about five or  
20 six specific proposals, which I would rather address in  
21 our submissions rather than going through now because  
22 they really aren't on the table.

23 MS. BIRNBAUN: That's fine.

24 MR. BLAND: In that study, 15 percent of the  
25 people said that an excessive number of documents were

1 requested. So there was a response that found an  
2 excessive number of documents requested.

3 It is virtually the same number that you had in  
4 the 1968 study, the Glaser study for the Columbia  
5 Project that was the basis of this Committee's decision  
6 in 1978 to not to go forward with this rule to narrow  
7 the scope of discovery.

8 So the 15 percent of excessive, 15 percent of  
9 lawyers reporting excessive requests is a very  
10 consistent number over time, but almost twice as many  
11 people said a failure to respond adequately was the  
12 biggest problem.

13 And what's more, in the study, more defense  
14 lawyers said failure to respond adequately was the  
15 problem than the number of defense lawyers who said  
16 that excessive requests was the problem. It was 24  
17 percent to 19 percent of the actual empirical evidence  
18 that was out there.

19 The Advisory Committee Note to the, or the  
20 proposed Advisory Committee Note to the proposal  
21 indicates that one-third of the lawyers endorse  
22 narrowing the scope of discovery. Well, that's a  
23 response to a question that said if we are to narrow --  
24 what proposal could we enact that would reduce the cost  
25 of discovery without harming justice in individual

1 cases? About one-third said this would, but this was  
2 not --

3           Apparently that means a significant number,  
4 perhaps even the majority of the people, felt that it  
5 would not reduce the cost. I mean saying well,  
6 one-third of the people were in favor when they were  
7 asked for it implies perhaps two-thirds of them were  
8 against it. I don't think that that, the fact that it  
9 is cited I mean by the Advisory Committee Note actually  
10 argues for this proposal.

11           As I said before, we made reference a second ago  
12 to the Columbia Project.

13           JUDGE NIEMEYER: That might be a remarkable  
14 number if you consider the fact that maybe 70 to 80  
15 percent of the cases there isn't any discovery problem  
16 basically in almost no discovery. So when you have  
17 that kind of response, that is indicative of something  
18 when discovery is being used.

19           MR. BLAND: I agree that in many, in the vast, in  
20 the majority of cases that discovery is not a problem.  
21 But to the extent that it is a problem, not only in the  
22 Federal Judicial Center study, but the other studies  
23 that have actually compared stonewalling versus  
24 excessive requests, in the Columbia study, more people  
25 identified stonewalling, and that study was called,

1 tripping offenses was the phrase that they used. That  
2 meant to --

3 JUDGE NIEMEYER: Yeah, but if you have a rule  
4 that says to a party you have to answer a question put  
5 to you, and the party refuses to answer it, that is not  
6 an architectural problem. It is not going to lessen  
7 the scope. That is a problem of abuse, and there are  
8 ways of handling that. I am not sure we have heard  
9 that there is any better way to handle it than it is  
10 being handled now.

11 We have known about stonewalling for a long  
12 time. Nobody wants to -- it goes on in all kinds of  
13 forums.

14 MR. BLAND: But the way that stonewalling gets  
15 addressed in a case-by-case basis generally, Your  
16 Honor, is someone files a request for production. They  
17 get very, very limited response or a great deal of  
18 objections. There's a motion to compel prepared when  
19 there is stonewalling. There then is sort of a  
20 conference in which people argue these things out.

21 At that conference, the principal argument to try  
22 and shake free the documents in many instances is the  
23 scope of discovery. If what the Committee is going to  
24 do is adopt a rule that dramatically -- I believe it is  
25 a significant amendment -- that would narrow the scope

1 of discovery, if the goal is sending out a signal that  
2 excessive requests is the problem, I think the people  
3 who are stonewalling are going to take heart from that  
4 and have an extra argument in that conference.

5 JUDGE NIEMEYER: You are concerned that the  
6 parties aren't going to get all the documents that are  
7 relevant to a claim or defense?

8 MR. BLAND: I believe, Your Honor, that  
9 ultimately I think that that will turn out to be true,  
10 but I think that putting on a claim or defense standard  
11 with a goal of sending a signal to narrow things is  
12 going to narrow what, the documents that come out that  
13 are relevant to resolving the case, resolving the  
14 merits of the case. I do think that that's right, yes,  
15 Your Honor.

16 JUDGE KYLE: Let's assume we weren't trying to  
17 send any signals then, but we are just writing on a  
18 clean slate. What is wrong with the proposal?

19 MR. BLAND: Both the claim and defense proposal?  
20 Two things, Your Honor.

21 First is, beyond the question of the argument  
22 of --

23 JUDGE KYLE: Don't compare it to what we have.  
24 Just if someone came and said we are writing the rule  
25 now for the first time, this is what is there, what

1 would be wrong with it?

2 MR. BLAND: First, Your Honor, I think that by  
3 putting the emphasis on the claims or defenses in the  
4 pleadings, that you are going back a great deal in the  
5 way of -- right now, the rules are principally aimed at  
6 the pleadings, will not have significant emphasis  
7 placed upon them, that under Rule 8, the pleadings  
8 would be fairly general and the merits should be  
9 decided on the facts.

10 This is going to put a lot more emphasis on  
11 pleadings. I think there is going to be a lot more  
12 litigation about exactly what is meant by the language  
13 in a complaint, in an answer, that is going to have a  
14 lot of struggling.

15 You are going to see satellite litigation  
16 involving Rule 11. You are going to see more discovery  
17 disputes being resolved around what is in the language  
18 of the complaint. I think it is going to create  
19 formality and game playing and that sort of thing.

20 Secondly, I think there are going to be a lot of  
21 cases where people who have valid, deserving claims are  
22 going to be prevented from obtaining relief because it  
23 is hard in the outset of a case to define the complaint  
24 in such a way as to specify the facts that would let  
25 you go forward.

1           If I could quote one sentence from the treatise  
2 of Professors Wright, Miller and Professor Marcus, this  
3 is one of the books in which he was a coauthor. There  
4 they are quoting from Judge Leibell of the Southern  
5 District of New York, a 1990 case.

6           They said to limit the examination to matters  
7 relevant only to the precise issues presented by the  
8 pleadings would not only be contrary to the expressed  
9 purposes of Rule 26, which I understand you can change  
10 those purposes, but also might result in a complete  
11 failure to afford plaintiff an adequate opportunity to  
12 obtain information that would be useful at trial.

13           I think that that is going to happen in cases. I  
14 think that the case law that has recognized that in the  
15 past has been correct.

16           If I could add one other point? I assume my time  
17 is almost gone.

18           JUDGE ROSENTHAL: Let me ask you a question about  
19 that before you go on.

20           MR. BLAND: Please, please, Your Honor. I'm  
21 sorry.

22           JUDGE ROSENTHAL: Doesn't the good cause showing  
23 that would let you obtain broader discovery prevent the  
24 truncation that you are concerned about?

25           MR. BLAND: I think it helps. I do not think it

1 prevents it, Your Honor. I think that that is a fairly  
2 modest change from the original proposal for a couple  
3 of reasons.

4 First is I do believe it is very difficult in  
5 many courts to obtain a hearing on discovery matters in  
6 any kind of timely way. A lot of times it's a very low  
7 priority and it can take months to even get a hearing.  
8 If you want to go forward with the case, people end up  
9 just going forward with what they are able to get in  
10 arguments. I think that it is very hard to get  
11 hearings in many cases.

12 Secondly, I think it is a little bit of a  
13 Catch-22 situation. I mean if you don't know exactly  
14 what it is that you are asking for, I think it is hard  
15 to prove good cause.

16 The case law with respect to, say, protective  
17 orders, where the good cause standard is shown, usually  
18 requires a lot of specificity in going after  
19 something. And to say well, in this case we need to  
20 broaden it to what discovery used to be because here in  
21 this case we have, it is going to be very hard in many  
22 cases to come out with what exactly you are going to  
23 say.

24 I think that in fact that that is not, I think  
25 that escape valve is going to have very small practical

1 effect in real litigation.

2 JUDGE ROSENTHAL: If I understand you right, you  
3 want the ability to be able to obtain discovery of  
4 information that you cannot show good cause for  
5 obtaining?

6 MR. BLAND: Where I think you would have some  
7 difficulty coming forward with the kind of evidence or  
8 showing that is required for good cause.

9 JUDGE ROSENTHAL: Thank you.

10 MR. BLAND: If I could briefly object, refer to  
11 the cost-shifting issue.

12 Once again, I think it is true, as several male  
13 members of the Committee pointed out, that there is  
14 authority implicit to do this already in the rule.  
15 What is being said is we should say it again more  
16 clearly, with the goal of sending a signal to people,  
17 to litigants out there, since it is already in the  
18 rule.

19 And the evidence that is supported that is cited  
20 for this in the Advisory Committee Note is a quote from  
21 the Federal Judicial Center study that says that  
22 document production is the most problematic area of  
23 discovery, that more people complain of problems with  
24 document production.

25 That is true. That quote is perfectly in the

1 study, but the breakdown of what those problems are  
2 goes back to the chart where almost twice as many  
3 people said that stonewalling is the problem than said  
4 that excessive requests were the problem.

5 So if you are citing from the study that says  
6 that the biggest problem in discovery is document abuse  
7 and then the study itself goes on to say the biggest  
8 problem with document abuse is stonewalling, why you  
9 would try to send a signal that only helps the people  
10 who are stonewalling and not the other side doesn't  
11 seem clear to us at all. It seems that the quote that  
12 is in the Advisory Committee Notes doesn't support, the  
13 study doesn't support the quote.

14 PROFESSOR ROWE: Fine, but isn't the -- the  
15 proposal is tied to a finding that the additional  
16 discovery requested would have to be excessive, unduly  
17 burdensome, and it says if the Court makes that  
18 finding, then it can say you can get it if you are  
19 willing to pay for it.

20 MR. BLAND: I agree.

21 PROFESSOR ROWE: Not with respect to core  
22 discovery.

23 MR. BLAND: I believe that that's right.

24 But once again, if you look at the memo that this  
25 Committee sent to the Standing Committee, where it

1 summarized this proposal, the cost-shifting proposal,  
2 there was an explanation that the way this was most  
3 likely to come out would be in conferences on discovery  
4 between the parties.

5 I think that that's right, that the cost-shifting  
6 proposal is going to be played out in the course of  
7 negotiations when someone is coming with a request, got  
8 nothing, they made a motion to compel, and the parties  
9 are hashing it out.

10 It seems like the signal that is being sent is  
11 we're trying to give an extra weapon to one side of  
12 this negotiation. We know right now that requesters  
13 and responders are having these conferences, fighting  
14 over what is going to be produced and we are trying to  
15 send a signal to give one, that one side is going to  
16 have a stronger weapon. Why you would send that to the  
17 side that more people are saying is abusing right now  
18 doesn't seem fair to us.

19 PROFESSOR MARCUS: Can I have ask a follow-up  
20 question about that same general area, I think?

21 Do you think if the Committee goes forward with  
22 cost bearing as an idea it would be better in Rule  
23 34(b) where it is currently proposed or in Rule  
24 26(b)(2) so that it could apply to depositions,  
25 interrogatories and other forms of discovery?

1           I understand you to say that you believe that the  
2 authority exists for this sort of order already. So my  
3 question is would it be better, if we are going to say  
4 it in the rule, to say it with regard to all forms of  
5 discovery or with regard to document discovery only?

6           MR. BLAND: I think that, I mean I think I'm  
7 opposed to it in both places. Stressing is the same as  
8 message.

9           To the extent that putting it in Rule 26 would  
10 send that message even more broadly, I guess I would be  
11 opposed to it there even more than I am opposed to it  
12 in Rule 34.

13          JUDGE NIEMEYER: All right. Thank you, Mr.  
14 Bland.

15          MR. BLAND: Thank you, Your Honor.

16          JUDGE NIEMEYER: Ms. Goldberg, Helene Goldberg?  
17 Does anybody know if she was here today? It is the  
18 Department of Justice.

19          JUDGE KYLE: I think she was coming later this  
20 morning.

21          JUDGE NIEMEYER: She was?

22          JUDGE KYLE: A letter.

23          JUDGE NIEMEYER: All right. We will take her out  
24 of order if she comes back in.

25          Torrey Armstrong.

1           MR. ARMSTRONG: Good morning, members of the  
2           Committee. I am here on behalf of the Federal Bar  
3           Associations of Northern Virginia, Norfolk and  
4           Richmond. I've submitted a letter that I hope you all  
5           have received by now. Perhaps you haven't had a chance  
6           to read it.

7           JUDGE NIEMEYER: Yeah. You said basically it was  
8           going to slow up the rocket.

9           MR. ARMSTRONG: It will. I do say that, Your  
10          Honor, and that's essentially our position.

11          Our focus here on behalf of the Federal Bar  
12          Association Chapter, as it comprises the Eastern  
13          District of Virginia, sometimes known as the Rocket  
14          Docket, is that it will slow our docket down.

15          I think that is a more serious point than perhaps  
16          might seem as first expressed because obviously, I have  
17          a parochial interest. We think we have a very  
18          effective docket system. We think it's among the best  
19          in the country. As a consequence, we do not wish to  
20          see rules applied automatically without giving that  
21          docket system its due credit.

22          The fact that the Eastern District of Virginia  
23          docket, which is known as the Rocket Docket  
24          internationally, handles as complex a series of cases  
25          as any court in the country, I think it is proof in and

1 of itself that there are better ways than having  
2 one-size-fits-all rules that don't necessarily help in  
3 every instance. That is why we oppose the elimination  
4 of the opt-out features in these new rules.

5 I will say, just as an aside, we haven't  
6 particularly commented on the other features of the  
7 proposed changes, but they don't seem substantially  
8 different from what the active practice is in the  
9 Eastern District of Virginia, so perhaps they are  
10 all --

11 JUDGE NIEMEYER: Why do you think disclosure  
12 would, as this group proposed it in these changes,  
13 would slow up the process in the Eastern District?

14 MR. ARMSTRONG: As it is now, we have no waiting  
15 period. It is well-known you don't file a case in the  
16 Eastern District of Virginia until you are ready as a  
17 plaintiff, so you are ready to go as a plaintiff.  
18 That's one.

19 You go right into discovery, and that's two.  
20 There is no waiting for a pretrial or status or a  
21 conference among counsel.

22 Discovery is limited. Interrogatories are  
23 already limited and people have to be judicious on what  
24 they use, and I see no practical difference between  
25 this proposed, as we see it, mandatory disclosure.

1           JUDGE NIEMEYER: Discovery is limited in other  
2 respects other than --

3           MR. ARMSTRONG: Yes. We have five nonparty  
4 deposition limits per side, per party, 30  
5 interrogatories, no limit on document production  
6 requests, other than common sense and the supervision  
7 and oversight of the court. But we have --

8           This would put as much as a month to two month  
9 delay right into our docket system, which has already  
10 been slowed by the last round of changes.

11          MS. BIRNBAUN: This is because of the pretrial  
12 conference basically?

13          MR. ARMSTRONG: Pardon?

14          MS. BIRNBAUN: Is this because of the pretrial  
15 conference that would be required basically, not any  
16 other provision of it?

17          MR. ARMSTRONG: It's the sequencing of it that is  
18 the essential problem, as we see it, that we have to  
19 wait in place until the sequence begins to operate  
20 instead of --

21          MS. BIRNBAUN: Let me ask you this. If this  
22 works so well for Virginia, and if we could bring much  
23 of what you are doing in Virginia through the Federal  
24 Rules to the rest of the country, wouldn't it be okay  
25 for you to give up a month or two of your docket to

1 improve everybody else in the country?

2 MR. ARMSTRONG: Well, we would like to persuade  
3 you to give up these mandatory changes in favor of what  
4 we are doing. I think that is really the purpose and  
5 intent of the whole exercise, is to find faster,  
6 cheaper, more efficient ways of conducting the court  
7 system.

8 Yes, it would be, I suppose, a noble sacrifice,  
9 but the outcome would be delay.

10 Over our courthouse in Alexandria, the phrase  
11 Justice Delayed, Justice Denied is recently emblazed  
12 across the entranceway, and it is seriously pursued.  
13 When you come to that court, you better be ready. When  
14 you have a deadline, you better meet it. It's a firm,  
15 fixed trial date, a firm, fixed cutoff date.

16 PROFESSOR ROWE: Mr. Armstrong.

17 MR. ARMSTRONG: One of the speakers, I think the  
18 very first one, said discovery cutoff dates only seem  
19 to work in undercrowded dockets. That's just not  
20 correct. This docket in the Eastern District of  
21 Virginia is one of the busiest in the country. In some  
22 years, it has been the busiest.

23 PROFESSOR ROWE: Excuse me, Mr. Armstrong.

24 MR. ARMSTRONG: So it can work.

25 PROFESSOR ROWE: Your statement, if I read you

1 correctly, is basically an argument, please don't  
2 impose uniformity. Let us keep our local system as,  
3 without regard to what others are doing.

4 This Committee has been placing quite a high  
5 premium on restoring uniformity. Given that premium,  
6 can you make suggestions for the form that the national  
7 uniform rules should take in this area?

8 MR. ARMSTRONG: Well, I think --

9 PROFESSOR ROWE: Without imposing the Rocket  
10 Docket on the rest of the country.

11 MR. ARMSTRONG: I would address it this way. I  
12 don't understand all the ins and outs of this, but I  
13 believe that the Eastern District of Virginia was not  
14 included among those pilot courts. So I think in some  
15 ways we have missed the opportunity to study what has  
16 worked so successfully there. It was not a pilot  
17 program, yet it was cited in the Civil Justice Reform  
18 Act study for the Eastern District as a paradigm among  
19 courts on how to reduce delay, minimize excessive and  
20 unnecessary discovery.

21 JUDGE NIEMEYER: Do you think that if a poll were  
22 conducted of the people that use the procedures in the  
23 Eastern District of Virginia, that the response, both  
24 the plaintiffs' lawyers and defendants' lawyers would  
25 be positive to the procedures that are there?

1           MR. ARMSTRONG: Yes, I do, Judge. I do very much  
2 believe that.

3           In fact, one of the judges commented to me on the  
4 telephone that he was surprised in a sense to hear the  
5 feedback because from the bench, it doesn't always know  
6 what the bar really is saying, that the consistency and  
7 uniformity in both plaintiff and defense lawyers,  
8 criminal and civil, favor the procedures in the Rocket  
9 Docket.

10           You will find, as you probably have from where  
11 you sit, that those who are not prepared will complain,  
12 but they are not the ones that we really should be  
13 concerned about. We should be concerned about the  
14 clients who want to get their cases in and out, and  
15 that's why the Rocket system is so successful.

16           JUDGE NIEMEYER: Now I, for one, have been one of  
17 the persons that has advocated regularly in public that  
18 the docket procedures, the Rocket Docket be examined  
19 because there really are not very many courts in the  
20 country doing something like that. It really is  
21 producing remarkable results.

22           I guess the only reservation that one could make  
23 is the question of whether the users like it or whether  
24 they feel like they are being trampled on. You're  
25 saying that you think that if we conducted such a poll,

1 you think that the users would say they like it?

2 MR. ARMSTRONG: I do. I think in response to the  
3 professor's question is perhaps we ought to have that  
4 time. I don't think the period of experimentation is  
5 over yet. We really haven't seen, at least in  
6 comparison to the Rocket Docket system, what else works  
7 well so that there is this flexibility.

8 The uniformity for the sake of uniformity may be  
9 a worthwhile goal. I debate that at times and  
10 specifics, but I don't think it ought to overwhelm a  
11 system that clearly, and year after year, has worked  
12 well with very complex, as well as very ordinary,  
13 day-to-day, run-of-the-mill cases.

14 I think that there are a number of procedural  
15 things the court can do, great use of the magistrate  
16 judges, which is what happens in the Eastern District  
17 of Virginia.

18 You develop your reputation by not being in court  
19 on discovery motions, instead of coming to court a  
20 lot. So the practitioners really must care and support  
21 these rules, and the judges have to be involved. They  
22 have to supervise and stay on top of these cases. They  
23 are, by and large, in the Eastern District of  
24 Virginia.

25 So we don't want to get into --

1           JUDGE NIEMEYER: You don't have individualized  
2 assignment either, do you?

3           MR. ARMSTRONG: We do in Richmond, but not in  
4 Norfolk or Alexandria. So it works both ways, either  
5 the master docket system or the individual case  
6 assignment system.

7           It really comes down to the credibility of the  
8 system. We will have a trial seven months from filing,  
9 and we will have discovery cutoffs, and we really mean  
10 it.

11           You don't have time to mess around with  
12 irrelevant interrogatories or too many depositions.  
13 You have to focus on what is important. That is what  
14 the judges expect.

15           And where the magistrates are used repeatedly to  
16 sharpen up the inquiry, if you will, in discovery  
17 disputes and breaking the disagreements up, they rule.  
18 They rule every week. They rule by telephone. They  
19 rule from the deposition room by telephone. So they  
20 are accessible, and I think that's another important  
21 element.

22           Now, can you build a rule that says judges must  
23 be accessible? I'm not sure, Professor. I doubt it.  
24 At the same time, there is an ethic and a  
25 professionalism involved here. You shouldn't just by

1 rule make it just sort of standardized and I think in  
2 some ways, from my standpoint, if you'll forgive me,  
3 bring it down to a lower common denominator.

4 JUDGE NIEMEYER: The rule that you have the  
5 greatest trouble with is the initial disclosure?

6 MR. ARMSTRONG: Yes. The opt-out features that  
7 are now allowable, we would like to preserve, until it  
8 is shown they don't work in our court. I think other  
9 aspects of it, assuming those changes do go through,  
10 probably are okay because they don't change much, that  
11 I see, and hearing the questions and answers --

12 JUDGE NIEMEYER: How should we, as a committee,  
13 which really has to think in terms of 94 districts and  
14 of some kind of improvement of procedure, study of  
15 procedure of 94 districts, if we were to conclude that  
16 93 districts could be improved, but agree with you that  
17 we are probably hurting the Eastern District, it makes  
18 it sort of a hard case. You don't like to ruin the  
19 good things.

20 MR. ARMSTRONG: That's why I am here, Judge.

21 JUDGE NIEMEYER: I understand that.

22 MR. ARMSTRONG: I am here for the minority, I  
23 suppose, crying in the wilderness that there are good  
24 ways other than simply imposing these  
25 fraught-with-problem, mandatory discovery

1 requirements.

2 I mean maybe they are working in some districts,  
3 but I heard a lot of complaints that we still don't  
4 know the parameters of what is and isn't required. The  
5 simplified, pared-down approach of these new rule  
6 changes actually is good; but what's wrong with one or  
7 two interrogatories at the outset of the case that ask  
8 those same questions?

9 I don't see it. I don't see the gain in terms of  
10 improving the system just for the sake of national  
11 uniformity. At least our organizations would like to  
12 express a desire not to eliminate those as to us.

13 PROFESSOR MARCUS: Mr. Armstrong, can I ask one  
14 specific question about one specific thing you say in  
15 your letter?

16 MR. ARMSTRONG: Please.

17 PROFESSOR MARCUS: You question the proposal, if  
18 uniformity occurs, to exempt actions to enforce  
19 arbitration awards from initial disclosure. I would  
20 have thought that the amount of discovery and hence,  
21 disclosure in those cases would make it inappropriate  
22 to require disclosure there.

23 Can you explain briefly why in those cases it  
24 seems disclosure should be employed if it is to be  
25 employed generally?

1           MR. ARMSTRONG: Well, I thought, my thinking at  
2 the time was that it is really relatively easy to set  
3 forth in those kinds of cases what this essential  
4 information is. Why carve it out?

5           But it really probably doesn't make that much  
6 difference. It is sort of the perverse way I would  
7 like for everybody to share our pain, the new changes.

8           JUDGE NIEMEYER: All right. Thank you.

9           PROFESSOR MARCUS: Thank you.

10          JUDGE NIEMEYER: Mr. Cavanagh.

11          MR. CAVANAGH: Good morning. My name is Edward  
12 Cavanagh. I'm a professor of law at St. John's  
13 University School of Law and also I'm counsel with the  
14 New York City Office of Morgan, Lewis & Bockius.

15          In the interest of full disclosure, I will also  
16 tell you that for the last 16 years I have been a  
17 reporter for the Eastern District of New York Civil  
18 Litigation Committee and also was a reporter for the  
19 Advisory Committee when the Civil Justice Reform Act  
20 was in place.

21          I will also tell you that I am speaking for  
22 myself today and not for any of those organizations,  
23 although, we may share common views in certain  
24 instances.

25          It is a little late in the game and just about

1 everything that I was going to say has been said in one  
2 form or another. I just want to briefly make some  
3 comments, and then I will sit down.

4 My view is that discovery in the main is working  
5 efficiently. I think the problems are at the edges in  
6 the odd case, in the complex cases. I think the 1993  
7 amendments have worked, are working, and we ought to  
8 let them continue to work. I think they are a great  
9 step forward.

10 I think we also have to keep in mind that  
11 discovery --

12 JUDGE NIEMEYER: Do you think the heartburn part  
13 works, what lawyers call heartburn, where you have to  
14 produce documents?

15 MR. CAVANAGH: The mandatory automatic disclosure  
16 I don't think has worked, but I think what has worked  
17 is the understanding that discovery is not unlimited,  
18 that you are not entitled to a no-stone-untuned,  
19 scorched-earth policy, that there are limits on  
20 discovery, the notion of presumptive limitation.

21 That also goes back, of course, Judge, to the  
22 1983 amendments, where we had that same notion, but I  
23 think we built on it in the '93 amendments with, you  
24 know, the limits on interrogatories, presumptive limits  
25 on interrogatories, presumptive limits on depositions.

1           I think the message is there. Discovery is not  
2 unlimited. I think that is slowly getting across to  
3 litigants. It is getting across to the court personnel  
4 also. I think that's where the merit is.

5           In terms of mandatory automatic disclosure, while  
6 I think there is great merits and I respect Judge  
7 Schwarzer and Judge Brazil, I think theoretically it  
8 makes a lot of sense.

9           I think the problem has been there that the bar  
10 has not gotten over the very uncomfortable shift in  
11 emphasis in discovery from, you know, the adversarial  
12 system making discovery -- you know, always was a  
13 matter of being part of the adversarial system and now  
14 we've shifted over to a matter of professional  
15 responsibility. I think that's where the heartburn  
16 comes in.

17           In that respect, I think this suggestion that is  
18 in the amendments, the proposed amendment to make it,  
19 to limit the disclosure requirements only to the  
20 materials that are favorable, I think that is a step in  
21 the right direction.

22           I think what I would ask the Committee to think  
23 about is whether that's enough or if this is something  
24 that we ought to scrap.

25           I think it has been very, this episode has been

1 very painful for the bar. You not only had Rule 26(a),  
2 but you also had Civil Justice Reform Act plans that  
3 were sort of all over the place.

4 You know, what we've had in the Eastern District  
5 of New York, for example, Judge, was mandatory  
6 automatic disclosure based on the 1991 draft of the  
7 Federal Rules because that's when our committee went to  
8 work. That's what we were working with. We thought  
9 that that was what was going to be eventually adopted.  
10 It was not. It was down-sized and changed  
11 significantly. Other groups did that.

12 So out there you had, under the Civil Justice  
13 Reform Act plans, you had a lot of different variations  
14 of mandatory automatic disclosure, which I think were  
15 very confusing and made a lot of attorneys very, very  
16 uncomfortable.

17 So I think with respect to disclosure, I don't  
18 think it has worked the way we wanted it to work. I  
19 think the proposal in the amendments is a step in the  
20 right direction, but I also think we ought to think  
21 about whether long-term, that that is a good idea.

22 I'm a little, I don't know, disturbed today with  
23 sort of the tenor of the comments here that federal  
24 judges aren't working hard enough or maybe we ought to  
25 make them work harder, and I do think that they are

1 working hard enough. Particularly with my experience  
2 in the Eastern District, I know the judges work very,  
3 very hard.

4 Discovery, it is not that they are not going to  
5 do discovery or they think discovery is --

6 JUDGE NIEMEYER: I guess the question that we've  
7 been faced with all along is how do you get the  
8 attention of a busy district judge to resolve a matter  
9 which is not glamorous, which has got the lawyers bound  
10 up because maybe, by their own fault, they couldn't  
11 work it out? You can't just say to the judge, handle  
12 these.

13 MR. CAVANAGH: I agree.

14 JUDGE NIEMEYER: The real question is how do you  
15 get them more involved? I think most of the testimony  
16 we have heard was not to give them more work as much as  
17 get them with their hands on these issues so they can,  
18 whether it is by telephone or whatever, to resolve  
19 these and let the lawyers continue on their efforts.

20 MR. CAVANAGH: That's not easy, and I agree with  
21 you.

22 Let me just tell you what we did in the Eastern  
23 District, have done in the Eastern District. This goes  
24 back to the early '80s, even prior to the adoption of  
25 the 1993 amendments. This is really the brainchild of

1 then Chief Judge Weinstein.

2 That was to get the magistrate judges involved  
3 more in discovery. What evolved in the Eastern  
4 District is a system whereby discovery in most matters,  
5 with the exception of complex matters, is routinely  
6 referred to magistrates for supervision and  
7 disposition.

8 What we've done in that, by doing that, is  
9 eliminated that problem to some extent of the discovery  
10 issues being at the bottom of the judge's pile, you  
11 know, particularly in the Eastern District of New York,  
12 Judge, where we have La Guardia, Kennedy, MacArthur  
13 Airports, all drug centers, and we have a lot of  
14 criminal drug cases. So with a heavy criminal docket,  
15 the civil cases fight for attention.

16 But what was done, I think, with the magistrates,  
17 having this system involving magistrate judges, what we  
18 have been able to do is to take discovery disputes and  
19 have them, have somebody, a judicial officer who is  
20 going to be responsible and get back to you quickly.

21 You've got a fight at a deposition. The  
22 magistrate judge is assigned from the wheel at the same  
23 time the judge is, because we have an individual  
24 assignment system there. Magistrate judges are also  
25 assigned for non-dispositive pretrial purposes.

1           You've got a disputed discovery, you know, work  
2 product or some privilege dispute. You call up from  
3 the discovery room. You call up the magistrate judge.  
4 You get a quick response. It is on the record. There  
5 are no formal papers. It's done by phone. You know,  
6 there is no time off, you know, I have to set aside a  
7 morning for conference or anything. There is quick  
8 access and quick response.

9           Although I think probably many practitioners had  
10 some doubts about whether that could work, it has  
11 worked very, very well in the Eastern District.

12           Now, can that work in all districts? I don't  
13 know, but I think it is worth looking at.

14           One of the things that we have in the Eastern  
15 District of New York, we have a small, a relatively  
16 small bench compared to our brethren over in the  
17 Southern District. We have a small number of  
18 magistrates who are all uniformly high quality and  
19 respected by the bar, and I think that probably helps.

20           MR. KASANIN: Are the magistrates required to  
21 deal with discovery issues by phone by local rule?

22           MR. CAVANAGH: They are not required to deal with  
23 them by phone, but they typically do. The idea there  
24 is that it just saves a lot of time.

25           MR. KASANIN: I understand that.

1           MR. CAVANAGH: You don't have to come from the  
2 east end of Long Island all the way into Brooklyn,  
3 which is a whole day's drive anyway.

4           But I think that's the way. I'm just not sure  
5 that these -- and I understand here that largely we are  
6 not changing the substance of these rules, that most of  
7 these proposals are in there one way or another and  
8 what we are trying to do is get a judge's attention.  
9 I'm just not sure that we are going to be able to do  
10 that by these rules and that maybe we ought to be  
11 looking at another way.

12           Another concern that I have is this sort of  
13 three-tier approach that we have for discovery on  
14 mandatory-automatic disclosure, attorney-initiated  
15 discovery, and court-supervised discovery. I'm not  
16 sure that that's a good idea.

17           What my fear is is that what is going to happen  
18 here, when we start talking about discovery with  
19 respect to subject matter, we are going to have matters  
20 that are going to be routinely now going up to the  
21 judge, is this, should the judge be deciding this, and  
22 again you are going to have the problem of competing  
23 for the judge's time when the judge doesn't have a  
24 whole lot of time and I think in matters where you are  
25 probably going to say yeah, you probably are going to

1 be entitled to discovery anyway.

2 So I don't think that this is going to resolve,  
3 having this distinction between court-supervised and  
4 attorney-supervised discovery is going to result in any  
5 efficiencies or any cost-savings and quite to the  
6 contrary, I'm afraid that it is going to be inefficient  
7 and probably increase cost.

8 Somebody asked before I thought was a good  
9 question. If you are writing on a clean slate, what  
10 would you do in terms of what the scope of discovery is  
11 going to be? My answer to that is very simple, and I  
12 think it shows the wisdom of your predecessors who  
13 drafted these rules. I think subject matter is great.

14 One of the big, main purposes, and I don't mean  
15 to lecture to this distinguished body, one of the main  
16 purposes of the Federal Rules was to get away from this  
17 notion of common law pleadings. If you had a theory,  
18 you had to have everything in the can. You had to have  
19 your case ready to go from the pleadings stage on, and  
20 that the recognition here that, you know, discovery in  
21 trial is an organic process and you learn more as you  
22 go through, and you may have limited access to the  
23 facts at the outset because you just, you know, an  
24 employee case, you don't have access to the employer's  
25 records and you can't have your case in the can. I

1 think that's one of the beauties of the Federal Rules.  
2 Apart from that, whether subject matter was right then,  
3 we've got 60 years of experience to find that.

4 Now, if you want to introduce a new term, claim  
5 or defense, and maybe there is no significant  
6 difference -- I have an example, but I don't know that  
7 you would like it any more than the other ones -- the  
8 fact is there is going to be a difference. The fact is  
9 it is going to be talked about and it is going to be a  
10 matter of motion before the court, and I don't think  
11 that is going to be a productive use of court time.

12 I would just rather have what we have now,  
13 subject matter, and don't have this difference between,  
14 distinction between attorney-supervised and  
15 court-supervised discovery.

16 I don't want to leave the impression that I think  
17 all of these changes are bad. I'm fully in favor of  
18 national rules. I would eliminate the local option for  
19 26(a)(1). I would eliminate local options for limiting  
20 by local rule numbers of interrogatories, the number of  
21 depositions; although, I think on a case-by-case basis  
22 or by consent, that that probably would be appropriate,  
23 those sorts of limitations would be appropriate.

24 The last thing I've got is somebody said here  
25 that life was unfair. Life may indeed be unfair, but

1 the Federal Rules of Civil Procedure are not unfair.

2 Rule 1 says that, you know, these rules shall be  
3 interpreted and administered to achieve the just,  
4 speedy and inexpensive determination of all civil  
5 cases, and I underscore the just there. I think that  
6 goes to fairness. If there is unfairness in life, we  
7 ought not to have the Federal Rules exacerbate them, I  
8 think.

9 Thank you very much.

10 JUDGE NIEMEYER: Thank you, Professor.

11 All right. Mr. Morrison.

12 MR. MORRISON: Good morning, Judge Niemeyer, the  
13 Panel. I was pleased to be with you today. I came up  
14 from South Carolina.

15 My name is Steve Morrison. I'm a lawyer with  
16 Nelson, Mullins, Riley & Scarborough. We have offices  
17 in North Carolina and Georgia and in South Carolina,  
18 about 200 lawyers. Our practice is primarily defense.

19 I'm also the General Counsel of a New York Stock  
20 Exchange computer software company called Policy  
21 Management Systems Corporation, and I have served as a  
22 past president of the Defense Research Institute, which  
23 has 21,000 members. I am currently the Chairman of the  
24 Board of Lawyers for Civil Justice, which is a  
25 coalition of corporations and defense bar organizations

1       trying to improve the civil justice system in America.

2               I guess I want to begin by telling you that we've  
3       made extensive submissions and participated in the  
4       Boston symposium, and we were greatly privileged to do  
5       that. Today I am not going to bring up the issues that  
6       have not gotten legs with your Committee at this point  
7       in time, but rather simply talk about what we believe  
8       the architecture of these new rules has that is a  
9       positive.

10              From our standpoint, if you were to begin to give  
11       the judges the rules by which they could appropriately  
12       manage discovery, you would in fact begin with the  
13       scope of discovery, and you would in fact begin by  
14       changing the scope of discovery from subject matter to  
15       relevant claims and defenses. There is a distinction  
16       there, and I will go back to that.

17              You would follow that, we believe appropriately,  
18       by making sure that these rules were uniform across all  
19       jurisdictions so that you didn't have shopping with  
20       national commerce, shopping from one jurisdiction to  
21       another so that one product could be found or  
22       discovered in another, in one jurisdiction and not  
23       appropriately discovered in another. You would have  
24       one place where this took place, under one set of  
25       rules. The place would be the federal courts and the

1 Federal Rules.

2 You would also ask the lawyers to undertake to  
3 make an automatic disclosure, if you will, of their  
4 claims and defenses. We think that makes sense,  
5 although we have some difficulties, but the elimination  
6 of the heartburn aspect of this makes a great deal of  
7 sense to us.

8 And so telling the other side what we have to  
9 support our defenses and them telling us what they have  
10 to support our claims at the very beginning sets a  
11 bull's-eye for the case. It actually has the benefit  
12 of having the parties and the courts focus on the  
13 bull's-eye and only expand the bull's-eye in the two  
14 additional methodologies that you have laid out. So  
15 the disclosure of claims and defense materials seems  
16 appropriate.

17 Then you would balance the additional discovery  
18 of going forward beyond that bull's-eye; that is,  
19 expanding out onto the edges of the case, if you will.  
20 You would ask for early judicial intervention, which  
21 you have provided for, and you would ask for the judge  
22 to have a tool balancing proportionality, the cost  
23 benefit, and also a tool, like probable cause or good  
24 cause, that would allow the judge to have a tool for  
25 saying there is a limit to discovery, which, frankly,

1 does not exist under the evolutionary system that we've  
2 got now.

3 Finally, you would adopt an architecture that  
4 would allow for cost shifting in the place where cost  
5 shifting makes sense, and that is in document  
6 discovery. That is the only place that it really makes  
7 sense, where there is a lack of balance in the current  
8 system. So all in all, these are good moves to move us  
9 forward in the judicial administration of civil  
10 lawsuits.

11 Let me return then to scope and address this  
12 issue particularly because I know there have been some  
13 questions about it. The issue of scope and the  
14 difference between relevant to the claims and defenses  
15 and subject matter might be described by a couple of  
16 cases from my personal experience.

17 As a trial lawyer, it has been my privilege to  
18 try over 200 cases to verdict. I've had the privilege  
19 also, the opportunity to argue over 50 appeals in my  
20 career of 23 years now. It has been a career that has  
21 been involved with the federal courts and as I have  
22 gone forward in the federal courts, I have found that  
23 the limitation of subject matter, combined with the  
24 issue of leading to relevant information, is one which  
25 has allowed no limitation on scope. There has been, as

1 I called in the Boston Conference, an excessive scope  
2 creep over time.

3 So that what we have in the current system is an  
4 evolutionary problem that over the past 25 years we  
5 have achieved a system where, with subject matter and  
6 lead to relevant evidence being the standard, in  
7 essence we have open discovery on all subjects. Three  
8 specific examples since you asked.

9 One involved a case where I was litigating in the  
10 federal courts involving a rear seat shoulder harness.  
11 A rear seat shoulder harness for the automobile  
12 industry is the three-point belt as opposed to  
13 the two-point belt.

14 Obviously the claim is that in the back seat  
15 there should have been a three-point belt versus a  
16 two-point belt and therefore, the vehicle is  
17 defective. That's the claim. I would be litigating  
18 that claim and be happy to litigate that claim. In  
19 fact, I thought that is what I was.

20 The discovery came out. I produced the documents  
21 related to the rear seat two-point belts.

22 My opponent took the position that the subject  
23 matter of the case was seat belts. And because my  
24 client, who had been in the automobile business for a  
25 long time, pulled out from his briefcase some material

1 that he had researched involving two cars, one  
2 purchased, one actually sold in the 1920's and one sold  
3 in the 1930's, he chastised me and actually made a  
4 motion for sanctions that I and my client had not  
5 produced the seat belt information from those two  
6 public advertisements since the subject matter of the  
7 case was indeed, seat belts, not --

8 The claim, of course, had nothing to do with the  
9 1930 or the 1920 design of rear seats or those cars.

10 In addition, my client happened to own an  
11 aircraft manufacturing subsidiary, which had nothing to  
12 do with the case.

13 Now in an aircraft seat, you have five-point  
14 belts, going across both shoulders and buckling on two  
15 sides of the lap. Obviously, those are designed for  
16 something entirely different. Many race car drivers  
17 have those.

18 This particular attorney took the position that  
19 because we had not produced the seat belt information,  
20 and the subject matter was seat belts, regarding the  
21 cockpit of the airplane, that we were indeed  
22 stonewalling, which takes me to your point. The  
23 relevance of the scope definition is indeed relevant to  
24 these allegations.

25 JUDGE CARROLL: Did the court ever enforce the

1 broad notion that your opponent was offering?

2 MR. MORRISON: The court denied the aircraft seat  
3 belt. The court did require us to go back to 1920,  
4 which was in fact the first seat belt in an automobile,  
5 and give the information going forward on that basis on  
6 the two-point belt, even though those were for the  
7 drivers only, even though there was no energy-absorbing  
8 steering columns and so forth, even though the cost of  
9 doing that, Your Honor, was in excess of \$342,000, and  
10 even though we put in an affidavit, and I move to the  
11 proportionality point, saying that the case in  
12 controversy involved a person who did survive, it was  
13 not a catastrophic injury or a paralyzing injury -- it  
14 was what we call a spleen-out case, as a practical  
15 matter -- and that the \$342,000 that we were about to  
16 spend on seat belt discovery might in fact overwhelm  
17 the settlement value of the case.

18 JUDGE CARROLL: This is a federal district  
19 court?

20 MR. MORRISON: Yes, it was. In fact, it had been  
21 referred from the Article 3 judge in that particular  
22 instance, Your Honor.

23 JUDGE KYLE: Is it your view that if these rules  
24 were changed as proposed and drafted, you would have  
25 gotten a different ruling from that judge?

1           MR. MORRISON: Yes, sir, absolutely. Because if  
2 it was relevant to the claims and defenses, what is  
3 relevant to the claims and defenses is really the 1987,  
4 '88, '89 decisions made by the automotive industry in  
5 the United States and by the National Highway Traffic  
6 Safety Administration to require three-point belts in  
7 the rear seats of cars.

8           If you were limited to that claim, that it was  
9 defective because it didn't have a two-point system,  
10 and you had proportionality, I believe that the judge  
11 would say yes, there should be a limitation on this.  
12 Proportionality should be considered, and there is no  
13 good cause to go back to the 20's and 30's, and this is  
14 not about seat belts.

15           Because you see, the argument that prevailed,  
16 Your Honor, was that this is a case about seat belts  
17 and the rule says subject matter and it says reasonably  
18 calculated to lead to the discovery of admissible  
19 evidence. Since it is about seat belts, the judge  
20 accepted the argument, since it is about seat belts and  
21 it might, even though it is not likely the 20's and  
22 30's are going to produce that. In fact, we did try  
23 the case, Your Honor, and none of it came into  
24 evidence.

25           JUDGE CARROLL: Couldn't the judge have just as

1 easily, under subject matter jurisdiction though, said  
2 that this involved a three-point seat belt restraint in  
3 this kind of a car? I mean isn't the problem, isn't  
4 the problem with the ruling and not the standard?

5 MR. MORRISON: It is a problem with the tools  
6 that the judge has now. The tool that the judge has  
7 now is subject matter only, and it is not related to  
8 claim and defense. In other words, the focus of  
9 discovery right now is not on the case before the  
10 judge, but on the product before the judge in the  
11 court.

12 What we are trying to say is what you have done  
13 is appropriate.

14 JUDGE CARROLL: It is not really a standard  
15 problem or in the way the standard is being interpreted  
16 by, in your case, the one judge.

17 MR. MORRISON: Well, I've got two others here,  
18 since you had asked.

19 But in fact, it is a tool, it is a tool issue.

20 JUDGE NIEMEYER: The two others would go beyond  
21 our time limits.

22 MR. MORRISON: I'm sorry, Your Honor.

23 JUDGE NIEMEYER: Stay with the one.

24 MR. MORRISON: Stay with the one. I will. I had  
25 a couple of others, but stay with the one.

1           In my view, Your Honor, the real issue is not a  
2 judge going off in the wrong direction, but a judge who  
3 doesn't have a clear tool and an evolutionary process  
4 that has allowed so much scope creep into the system  
5 that if you give the judge a clear tool, stay focused  
6 on the case, unless you have explored good cause, stay  
7 focused on the claim or the defense in this case,  
8 unless you have explored good cause and balanced  
9 proportionality -- that seems so fair and so logical.

10           Now you may expect that to happen in courts  
11 today, but I guess what I am here to say is as a  
12 practical matter in my cases, it isn't happening. One  
13 of the reasons it isn't happening is because the judges  
14 are saying how can I get a grip on this? The reason  
15 they are saying how can I get a grip on it is because  
16 they don't have good, clear information before we go  
17 into them.

18           What is good about what you have done here is  
19 said let's require a little bit of core disclosure by  
20 both sides about their own claims and defenses. The  
21 judge has that as a basis going in. You've also said  
22 we are going to focus the scope and by the time you get  
23 to the 26(f) conference, the judge has a basis upon  
24 which to do this.

25           Frequently these rulings that are a little bit

1 odd are made at the beginning of the case. By the end  
2 of the case, judges are throwing stuff out, trying to  
3 get down to the narrower piece.

4 MR. SCHREIBER: Mr. Morrison, you have tried 200  
5 cases?

6 MR. MORRISON: Yes, sir.

7 MR. SCHREIBER: You have probably handled a  
8 thousand cases?

9 MR. MORRISON: Yes, sir. By my current count, it  
10 is a over little 2,000 case.

11 MR. SCHREIBER: Two thousand cases, and you come  
12 before us with three examples.

13 MR. MORRISON: Well, I could give more.

14 MR. SCHREIBER: Yeah, but why wouldn't you have  
15 said --

16 See, the problem is --

17 MR. MORRISON: I would be happy to give you  
18 more.

19 MR. SCHREIBER: -- people are suggesting that  
20 everything in relevancy has been worked out or almost  
21 worked out.

22 MR. MORRISON: Right.

23 MR. SCHREIBER: If you check the number of cases,  
24 there aren't many cases of that. Maybe it is because  
25 everybody has fallen into what you call the pit.

1           But it does seem kind of odd that with 2,000  
2 cases, you would only come before us with three. Now,  
3 you can talk about three.

4           MR. MORRISON: Right.

5           MR. SCHREIBER: But you probably have 500 of  
6 those cases; isn't that correct?

7           MR. MORRISON: The practical truth is that there  
8 is no basis upon which to really litigate these issues  
9 frequently, and they have to be really important. So  
10 what we have is a discovery system that is in essence,  
11 from the beginning of the filing of the case, one that  
12 proliferates extensive, useless, ultimately valueless  
13 work that doesn't produce value to the justice system  
14 in the quality of justice that we get, nor does it  
15 produce value to the clients.

16           Let me take a client's viewpoint of one other  
17 issue that has been asked about, Rule 34. It is where  
18 the cost issue should be shifted, and the answer is  
19 yes.

20           There has been a suggestion of impecunious  
21 plaintiffs. In fairness, I do not know, in my entire  
22 history, of any plaintiff who ever reimbursed their  
23 lawyer for any cost in a contingency-fee case after the  
24 case was lost or after the settlement was less than  
25 satisfactory.

1           Therefore, the practical truth of cost shifting  
2           is that it is between plaintiffs' attorneys who are  
3           extremely willing to invest in cases at different times  
4           and the defendants. That's sit. That's where the cost  
5           shifting takes place.

6           MR. SCHREIBER: Isn't that a violation of your  
7           professional responsibility?

8           MR. MORRISON: No, sir, not if you are investing  
9           in the case. If you are doing discovery in the case,  
10          it is not a violation. If you are loaning money to the  
11          plaintiff and you are giving them their living  
12          expenses, it is a violation.

13          MR. SCHREIBER: The way the class action  
14          exception is the one where the lawyer doesn't have to  
15          ask the client for money back. Every other case the  
16          lawyer is -- the lawyer can't advertise no cost in a  
17          case. That's a violation of the profession.

18          MR. MORRISON: The lawyer cannot advertise it,  
19          the lawyer cannot advertise it, but as a practical  
20          matter, the truth and the practical truth is  
21          plaintiffs' lawyers are not going back against their  
22          clients for cost, for some costs. It doesn't happen.

23          The impecunious plaintiff doesn't exist. This is  
24          a decision that is made by the plaintiff's attorney and  
25          his firm in investing in the case. They know that some

1 will win and some will lose. That's the way it  
2 honestly works.

3 You are not going to, by having cost shifting in  
4 Rule 34, you are not going to take any chance, as a  
5 practical matter, of causing any plaintiff to not have  
6 their opportunity to come to court.

7 JUDGE SCHEINDLIN: But you limited yourself  
8 somewhat to contingency cases, I think I heard you  
9 say.

10 MR. MORRISON: Yes, ma'am.

11 JUDGE SCHEINDLIN: We have a lot of employment  
12 cases that are not done on contingency. We have a lot  
13 of pro se cases where there is no lawyer at all to pick  
14 up those costs.

15 MR. MORRISON: Yes.

16 JUDGE SCHEINDLIN: So there are a number of  
17 plaintiffs out there who really will be at risk with  
18 this cost bearing that you haven't discussed.

19 MR. MORRISON: Well, if the plaintiff is at risk,  
20 Your Honor, on a pro se issue, then let's take a look  
21 at what you are allowing the judge to take into  
22 consideration on the cost shifting, which I believe is  
23 appropriate in terms of allowing the judge to take into  
24 consideration those specific cases which are, which are  
25 brought by the public welfare organizations and by the

1 pro se person.

2 So I don't think you are suggesting in the rule,  
3 as I read it, that those have cost shifting imposed.

4 The other thing I would say on the subject of  
5 cost shifting -- I'm sorry.

6 JUDGE SCHEINDLIN: I wasn't limiting it to pro  
7 se. I want that clear. There are a number of  
8 plaintiffs, I think, whose lawyers are not working on  
9 contingency who can't afford to pay all that you  
10 suggest that they could. I think you really were  
11 talking about contingency cases.

12 MR. MORRISON: I was talking about contingency  
13 cases.

14 JUDGE SCHEINDLIN: Yeah.

15 MR. MORRISON: Yes. Yes, I was.

16 JUDGE SCHEINDLIN: And we have a lot of  
17 plaintiffs' cases that are not contingency cases and  
18 not pro se.

19 MR. MORRISON: Yes, yes. I was talking about  
20 contingency cases.

21 PROFESSOR ROWE: Won't the way the rule works in  
22 those cases, it will mean not the people who can't  
23 afford it will have to pay, it will mean that they get  
24 the core discovery and then the choice of whether to  
25 pay or get the burdensome discovery and if they can't,

1 feel they can't pay, then they don't get the extra  
2 discovery?

3 MR. MORRISON: That's absolutely the genius of  
4 putting it in Rule 34 because that's where the cost  
5 is. The cost is in finding and producing the  
6 documents, and the person who is making the claim at  
7 that point in time has a choice to make. Do I want  
8 this extensive discovery or not? If I don't want to  
9 pay for it, it has the effect of narrowing the  
10 discovery.

11 Every time that I have had a plaintiff faced with  
12 that decision, the negotiation has moved toward a  
13 narrower scope, which was less costly and in their  
14 opinion more reasonable and in my opinion more  
15 reasonable.

16 PROFESSOR ROWE: I don't see that that has  
17 anything to do with being in Rule 34 as opposed to  
18 being general because if there were other means of  
19 excessive discovery as well, you would have the same  
20 mechanism, that a person could pay for the extra  
21 interrogatories or whatever.

22 MR. MORRISON: Rule 34 is the only place where  
23 there is significant imbalance in the system at the  
24 present time. Both sides do depositions, roughly equal  
25 numbers. Both sides answer interrogatories, roughly

1 equal numbers. In personal injuries cases, one side  
2 has documents, the other side doesn't. That's the  
3 practical aspect.

4 JUDGE NIEMEYER: All right. Thank you very much,  
5 Mr. Morrison.

6 MR. MORRISON: Thank you, Your Honor.

7 JUDGE NIEMEYER: Mr. Doub.

8 MR. DOUB: Good afternoon, ladies and gentlemen.  
9 I'm George Doub. I've been with Venable, Baetjer &  
10 Howard in Baltimore for many years in litigation. With  
11 your permission, I would like to just be very brief.

12 Jim Archibald, my partner, intended to be here at  
13 this time, hoped to be here and found, to his great  
14 regret, that he could not, and asked me to come and  
15 express his regret to you.

16 Jim is very supportive of the proposed rule  
17 changes. He is a former president of the Defense  
18 Research Institute.

19 I've reviewed them and my reaction is the same.  
20 They are a small step in the right direction. There is  
21 nothing revolutionary in them. They seem to me to be  
22 very evenhanded. Thank you.

23 JUDGE NIEMEYER: Thank you.

24 Helene Goldberg? Well, I guess she might want to  
25 testify in Chicago or San Francisco. If anybody sees

1 her, she is invited.

2 All right. I don't think we have anybody else,  
3 and we have done this timely. I appreciate your  
4 cooperation.

5 I also want to express thanks to those persons  
6 who also participated earlier in this process at  
7 Boston. Several of you referred to the fact that you  
8 had been at the Boston Conference. I think that  
9 happened to be one of the most meaningful conferences  
10 I've attended in terms of informing a group. We  
11 learned a lot from that. I hope we learned a lot from  
12 today. There are some things that I think merit our  
13 looking at more closely, and your testifying helps  
14 along those lines.

15 We will stand adjourned for today, and there will  
16 be further hearings, I am not sure how many times we  
17 will let you testify, but further hearings in San  
18 Francisco and in Chicago in January. All right, we  
19 stand adjourned.

20 (The hearing concluded 12:04 a.m.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript of the Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure before the Civil Rules Committee on December 7, 1998, in the United States District Court for the District of Maryland, Courtroom 1-A, 9:00 a.m., in Baltimore, Maryland is true and accurate.



Gail A. Simpkins

Official Court Reporter

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