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PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF CIVIL PROCEDURE

JANUARY 29, 1999
COURTROOM 2525
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS
8:30 o'clock a.m.

BEFORE:

THE HONORABLE PAUL V. NIEMEYER
THE HONORABLE RICHARD H. KYLE
THE HONORABLE DAVID F. LEVI
THE HONORABLE JOHN L. CARROLL
THE HONORABLE LEE H. ROSENTHAL
PROFESSOR RICHARD L. MARCUS
PROFESSOR EDWARD H. COOPER
PROFESSOR THOMAS D. ROWE, JR.
MR. SOL SCHREIBER, ESQUIRE
MR. MARK O. KASANIN, ESQUIRE
MR. ANDREW M. SCHERFFIUS, ESQUIRE
MR. MYLES V. LYNK, ESQUIRE

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1 THE HONORABLE JUDGE NIEMEYER: This is the third and
2 final public hearing on the rules, Admiralty Rules B, C and E,
3 you are all here to talk those; and the discovery rules, Rules
4 4, 5, 12, 14, 26, 30, 34 and 37. Actually some of that is a
5 little bit beyond discovery.

6 We had a hearing on December 7 in Baltimore. We had a
7 hearing in San Francisco on January 22, and this hearing in
8 Chicago is the final hearing. All comments will close on
9 February 1. And then the committee will consider the comments
10 and consider the testimony at its meeting in April, which will
11 be in Oregon, I think it's April 19 and 20, and reflect on what
12 we have heard.

13 What we have heard so far has been very informative.
14 We have heard a lot of positive comments. We have heard some
15 problems. We have heard points of view. And once we come to a
16 consensus in the committee about how to handle the comments,
17 then we will make our recommendations to the standing committee
18 at the June meeting this year, June 1999.

19 If it gets through the standing committee, it goes to
20 the Judicial Conference, which is, as you know, the third
21 branch legislative body. That will be considered in September.
22 If it passes the conference, it goes to the Supreme Court. The
23 Supreme Court has until May to transfer it to Congress. And
24 Congress then holds it from May 1 to December 1.

25 If it does nothing during that period, then the rules

1 will go into effect as law. Of course, if it acted within that
2 period, whatever it did would become law with the President's
3 signature.

4 All right. We have a long list of people who would
5 like to present their views, and we just have this one day. So
6 in order to accommodate everybody, what I would like to do is
7 limit everybody's time period to ten minutes and ask you to try
8 to hold yourself to ten minutes. I will try not to be like an
9 appellate court, where when the light comes on you get cut off
10 in mid-sentence virtually. But I would like to have you try to
11 honor that. And as you go over, the longer you go over I will
12 try to press you to wind up. I think if we do that ten-minute
13 business, we will get through this list. There are over 30
14 witnesses who are lined up to testify.

15 I would expect us to take a mid-morning break, a lunch
16 hour at around 12:30, and have an afternoon session with a
17 mid-afternoon break. We will go in the order in which the
18 witnesses are listed. If it turns out that one of you wishes
19 to change that order or to come at another time, let me know.
20 We can accommodate that. But we need to know. Otherwise I
21 will call them in the order listed.

22 All right. Ms. Cabraser, are you prepared to come
23 forward?

24 MS. CABRASER: Yes, your Honor.

25 THE HONORABLE JUDGE NIEMEYER: It's good to see you.

1 I didn't realize your range of interest was so broad.

2 MS. CABRASER: I'm struggling to understand the
3 current discovery rules, your Honor. Good morning.

4 THE HONORABLE JUDGE NIEMEYER: We knew there was a
5 problem with them. That's why we are trying to make them a
6 little bit simpler.

7 MS. CABRASER: I appreciate that.

8 Good morning, members of the committee. My name is
9 Elizabeth Cabraser. I'm an attorney in private practice, and I
10 represent primarily plaintiffs in a range of civil litigation
11 predominantly in the federal courts.

12 My practice is a nomadic one, and I've had the
13 privilege to appear in many federal courts across the country
14 in the course of representing plaintiffs and plaintiff classes
15 in complex civil litigation. And as a result of that, I became
16 a guinea pig in the great experiment that succeeded the Civil
17 Justice Reform Act as a broad range of discovery techniques and
18 alternatives were employed by courts across the country. It
19 was an exhilarating albeit confusing period.

20 As a result I am not sure that I understand or follow
21 the current discovery rules at all, although that doesn't mean
22 I am not without opinions about them. We all are. Every
23 litigator has a perfect way to conduct discovery, and there is
24 very little intersection between those preferences and either
25 civil rules as they are on discovery or the civil rules as they

1 could ever be on discovery.

2 And I think the range of comment and complaint that
3 has come in in response to these rule proposals is both utterly
4 predictable and, to some extent, necessary. Part of it has to
5 do with the fact that we as lawyers don't like change. We are
6 not comfortable with it. We are facing new changes to Rule 26
7 primarily, which in its present form very few of us are yet
8 completely comfortable with or skilled in applying. And so new
9 changes, new potential changes, are being overlaid against a
10 current situation.

11 THE HONORABLE JUDGE NIEMEYER: To make your
12 observations even more accurate, in 1993 we authorized district
13 courts to do some of their own rule making on Rule 26. And now
14 out of the 94 districts I wouldn't be surprised if we have 50
15 different rules.

16 MS. CABRASER: I think there may be at least 50
17 different rules, and I had a handy pocket guide to the opt-in
18 and opt-out districts, and I invariably leave it at home and am
19 completely lost. Although I have found that paradoxically in
20 complex civil litigation, discovery seems to be easiest because
21 judges who are used to pro-active case management are used to
22 entrust counsel with discovery plans and are used to doing what
23 works in a particular case, which may or may not coincide with
24 the written rules of that particular district.

25 Nonetheless, the goal of uniformity that is embodied

1 in the new proposal I think is extremely important and
2 necessary because there is confusion. It's unnecessary. I
3 think as a result the rules actually obtained in day-to-day
4 litigation are probably written down nowhere in any of the
5 districts. Courts and counsel tend to do what works, and I
6 think to the extent the rules as written can be brought into
7 conformity with practical experience of what works, the rules
8 will be honored. There will be less litigation about them, and
9 discovery will proceed more smoothly.

10 Which brings me to my central concern about the new
11 proposals, and that is the proposal to restrict the scope of
12 automatic discovery under Rule 26 to refer not to the subject
13 matter of the action but to the claims and defenses in the
14 pleadings. Now, in an ideal world that ought not to cause any
15 problem because after all, Rule 8(a)(2) tells us that what gets
16 filed in Court is a short and plain statement of the claim
17 showing the pleader is entitled to relieve. That's probably
18 the most important of the rules for the conduct of civil
19 procedure.

20 I am not sure I have yet been able to file a complaint
21 that complies with that rule. "Short and plain" seems to mean
22 between 60 and a hundred and 20 pages. And that points out a
23 problem that could result almost immediately upon the enactment
24 of this particular revision to Rule 26, because what it does,
25 it places a premium not only on the contents of the pleadings

1 but on the literalistic and hypertechnical interpretation of
2 those contents.

3 It raises the stakes and will, I fear, result in an
4 explosion of motions practice directed at the pleadings, an
5 explosion of Rule 9(b) motions, and explosion of Rule 12(b)(6)
6 motions, because if the scope of discovery is governed by what
7 is left of the complaint, all the more reason to attack a
8 complaint by motions to dismiss and motions to strike at the
9 outset of the case to delimit before it starts the scope of
10 discovery which can get underway. And that is going to, in
11 turn, cause pleaders to become more not less prolix.

12 There is currently some balance and some harmony
13 between Rule 26 and Rule 8. And I am afraid that the harmony
14 -- or I guess a better word would be the tension that exists,
15 the balanced tension that exists, between those rules may be
16 broken. Pleadings motion has subsided in recent years I think
17 to a manageable level. It is no longer de rigueur to file
18 motions to dismiss to every complaint. More and more answers
19 are filed, and cases proceed past the additional pleadings
20 stage with the notable exception of securities actions because
21 of the special rules that apply to dismissal motions and
22 discovery stays in those cases.

23 Some of what is happening in that litigation as a
24 result of the restriction on discovery could migrate to civil
25 litigation in general if the scope of automatic discovery is

1 restricted. I don't think any of us wants to promote,
2 intentionally or inadvertently, any explosion of any aspect of
3 pleadings practice, which is not related to the refinement and
4 resolution of the merits of the case.

5 But the scope of discovery referenced to claims and
6 defenses places such a premium on knocking out or keeping in
7 allegations.

8 THE HONORABLE JUDGE NIEMEYER: Let me ask you, if
9 there is going to be a fight on the scope of discovery, would
10 you think it's better to have that fight in the pleadings or
11 out in the field when you are getting documents and taking
12 depositions?

13 MS. CABRASER: Well, your Honor, I think that by
14 narrowing the scope at the outset, we may cause the fight to
15 occur in both places. It is not going to go away no matter
16 what is done to the civil rules because the problem here is not
17 what's in the rules, but the attitude that we as litigators
18 have towards the rules.

19 The rules are not seen as something that helps us do
20 what we know we must do. They're seen as something that we
21 look at to decide how little or how much we can get away with.
22 And I think by restricting the scope of discovery, we may be
23 adding to battles that don't already exist.

24 THE HONORABLE JUDGE LEVI: Can I ask you, do you see
25 this as a real problem in the kinds of cases that you handle?

1 You have been before me. And I recall the case in which I
2 think you said you had not made certain kinds of claims yet in
3 the complaint because you didn't feel entirely comfortable that
4 you could make them, but you wanted to do a limited amount of
5 discovery in that area.

6 I think that's what we would call subject matter
7 discovery because it didn't relate directly to claims that you
8 felt you could make.

9 MS. CABRASER: Yes.

10 THE HONORABLE JUDGE LEVI: And you did that discovery
11 over a limited time, and as I recall it, it didn't lead in the
12 direction that would permit you to have the claims and the case
13 was resolved shortly thereafter.

14 I think that's what we have in mind. And in any kind
15 of complicated case it seems to me you would have a discovery
16 plan, and that would all be hashed out. It wouldn't be hashed
17 out in the context of motions to dismiss, but it would be part
18 of the 26(f) procedure we are told works beautifully.

19 MS. CABRASER: I can see, your Honor, that it could
20 work that way, and that would be refreshing. My concern,
21 however -- and it can work that way now under the present scope
22 of discovery.

23 My concern about the express restriction of the scope
24 at the outset of the litigation is that it sends a signal,
25 perhaps unintentionally, to litigators that the way to avoid

1 and delay and preclude discovery is to hammer away at the
2 complaint. And it provides an excuse for motions practice that
3 might otherwise not be conducted because one can say, but, your
4 Honor, I need to file this motion to strike, this motion to
5 dismiss. We need to decide it before discovery starts because
6 if I win, this discovery will never take place. It can't take
7 place under the rule. That's a concern.

8 Another concern that is based in the potential for
9 collateral litigation is, of course, the cost bearing provision
10 with respect to Rule 34(b). The concern there is that we may
11 see a repeat of collateral litigation as we saw under old new
12 Rule 11, where every motion was accompanied by a sanctions
13 motion for fees and costs. And the courts spent a great deal
14 of time and effort and frustration attempting to deal with
15 sanctions practice that sometimes overshadowed the case itself.

16 The courts do have the authority to impose cost
17 bearing responsibility and to shift cost in cases where it's
18 truly necessary. And discovery imposes costs on both sides as
19 well, and for that reason I do not think that there is a large
20 amount of unnecessary and irrelevant discovery that is taking
21 place. In very large cases, much time and much money is spent
22 on discovery, but that discovery serves in many, many, many
23 cases, and there is usually a net savings.

24 THE HONORABLE JUDGE CARROLL: What about problems of
25 electronic discovery, E-mail that's erased, mapping e-mail

1 systems and that sort of thing? Doesn't cost bearing provision
2 make sense in those sorts of issues?

3 MS. CABRASER: I am not sure that the costs associated
4 with that type of discovery, as we become more familiar with it
5 and more used to conducting it -- I'm not sure that we are
6 there yet -- create any large new costs problems that would
7 require a new provision of the rule. I think that that issue
8 can be adequately addressed under the power that the courts now
9 have.

10 The problem again with putting something in a rule is
11 that what's permissive becomes mandatory, and you see costs
12 motions with respect to every discovery program.

13 Finally, the restriction on initial disclosures has
14 the same problematic interplay with other aspects of the rules
15 that are in place, particularly the moratorium on formal
16 discovery pending the Rule 26(f) meeting or the Rule 26(f)
17 conference. There is a problem now with delay in the
18 commencement of discovery. Many lawyers believe that they
19 cannot even propound proposed interrogatories to opposing
20 counsel unless and until there has been that meeting.

21 We know that the discovery is not due until there is a
22 discovery meeting and a discovery plan, but what is happening
23 is that tactic one is to delay the meeting as long as possible
24 to avoid commencement of discovery. Tactic two is to
25 misunderstand or misunderstand the scope of discovery at that

1 meeting and to reject the notion that proposed interrogatories
2 can even be propounded for discussion purposes to frame and
3 inform that meeting.

4 If the disclosures that are going to be required under
5 the changes are not disclosures that are helpful to the
6 opposing party, then there is no reason to have a moratorium on
7 formal discovery while the disclosures are made or pending a
8 Rule 26(f) meeting. I think that the idea of the discovery
9 plan that is tailored to the case is a magnificent idea. I
10 think it is beginning to work well, as counsel get used to it.
11 But one of the problems in the sequencing aspect of Rule 26 is
12 that the net effect is often to delay routine discovery for
13 many, many, many months, as counsel hassle with each other over
14 the logistics and the timing of the discovery conference.

15 So it has not risen to the level of an abuse but it is
16 something that happens and it's quite frustrating. And I think
17 the more restriction that is loaded into the rules at early
18 stages, the more the tendency will be to exploit the rules for
19 purposes of delay and protraction. I think it's a natural
20 tendency to do that in the course of protecting the clients.

21 The same disease that defense counsel have expressed
22 about the voluntary disclosure of information that might be
23 inculpatory or not helpful to their client is going to express
24 itself in resistance to discovery that relies on new
25 restrictive language in rules.

1 So I think that the last thing that should be done at
2 this juncture, as we are all still feeling our way through the
3 recent amendments to Rule 26, the last thing that should be
4 done at this juncture is to put in provisions that appear at
5 least to further restrict the scope of discovery from the
6 outset of the action and seem to posit the opportunity for
7 discovery or the right for discovery on winning motions early
8 in the case.

9 MR. SCHREIBER: Counsel, as one who does complex
10 litigation, can you live with a one-day deposition?

11 MS. CABRASER: In most cases, yes. One of the
12 proposed changes that I think is refreshing is limitations on
13 duration of depositions. Most depositions take longer than one
14 day because counsel do not prepare and organize their
15 questions. Many depositions do nothing more than waste the
16 time of opposing counsel, harass witnesses.

17 I don't believe that depositions should be a
18 free-form, indeterminate exercise in indulging counsel who are
19 trying to figure out what their case is about. There is a duty
20 to prepare a cross-examination before a deposition so it can be
21 completed in a reasonable time.

22 MR. KASANIN: Does your comment go to experts?

23 MS. CABRASER: Experts can take longer but need not
24 take longer, particularly if the scope of expertise and the
25 scope of the opinion is a limited one.

1 All of the time that is spent in depositions, if 95
2 percent of that time were spent in deposition preparation by
3 the counsel taking the deposition, depositions would waste far
4 less time. It would take far less time. It's a rare
5 deposition that needs to take multiple days. And in those
6 cases, in complex cases, where there is a long-term course of
7 action, this is a key witness --

8 THE HONORABLE JUDGE NIEMEYER: You can accommodate
9 that with your plan, can't you?

10 MS. CABRASER: Absolutely, your Honor. It's done all
11 the time. I am sure that courts will -- that's one thing I am
12 sure of with courts and judges, that if you need more time to
13 conduct and complete a particular deposition, you will get time
14 to do it. I don't think that should be a concern.

15 MR. SCHREIBER: It has been suggested -- may I?

16 THE HONORABLE JUDGE NIEMEYER: Yes. We have already
17 gone double on this witness. So go ahead.

18 MR. SCHREIBER: It has been suggested, at least by
19 yours truly, that in depositions parties should set out the
20 documents that are going to be used, except for impeaching
21 documents, and deponents being required to read them beforehand
22 so the deponent does not spend his time just reading the
23 document at the deposition.

24 Do you have an opinion? Have you done that in cases?
25 Does it make any sense?

1 MS. CABRASER: Yes. In many complex cases there is a
2 pre-trial order that is put in place very early that requires
3 the documents that are going to be used or may be used in a
4 deposition be exchanged at least ten days, sometimes 14 days,
5 before the deposition so that the witness can become familiar
6 with the documents. Counsel are familiar with the documents.
7 They are pre-labeled. They are in the deposition room.
8 Oftentimes now they are on CD Rom. They are in a computer.
9 And so very little time need be wasted on shuffling through the
10 exhibits and identifying them or reading them.

11 Yet another reason why these days, with advances in
12 technology, if document production is accomplished early, the
13 depositions can be done very efficiently.

14 THE HONORABLE JUDGE NIEMEYER: Thank you, Ms.
15 Cabraser. I appreciate your comments.

16 Mr. Rabiej, I have two lists before me. One has Paul
17 Price as second and the other has Rick Gass as second. Which
18 list is the right one?

19 MR. RABIEJ: The one that was faxed.

20 THE HONORABLE JUDGE NIEMEYER: Mr. Price?

21 MR. PRICE: Yes, Paul Price.

22 THE HONORABLE JUDGE NIEMEYER: That's the list I will
23 work off.

24 MR. PRICE: Good morning. My name is Paul Price. I
25 am an attorney in a small firm practicing right here in

1 Chicago. I formerly was a partner in a defense firm here in
2 Chicago of approximately 100 attorneys. I spent more than 25
3 years preparing and trying lawsuits, the vast majority of which
4 I find representing defendants in tort and commercial
5 litigation. I am a fellow of the American College of Trial
6 Lawyers, past president of the State Defense Bar. And I am
7 currently the president elect of the Federation of Insurance
8 and Corporate Counsel. That's why I am here.

9 I am here in a representative capacity because Mr.
10 Gass, our president, could not be here. So I am here in his
11 stead. Let me tell you just a little bit about our
12 organization so you get a feel of what I am about.

13 We have approximately 1,000 defense attorneys as
14 members. They are selected, gone through a very systematic and
15 thorough screening process before they are selected. And we
16 have about 300 members who are insurance and corporate
17 executives, who are in charge of litigation. One of our most
18 primary objectives is to assist, and I quote, in establishing
19 standards for providing competent, efficient and economical
20 legal services to our clients. That's why we are here.

21 Since Mr. Gass isn't here, but he has submitted
22 written materials, I am not going to go read those to you. You
23 have them. But I would like to highlight our reasoning for why
24 we support generally the proposed amendments.

25 Discovery today, based on what we feel we hear from

1 our membership, is too time consuming, too expensive and
2 guidelines remain too vague. Plaintiffs' attorneys continue to
3 develop new strategies to search warehouses, computers, in
4 order to find different strategies and develop this
5 documentation over years and years. Massive corporate sweeps
6 are justified under the current rules, lead to discoverable
7 evidence. And these formulas in reality provide no meaningful
8 limits to discovery. That's our position.

9 We feel that the early definition of issues is very
10 key to reducing discovery disputes with early court
11 involvement. Finding the flaws in the claim at the outset of
12 litigation obviates the need for expensive discovery later and
13 may even lead to early disposition by way of settlement and/or
14 summary judgment.

15 Now, the scope, we feel, has to be narrowed. That's
16 the primary issue. You just heard it. I think everybody would
17 agree that that's the primary issue that needs to be addressed.
18 The scope of discovery should be narrowed to claims and
19 defenses. Let some common sense and logic back into the
20 discovery process.

21 Paper, paper, more paper. Let's save the trees. We
22 don't need the additional paper, as far as we are concerned.
23 We feel that if the focus is more narrow, the discovery process
24 will become better. The trials will become faster and leaner,
25 more efficient, part of our goal, as well as the fact that we

1 all know, we have been through those circumstances, after
2 discovery of literally thousands and thousands of documents, by
3 the time trial arrives it all shrinks down to a chosen few of
4 maybe 20 or 30 documents that are key.

5 The current standard, we feel, is too vague. And you
6 have heard the example before, the defense attorney who has to
7 voluntarily disclose things that don't go to a claim, or
8 perhaps a defense. We know the defense perhaps better than
9 anybody, but we also know what our weaknesses are perhaps
10 better than anybody. And we don't want to voluntarily disclose
11 that because this is, after all, still an adversarial system.
12 If we focus it on claims and defenses, we feel that will be
13 eliminated.

14 We also support the concept of the two-tier, the good
15 cause. We understand that there are, of course, situations
16 where we all have experienced them, where the initial exchange
17 of discovery requires additional supplemental discovery. And
18 from time to time legitimate disputes occur.

19 The good-cause standard should be employed. The
20 judicial aid by coming to the courts for the process, just the
21 mere idea of having to come to court oftentimes settles those
22 disputes. A good-faith effort in order to satisfy that, we
23 know, helps the courts.

24 We would suggest that there is an example that could
25 be used, and it's one that is employed right here in Illinois,

1 from the standpoint of a prima facie case, if you will. What's
2 the good cause? How do you figure out what good cause is?

3 In Illinois you can't pursue a punitive damages claim
4 unless you establish that prima facie case before you embark on
5 discovery. No one wants to go through the financial aspects of
6 the defendant or all the other discovery that may be employed
7 on those types of issues. So a prima facie case must be shown,
8 and then the launch into that area.

9 We feel that's analogous. Not exactly the same, but
10 we feel it's analogous to the good-cause standard. And perhaps
11 a note in your comments might be effective along those lines.

12 We feel that the claims and defenses standards is the
13 appropriate one. I will cite one example from one of my
14 partners right in the office, a suit involving one machine. We
15 represented the plaintiff in that particular case. What
16 occurred effectively was a laundry list, if you will, of all
17 other types of documents with regard to all other machines that
18 we became involved in.

19 Totally irrelevant, we thought. The magistrate in
20 that particular case said, machines, subject matter, give it to
21 them. He is tied. He said, I think this may be an abuse, but
22 by the same token, those are the tools, those are the rules I
23 have to employ.

24 As it turns out, none of the other documents,
25 discovery, et cetera, et cetera, in the other machines ever got

1 into the ultimate trial of the case.

2 I've read other examples. Seatbelt example, I think,
3 was employed by someone who testified earlier before the
4 committee. And seatbelt is a subject matter, but the seatbelt
5 in 1992 may not be the seatbelt issue that was employed in
6 1920.

7 PROFESSOR MARCUS: Excuse me, sir. I think you said
8 that it would be important to find flaws in the claims to
9 narrow discovery? I think Ms. Cabraser said that a change like
10 this might produce more pleading motions. Are you saying that
11 is likely to occur?

12 MR. PRICE: I can't say what is likely to occur,
13 Professor. What I know is that the present practice as such is
14 too open. It's too broad. It's too vague.

15 PROFESSOR MARCUS: Is that a deterrent to you in
16 filing pleadings motions? Would you choose not to because it's
17 broader now?

18 MR. PRICE: I don't believe that would be the standard
19 at all. I don't think the pleading practice, if you will, is a
20 concern on our part, as was expressed by the last witness. I
21 don't feel it's going to end up in that. And I also, as I
22 heard that testimony, thought about we already have a rule to
23 enforce that in place, and it's called Rule 11. Just because
24 you feel you have a claim, there is a duty on attorneys to
25 investigate those types of situations before they file

1 lawsuits.

2 In any event, with respect to the uniformity issue,
3 let me direct comments to that. I think uniformity on behalf
4 of our membership, our organization, we stand for that
5 proposition. We agree with it. I hope none of the judges from
6 this jurisdiction are paying close attention to my comments
7 right now because they opted out, and we have had a good time
8 with opting out on those initial disclosures. And it has
9 worked very well because, I think, of the cooperation between
10 the bench and the bar right here.

11 However, our membership, most of which have national
12 practices, most of which represent national organizations, find
13 themselves conducting state surveys every time they come into
14 this jurisdiction versus that jurisdiction, and time, expense,
15 local counsel, et cetera, et cetera, all add up to the cost of
16 this.

17 THE HONORABLE JUDGE NIEMEYER: How many districts in
18 Illinois, three?

19 MR. PRICE: Two.

20 THE HONORABLE JUDGE NIEMEYER: Two. Did the Southern
21 District opt out, too?

22 MR. PRICE: I don't know. I can't answer that.

23 MR. SCHREIBER: Counsel, would you express an opinion
24 as a defense counsel on a one-day deposition?

25 MR. PRICE: I was going to get to that. I don't think

1 a temporal limit should be applied to depositions. Now, you're
2 all thinking, sure, the defense attorney wants to churn the
3 billable hours and that's all part of it.

4 MR. SCHREIBER: I don't think that. I was a defense
5 lawyer for many years.

6 MR. PRICE: Good. I applaud you. Thank you, sir.
7 Thank you for defending me.

8 Nevertheless, what I feel is that there is this
9 underlying current. I am standing before you as a
10 representative of our organization telling you we want
11 efficient, economical legal services. I don't like sitting in
12 depositions any more than anybody does when all the questioning
13 has nothing to do with what I know are the limited focus claims
14 and defenses in the case.

15 But how many times have we gone through that? How
16 many times have we had to do that? I understand there can be
17 abuses. There are solutions to those abuses.

18 THE HONORABLE JUDGE NIEMEYER: Is there a limit in the
19 Northern District of Illinois?

20 MR. SCHREIBER: State Court.

21 MR. PRICE: In State Court there is a three-hour limit
22 and nobody follows it because, quote, the routine case,
23 whatever that may be, that probably applies. But the cases --
24 I have enough gray hair now that I don't handle routine cases.
25 What I find myself in, all the attorneys basically say, this

1 case, this deposition, these depositions --

2 THE HONORABLE JUDGE NIEMEYER: They do it by
3 agreement?

4 MR. PRICE: Absolutely.

5 THE HONORABLE JUDGE LEVI: This rule change permits
6 that the lawyers can agree.

7 MR. PRICE: Well, if the lawyers can agree, then I
8 personally would feel that that would be a good salvation.
9 Now, I must anecdotally tell you about situations where there
10 are times when lawyers don't agree. And it's obvious to us in
11 a particular type of case you have to run to the courthouse,
12 make a phone call. You're ready to take a deposition. You
13 have taken seven depositions. All of a sudden on the eighth
14 deposition I am going to enforce the three-hour rule. Where
15 did that come from? There are abuses that occur.

16 I will agree with the first witness about there are
17 attorneys who practice law different from the way other
18 attorneys practice law. But by and large, I think what occurs
19 is that most of us get along, want to move the cases forward to
20 an early and just resolution.

21 THE HONORABLE JUDGE KYLE: Do you think having the
22 three-hour limitation, nobody apparently follows it, still has
23 a good effect in the sense that if you know it's there, you are
24 more likely to get agreement as to the length of the
25 deposition?

1 MR. PRICE: I think that hangs out there. I think
2 that has an effect.

3 THE HONORABLE JUDGE KYLE: Whether seven hours is the
4 correct number or not, it seems to me it has the purpose of
5 sending a message to counsel that there ought to be an end to
6 the deposition at some point.

7 MR. PRICE: If that is the import of that, then there
8 is certainly no reason to disagree with that.

9 THE HONORABLE JUDGE NIEMEYER: Okay. Do you have
10 anything further? I am trying to --

11 MR. PRICE: I understand. The plaintiff always get
12 more time than the defense. I appreciate that.

13 The only thing, I would like to conclude just by
14 saying, we would like to see you narrow the focus to the issues
15 at hand. We feel that standardizing those rules for all
16 federal litigants, attorneys and the judiciary would be
17 helpful.

18 And finally, bring back common sense and logic into
19 the discovery process so that all litigants can receive the
20 competent, efficient and economical legal services that they
21 expect. Thank you.

22 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Price.
23 I appreciate your comments.

24 Mr. Gallagher, is Mr. Gallagher here?

25 MR. GALLAGHER: Good morning, ladies and gentlemen.

1 Thank you for giving me the opportunity to address the issues
2 on the proposed rule changes.

3 My name is Daniel Gallagher. I am an attorney with
4 the law firm of Querrey & Harrow here in Chicago. It's a
5 100-person law firm. We do primarily defense work. But I have
6 probably the unusual distinction of not only being a member of
7 the Federation of Insurance and Corporate Counsel, but I am
8 also a member of the Illinois Trial Lawyers Association, which
9 is primarily a plaintiffs' group.

10 With respect to --

11 THE HONORABLE JUDGE NIEMEYER: Is your practice
12 balanced, or do you do one more than the other?

13 MR. GALLAGHER: I do more defense work than
14 plaintiffs' work, but I have done plaintiffs' work, and
15 particularly I have done more plaintiffs' work in federal
16 court.

17 There is no doubt that the biggest expense for all
18 parties is, of course, the discovery process. And I have not
19 seen any convincing evidence that pre-discovery disclosure
20 reduces discovery expenses, discovery delay or discovery
21 itself. In the Northern District of Illinois, as you know, the
22 judges generally take an active interest in the discovery
23 process and tend to tailor the process to the individual case.

24 THE HONORABLE JUDGE NIEMEYER: Have you practiced in a
25 district that uses disclosure?

1 MR. GALLAGHER: In the Northern District of Illinois I
2 have had a couple of judges apply the rules, the Rule 26, from
3 1993 to a couple cases to see how it worked. And my experience
4 with that has been that it did not promote discovery. It did
5 not -- it was just putting out another strata of discovery
6 really in the process. It really didn't help in limiting
7 discovery. It didn't help in limiting the expenses. And there
8 wasn't any less discovery because of that imposition of that
9 rule.

10 I believe that if polled, most attorneys that practice
11 in the Northern District of Illinois would not favor pre-
12 discovery disclosure or see the need for it. Rather a sequence
13 discovery process managed by the court, which we have, is
14 working fine with us at this time.

15 That having been said, we recognize that some form of
16 pre-discovery disclosure is probably going to be imposed at some
17 point in the Northern District of Illinois. And under those
18 circumstances, these comments are being offered with respect to
19 the proposed changes to the 1993 rules.

20 First of all with respect to uniformity, the fact that
21 the rules are not uniform in the federal system does drive up
22 the cost of discovery just from the standpoint of the learning
23 curve that attorneys must go through in practicing in different
24 districts. Clients can be prejudiced, of course, by running
25 afoul of the rules in District B because they are not the same

1 rules that apply in District A. And the outcome of
2 litigation --

3 MR. SCHREIBER: Counsel, isn't it true that if you go
4 to another state, you have to by law, by court order, retain a
5 counsel in that state?

6 MR. GALLAGHER: That's correct.

7 MR. SCHREIBER: How hard is it to find out what the
8 rules are? I mean, my firm practices all over the United
9 States. We had a case in New Mexico. It takes us about 12
10 minutes to find out from the attorney in New Mexico what the
11 rule is.

12 I like uniformity, too, but I don't understand the
13 argument that it's going to be costly. Uniformity has other
14 good reasons, but it isn't costly. You have to have a counsel.
15 Isn't that true?

16 MR. GALLAGHER: Well --

17 MR. SCHREIBER: And counsel has to tell you what the
18 rule is.

19 MR. GALLAGHER: If you are the principal attorney for
20 a corporation and they do business in a number of different
21 jurisdictions, number of different districts, and they choose
22 to use a certain law firm to represent them, I think there is a
23 learning curve every time you go into a different district.

24 MR. SCHREIBER: There is a book out that has all the
25 rules in it. It takes about five minutes.

1 MR. GALLAGHER: As Judge Niemeyer pointed out, you
2 have 94 different districts and you have 50 different rules.
3 It certainly can be argued that it would be much easier if
4 there was some uniformity in the rules and the lawyers would
5 not have to go through a learning curve every time they
6 practice in a different district, sometimes within the same
7 state or within 50 miles of where they are practicing.

8 So I think it would also -- uniformity will also avoid
9 placing practitioners in precarious malpractice positions as
10 well. Too often has the lack of uniformity led to colloquy
11 between Court and counsel such as this: But, Judge,
12 non-adherence to the rule should not result in, and you can
13 pick one whether you are the plaintiff or defendant, dismissal
14 or judgment, and my client being deprived of, pick one whether
15 you are the plaintiff or defendant, remedy or defense, to which
16 the Court replies: Counsel, I have not deprived your client of
17 his day in court. I am merely providing him with a new
18 defendant.

19 And I don't think that should be the case because of
20 the complexity of the rules and the labyrinthian rules that
21 exist in some districts.

22 With respect to the scope of discovery, the scope of
23 attorney-managed discovery as adopted under the 1993 rules was
24 far too broad. The limits proposed by the advisory committee
25 limiting disclosure to witnesses and material that support the

1 parties' claims or defenses are far preferable to the rule
2 requiring disclosure of any information relevant to the subject
3 matter. A party should not be required to flesh out the
4 opponent's case.

5 Likewise, the elimination of the requirement to
6 disclose discoverable information, quote, relevant to disputed
7 facts alleged with particularity in the pleadings, end quote,
8 clears up a great uncertainty. Since the federal courts permit
9 notice pleading in most instances instead of fact pleading, it
10 was most difficult to discern with any certitude what the facts
11 were which were alleged with particularity and were in dispute.

12 With respect to --

13 THE HONORABLE JUDGE LEVI: Excuse me. I think we took
14 that language out.

15 MR. GALLAGHER: Yes, and I was applauding taking that
16 language out.

17 With respect to the depositions, limiting the length
18 of depositions is a good rule. It prevents abuses by lawyers
19 of all stripes and it saves clients time and money. But seven
20 hours is also a considerable time, amount of time, to depose
21 someone. And let's hope that the imposed seven-hour rule or
22 ceiling does not become the floor.

23 As Mr. Price pointed out, in the State of Illinois
24 depositions are limited to three hours unless extended by
25 agreement of the parties or by the courts. I must say, in my

1 experience we have had no difficulty whatsoever in cases where,
2 because of the number of parties, it could go beyond that time,
3 or because of the complexity of the issues it can go beyond
4 that time. Basically the lawyers agree to that, and that
5 works. That system works very well.

6 THE HONORABLE JUDGE ROSENTHAL: May I ask a question,
7 sir?

8 MR. GALLAGHER: Sure.

9 THE HONORABLE JUDGE ROSENTHAL: Since we are not
10 proposing to change the standards for motions to dismiss or
11 Rule 12(b)(6) motions, do you see a likelihood or an incentive
12 as a defense lawyer to file a motion to dismiss or a specific
13 challenge under 12(b)(6) in order to avoid discovery?

14 MR. GALLAGHER: No, I do not. I don't see that as a
15 problem whatsoever.

16 THE HONORABLE JUDGE ROSENTHAL: Do you see complaints
17 being filed that are so bare-bones that they would comply with
18 Rule 8 and comply with 12(b)(6) requirements and yet permit a
19 party, a defendant, to avoid discovery?

20 MR. GALLAGHER: I don't see that happening. I don't
21 see the court, I don't see the judges allowing that to take
22 place. I think if that tact is attempted, I think that the
23 judges will handle it appropriately. I don't see that as
24 becoming a big problem.

25 PROFESSOR ROWE: Mr. Gallagher, a couple of questions

1 about the time limit and drawing on your experience in Illinois
2 practice with the three-hour limit. A couple of things we have
3 been hearing are, one, problems with experts. Seven hours is
4 often not enough. And, two, what about sides? Sometimes, of
5 course, there is one side, the main side, taking a deposition.
6 Other times if it's a distant witness, both sides will want to
7 do it, and then you have multi-parties.

8 How do those kinds of issues work under the Illinois
9 three-hour limit? Basically by counsel just agreeing to go
10 longer?

11 MR. GALLAGHER: Yes, and also the person who noticed
12 the deposition, usually someone takes the laboring oar with
13 respect to a certain portion of the discovery from the defense
14 side. That person is given the most time perhaps to ask
15 questions. The other people bat cleanup.

16 And most people don't want to reinvent the wheel and
17 obviously go back and ask the same questions over again,
18 although I have seen people attempt to try it. And if that
19 happens, there is always the appeal to the court, and the court
20 can be asked to sanction someone for not complying with the
21 rule.

22 But it really hasn't been a big problem.

23 PROFESSOR ROWE: Do you happen to remember whether the
24 Illinois rule says anything about consent of the deponent? We
25 included in our proposal the requirement of consent of the

1 deponent out of concern for basically the lawyers ganging up on
2 a non-party deponent. And the statements we have gotten
3 included some criticism of that.

4 MR. GALLAGHER: I was just going to get to that.
5 Having the deponent being able to say that he will not come
6 back or should come back or not extending the time I think is
7 the tail wagging the dog. And if you get into that, I think
8 you are going to have a real problem.

9 THE HONORABLE JUDGE NIEMEYER: We are starting to
10 recognize, and we are hearing it from you and hearing it from
11 others, we are starting to recognize that maybe Rule 45 is the
12 place to let the deponent protect himself. But --

13 MR. GALLAGHER: That may be. I just would propose
14 this scenario, too, to you, that lawyers would say, you give
15 them the out, well, gee, counsel, I'd love to extend the
16 deposition but my witness won't allow it. So don't give people
17 that out. If you give people that out, they will take it.
18 Make the lawyers have to agree to extend those depositions. I
19 think that's the better -- that's the better practice.

20 Mr. Price talked about document production. Obviously
21 document production is the most expensive part of discovery for
22 defendants in most types of litigation, including product
23 liability and construction accident litigation, which I do a
24 lot of. It should be limited at first, I think, to a
25 reasonable number of years prior to the cause of action and

1 only extended upon good cause shown.

2 MR. SCHREIBER: How many years would you suggest,
3 counsel? Seven, eight?

4 MR. GALLAGHER: I think seven years is a reasonable
5 standard.

6 THE HONORABLE JUDGE NIEMEYER: What do you do about an
7 exposure case? What do you do about an exposure case, somebody
8 sues, let's say, for, take the most prevalent one, asbestos.

9 MR. GALLAGHER: Those are obviously different
10 situations. But I am saying, by and large in most cases, I
11 think there should be some temporal limit. And if the parties
12 could go before the Court and argue for some sort of -- show
13 why it should go beyond that temporal limit, obviously the
14 Court could grant that. I don't think that would be a problem.

15 In Illinois, as you probably know or you may not know,
16 it says, "reasonable period of time."

17 THE HONORABLE JUDGE NIEMEYER: What about an antitrust
18 case or course of dealing when you are talking about markets?

19 MR. GALLAGHER: There is obviously --

20 THE HONORABLE JUDGE NIEMEYER: Environmental cases.

21 MR. GALLAGHER: Sure. There is obviously high end.
22 There is going to be certain high-end cases where you have to
23 go back. But then there are some cases where you don't have to
24 go back that far, and because the corporation has been in
25 business since 1981, every document that's ever been prepared

1 or proposed with respect to a certain product should not have
2 to be produced.

3 THE HONORABLE JUDGE NIEMEYER: I heard this proposal
4 several times from several different people made to our
5 committee. And I haven't yet seen somebody present a
6 formulation. If you think it's a good one, it might be useful
7 to have you or some organization do a formulation because the
8 difficulty I have is, there obviously ought to be some limits
9 in documents, but there is some issues that have deeper roots.

10 MR. GALLAGHER: Yes, there are. There absolutely are.

11 THE HONORABLE JUDGE NIEMEYER: Deep historical roots.
12 I must say, in the cases where that's not a problem, the
13 automobile accident case, you don't have a complaint about
14 that.

15 MR. GALLAGHER: Right.

16 THE HONORABLE JUDGE NIEMEYER: But in the cases where
17 the lawyers complain about having a larger scope historically,
18 usually that's a type of case you probably would except anyway
19 and have to come in and talk about reasonableness as opposed to
20 some bright line.

21 Anyway, if there is a good formulation, I will be
22 interested in seeing that.

23 MR. GALLAGHER: Thank you, sir. I will talk to my
24 colleagues, and see if we can help you out.

25 THE HONORABLE JUDGE NIEMEYER: Anything further?

1 MR. GALLAGHER: The one thing further, in reviewing
2 the advisory committee's report, at page 16 there is a mention
3 of possible amendment to Rule 34, which will permit an initial
4 examination of documents covered by a Rule 34 request without
5 formally producing the documents, and it would allow the
6 requesting party to take a look at those documents, conceivably
7 narrow them down. And then when they want the documents, the
8 responding party would object on the grounds of privilege. In
9 other words, it would be no inadvertent waiver of privilege by
10 producing everything for review.

11 I think this rule should not be imposed. I don't
12 think it should be changed at all because once the privilege
13 genie is out of the bottle, you can't get him back in even with
14 a pry bar. And I think the claim of privilege should be
15 jealously guarded.

16 I thank you very much for letting me give my comments
17 this morning.

18 THE HONORABLE JUDGE NIEMEYER: Thank you very much,
19 Mr. Gallagher.

20 Mr. Romine?

21 MR. ROMINE: Romine.

22 THE HONORABLE JUDGE NIEMEYER: Romine, excuse me.

23 MR. ROMINE: Good morning, and thank you all very much
24 for the opportunity to speak this morning.

25 I am here on one issue only, and that is the scope of

1 discovery under Rule 26(b)(1). And before I get to really the
2 substance of what I'd like to talk about, I'd like to address
3 the definitional issue because I believe that the proposed
4 changes do, in fact, change the scope of discovery.

5 The reason being, when lawyers talk about the scope of
6 discovery, what they're really talking about is the default
7 position. What is the default position? What is the scope of
8 discovery when there is no court order regarding that specific
9 case?

10 The proposed changes unambiguously change the default
11 position on the scope of discovery from relevant to the subject
12 matter to relevant to the claims and defenses asserted. So I
13 think that when we talk about the proposed changes, we should
14 recognize that what's being talked about really is a change in
15 the scope of discovery. It's my opinion.

16 Getting to the substance of the change, Judge Niemeyer
17 challenged this panel, this committee, to adopt the rule
18 changes, and not only this specific change but all the rule
19 changes, only after a disciplined inquiry reveals that those
20 changes are necessary. And specifically with regard to Rule
21 26(b)(1), we don't yet have that disciplined inquiry. And I
22 will use those two words as a theme for my brief presentation
23 this morning.

24 Of course, we do have two very good studies that may
25 provide a disciplined inquiry or may constitute a disciplined

1 inquiry for some of the changes that have been proposed: The
2 FJC survey and the Rand study. But the FJC survey, of course,
3 surveyed 2,000 lawyers; about a thousand responded. Most of
4 those that responded thought that a change in the scope of
5 discovery would not reduce costs while at the same time
6 maintain fair outcomes. And that was specifically asked with
7 regard to 13 possible changes to the rules. And that's Table
8 35 in the survey.

9 Same question asked a little bit differently, the list
10 of 13 proposed changes was whittled down to six. One of those
11 was rule change scope of discovery. That particular change
12 ranked fifth out of sixth in popularity among lawyers, 35
13 percent supported it. In other words, almost two thirds of the
14 lawyers thought that this particular change was not needed, or
15 specifically regarding the way the question was asked, they did
16 not think that the change would likely reduce expenses without
17 interfering with fair case resolution.

18 The Rand study did not really address this question,
19 and I'd like to take this opportunity to clarify or perhaps
20 correct something in my written testimony, which is on page 5.
21 I say the Rand study did not address or discuss the proposed
22 rule changes. The Rand study did mention that proposed change,
23 and I refer you to page 627 of the Boston College Law Review.
24 But the Rand study didn't really evaluate that proposed change
25 because it was a backward-looking study to evaluate the various

1 changes under the Civil Justice Reform Act. And that act
2 didn't relate -- encompass changes to the scope of discovery.

3 So in terms of the empirical evidence in the Rand
4 study or an evaluation of where we should go from here, the
5 Rand study does not really discuss that, although that proposed
6 change is mentioned in the Rand study.

7 So that's really the main thrust of what I want to say
8 to you here this morning, is that we don't yet have a
9 disciplined inquiry that would support this proposed change to
10 Rule 26(b)(1). And if you take nothing more from what I have
11 to say to you here this morning, that would be it.

12 If I could just pose some potential problems with what
13 would happen if this committee would adopt the change without
14 such a disciplined inquiry, I think the proposed change would
15 actually lead to more expense and more costly litigation.

16 THE HONORABLE JUDGE LEVI: Do you find that to be the
17 case when you litigate in state courts where they have this
18 definition of scope?

19 MR. ROMINE: My practice has been mostly in federal
20 court, so I don't know.

21 I think that the state court cases that I do have some
22 familiarity with tend to be the really low-stakes litigation.
23 It's really been car accident cases, where you are not likely
24 to have discovery disputes. I view the paradigm state court
25 case as being -- the chances of the paradigm state court case

1 involving significant discovery disputes, just because of the
2 subject matter of the litigation, is different than the
3 paradigm federal court case.

4 THE HONORABLE JUDGE LEVI: Take the paradigm case for
5 your firm. You do antitrust cases in federal court. Don't you
6 usually have a discovery plan in any event?

7 MR. ROMINE: Yes.

8 THE HONORABLE JUDGE LEVI: So your default position is
9 the discovery plan?

10 MR. ROMINE: Yes.

11 THE HONORABLE JUDGE LEVI: Is that going to be a
12 problem?

13 MR. ROMINE: I don't know. I don't know. I think the
14 real problem though with Rule 26(b)(1), the proposed changes,
15 is not the big antitrust case, cases, that my firm might
16 typically work on. The real problem with the proposed changes
17 are for the 60, 80, 90, 95 percent of the cases that are not a
18 problem.

19 THE HONORABLE JUDGE NIEMEYER: Actually our study
20 shows that with respect to the large number of cases, there is
21 no discovery. And with respect to another large bunch of cases
22 the discovery is three hours or less. And I think most
23 indications are that the disclosure will probably end up
24 serving as discovery in these cases and there really won't be
25 much formal discovery.

1 The testimony that was sort of interesting that we
2 heard from some people is that the routine case that's being
3 tried in federal court does not turn on discovery, and
4 discovery is not a big issue and we should not get involved
5 with that in any sense of trying to make it more expensive.
6 We're trying to leave that alone and make it less expensive.
7 And I think on those cases, these are probably not going to
8 affect anything.

9 I think the difficulty is in the cases where you are
10 involved in, Ms. Cabraser is involved in, where there is some
11 question as to whether we are inviting a motions practice or
12 fight over these fine lines in large discovery cases. And in
13 one hand, there may be an expense attendant to it, but there is
14 another countervailing thing that we found. A lot of attorneys
15 wanted the courts to be involved early, which, of course,
16 involves being before the Court anyway.

17 We are hoping that this conference with the Court and
18 a discovery plan will solve a lot of that. Obviously, a lot of
19 that is speculation, and we can't fully foresee how it's going
20 to work out. We are hoping that goodwill members of the bar
21 will demonstrate that things can work. I think we do
22 appreciate your point, though. It's a serious point.

23 THE HONORABLE JUDGE CARROLL: But isn't your point
24 based, in fact, on a reaction of the defense bar to these
25 changes? If the defense bar takes these changes for what they

1 really are, which is to apply in a very narrow field of cases,
2 and not meant at all to change the Rule 12(b)(6) standard or
3 motion practice, it won't have a negative effect. But if the
4 defense bar decides to fight tooth and nail over motions to
5 dismiss, to take an obstructionist position with regard to
6 discovery, that's where the problem is.

7 MR. ROMINE: I think the real problem will be in the
8 middle cases that Judge Niemeyer is talking about. Because the
9 proposed change is not limited to the big cases, it creates an
10 incentive in the middle cases where maybe discovery only takes
11 three hours. In those cases maybe discovery only takes three
12 hours because the lawyers know what's going to be discoverable
13 and what's not discoverable.

14 You take the middle case, which is now a routine case,
15 all of a sudden a party thinks, before I always gave my
16 opponents document X. But now --

17 THE HONORABLE JUDGE CARROLL: Give me an example of
18 what you are saying, these middle cases all of a sudden
19 discovery is going to be restricted and narrowed.

20 MR. ROMINE: I'd like to but --

21 THE HONORABLE JUDGE NIEMEYER: The three-hour case,
22 which we heard was basically the medical records in a
23 deposition.

24 MR. ROMINE: Medical records in a deposition.

25 THE HONORABLE JUDGE NIEMEYER: Or we heard employment

1 cases where it was the employment file.

2 MR. ROMINE: Let me try to think of a medical records
3 case.

4 Plaintiff's medical records showing that plaintiff was
5 treated for similar injuries to the ones he or she is now
6 claiming, perhaps repeatedly, at some point prior to the
7 actions complained of.

8 THE HONORABLE JUDGE NIEMEYER: Do you think the
9 parties, the court, would take the position other than that
10 they might be relevant?

11 MR. ROMINE: It's possible.

12 THE HONORABLE JUDGE NIEMEYER: Seems to me if they are
13 related to the same type of injury, it would be highly
14 relevant.

15 MR. ROMINE: I would agree with you. However, not
16 every single lawyer out there representing a doctor or
17 pharmaceutical company would agree with you.

18 MR. SCHERFFIUS: What is your suggested model for a
19 disciplined inquiry?

20 MR. ROMINE: Suggested model for a disciplined
21 inquiry?

22 MR. SCHERFFIUS: Because what I understood what you
23 wanted us to take from your remarks is that you feel that there
24 is a need for a disciplined inquiry. And I am simply asking
25 what model do you propose that that be conducted under.

1 MR. ROMINE: I think we have one, and that's the FJC
2 survey.

3 MR. SCHERFFIUS: Are you suggesting that a more
4 extensive survey be done or one that really hones in on the
5 change to 26, or do you say except what the FJC says?

6 MR. ROMINE: I do say today, except what the FJC says.
7 I think the only way to do a different kind of empirical study
8 might be to do something like what the Rand study is and have
9 some district or districts change the scope of discovery. You
10 do a comparison among the districts, like the Rand study does,
11 and say, A, B, C works and X, Y, Z doesn't work, or whatever.

12 MR. SCHERFFIUS: I think you and your client would be
13 highly upset if you were the plaintiff in one of those
14 districts. I think you'd end up trying to get to the U.S.
15 Supreme Court on that issue.

16 I thought about whether you could do some kind of a
17 guinea pig type of operation, but I don't see how, in
18 recognition of due process, you could possibly do that.

19 MR. ROMINE: I don't know.

20 THE HONORABLE JUDGE LEVI: It would be very difficult
21 to do that kind of empirical work. Empirical work tends not to
22 give answers. It helps in forming your judgment, but to try to
23 do an empirical study on the effects of the change in scope
24 would be, I think, extraordinarily complicated and take a very
25 long time.

1 Just so that you know that we are not going off half
2 cocked on this, this proposal has been around for a very long
3 time, very long time. It has been proposed by the litigation
4 section of the American Bar Association at different times.
5 And the American College of Trial Lawyers, which is a
6 plaintiffs' and defendants' organization, is very strongly
7 proposing it and has for a number of years. It didn't just
8 arrive.

9 MR. ROMINE: I guess my point is that to the extent
10 that we do have a disciplined inquiry regarding the specific
11 change -- and this may be the only disciplined inquiry that we
12 are ever going to get, I don't know -- but to the extent we do
13 have such a disciplined inquiry, it suggests that most lawyers
14 think that this change will not lead to reduced costs at the
15 same time as maintaining fair outcome of cases.

16 PROFESSOR COOPER: We have used up virtually all of
17 your time, but there is something in your written statement
18 that I'd like to ask you about for a moment. It's on page 11,
19 where you suggest that the proposed changes will force trial
20 judges to decide trial relevance at the discovery stage.

21 Are you in that comment drawing from the addition of
22 the word "relevant" information to what is now the last
23 sentence?

24 MR. ROMINE: Yes.

25 PROFESSOR COOPER: Could you tell us how you

1 understand the meaning of the addition of that one word?

2 MR. ROMINE: My understanding of that particular
3 change is that relevant information would be discoverable and
4 irrelevant information would not be discoverable.

5 PROFESSOR COOPER: And measuring relevance against
6 what?

7 MR. ROMINE: Measuring relevance as to whether a
8 particular piece of information would make it more likely than
9 not that on a particular claim the party would succeed or fail.

10 PROFESSOR COOPER: But the focus would be on a
11 particular claim, not on the subject matter of the dispute?

12 MR. ROMINE: The way I understand the changes, yes.

13 THE HONORABLE JUDGE ROSENTHAL: If a judge had ordered
14 additional discovery going to the subject matter after a
15 showing of good cause, would the measure of relevance then go
16 to the larger scope?

17 MR. ROMINE: Possibly. But again, these two questions
18 to me suggest that these are all things that have not yet been
19 worked out and will lead to increased litigation and,
20 therefore, increased costs, if the rule is enacted -- if the
21 rule change is enacted.

22 THE HONORABLE JUDGE NIEMEYER: All right. I
23 appreciate your testifying, Mr. Romine.

24 MR. ROMINE: Thank you very much.

25 THE HONORABLE JUDGE NIEMEYER: Thank you.

1 Mr. James Johnson, is he here?

2 MR. JOHNSON: Good morning. I am Jim Johnson. I'm
3 the general counsel of the Procter & Gamble Company in
4 Cincinnati.

5 My remarks will speak in favor of the proposed rule
6 amendments, but I would also like to provide the committee with
7 some tangent data related to our document discovery cost. We
8 took some time to analyze this. And I'd like to give you one
9 example from our recent experience, where the subject matter
10 rule was taken to an extreme. And I think both of these
11 hopefully will underscore the importance of what this committee
12 is looking at, at least with respect to these two elements.

13 And finally, I will make a suggestion that, I believe,
14 will enhance the committee's objectives in these two rules
15 while at the same time providing some balance in the discovery
16 process.

17 First some background. As you probably know, Procter
18 is a global company. More than half our sales are outside the
19 U.S. So we litigate in systems similar to the U.S. system and
20 in systems very different than the U.S. system, including
21 systems where discovery is very limited and systems in which
22 discovery does not exist at all.

23 Our conclusion, our strong conclusion, is that
24 discovery is a very important part of a fair judicial
25 proceeding. When we see the differences in what happens in

1 litigation, either as a plaintiff or a defendant, in a limited
2 discovery context, and in, even worse, a no discovery context,
3 our conclusion is that a much fairer process occurs when
4 discovery exists.

5 And I should point out that for most of our larger
6 cases, particularly in the U.S., we are just as frequently a
7 plaintiff as we are a defendant. We bring antitrust actions,
8 commercial disputes. We make claims for punitive damages, and
9 we make RICO claims. We do all the things that plaintiffs
10 naturally and normally do.

11 So my remarks here as they relate to the discovery
12 process are not necessarily from the defendant's point of view
13 or from the plaintiff's point of view.

14 Obviously we think as good as discovery is in the
15 U.S., it has gone too far. It has become inefficient and
16 wasteful. And to be candid, corporate litigants can be just as
17 much of a problem as any other kind of litigants because in my
18 view, which I hope to express to you, I think the problem is
19 systemic.

20 There are two fundamental causes. First, as a
21 practical matter, we have reached the point where there are
22 essentially no objective standards to decide how far discovery
23 can reach. The combination of the subject matter rule with the
24 rule that discovery may include anything which may lead to the
25 discovery of admissible evidence, leads to an absence of

1 objective standards as to scope. In my view, the fact that
2 there are no objective standards in turn leads judges naturally
3 to be less inclined to address the issue in the first place.

4 Second and even more important, the economic dynamics
5 of discovery lead inevitably to excess. Discovery,
6 particularly document discovery, is one of those rare processes
7 in which virtually all of the benefits are received by the
8 requesting party, plaintiff or defendant, and virtually all the
9 costs are born by the responding party. And, of course, this
10 goes both ways.

11 There are no internal system checks, economic checks,
12 which would naturally lead to reasonable controls. If I demand
13 documents from another party, why do I care how burdensome that
14 might be to the other party if they pay virtually the entire
15 costs? Conversely, why would they care about the burden and
16 costs that are imposed on Procter & Gamble when they make
17 sweeping discovery requests? They shouldn't and they don't.
18 The combination of the lack of objective standards as to scope
19 and the lack of an internal economic control on the process
20 yields a system perfectly designed for excess.

21 Now I'd like to share some data with you related to
22 document discovery. The committee has received data, as I
23 understand it, relating to the cost of all discovery as a
24 percentage of total litigation costs. We have analyzed P & G's
25 cost related more directly to document production per se. We

1 looked at large and small cases and analyzed our actual
2 internal costs, including billing records and our computer
3 files. And we also received input from our outside litigation
4 counsel on a number of specific questions.

5 Here is what we found: On average 8 percent of the
6 total costs of the P & G case in litigation goes into simply
7 copying, stamping and optically scanning the documents we turn
8 over to the other side. 8 percent of our 30 million a year
9 litigation budget on average is 2.4 million we pay on average
10 each year for the most ministerial part of the process.

11 MR. SCHERFFIUS: As a plaintiff and defendant?

12 MR. JOHNSON: Correct.

13 PROFESSOR MARCUS: Is there a difference between the
14 costs when you are a plaintiff and the cost when you are a
15 defendant?

16 MR. JOHNSON: No. There is a difference --

17 THE HONORABLE JUDGE NIEMEYER: I am trying to
18 understand that response. I thought you said the cost was
19 imposed always on the responding party. And if you are
20 plaintiff, you are not a responding party, are you?

21 MR. JOHNSON: Well, no, if we are a plaintiff, we get
22 huge, huge document demands.

23 MR. SCHERFFIUS: In the type of litigation that you
24 are in, plaintiff is going to get hit --

25 MR. JOHNSON: That's correct.

1 THE HONORABLE JUDGE NIEMEYER: I understand.

2 MR. JOHNSON: But I should clarify, there is a
3 distinction. This number 8 is an average. And it went, I
4 think, from 4 to 12. And the larger cases have a higher
5 percentage of ministerial costs captured in document discovery.
6 And I believe the reason is because we go through our scanning
7 process where you have to be able to put search engines against
8 each of the documents you produce, is very expensive. So there
9 is a range within case size.

10 PROFESSOR MARCUS: When you say larger, you mean
11 larger in terms of number of documents?

12 MR. JOHNSON: Yes.

13 PROFESSOR MARCUS: And that doesn't have anything to
14 do with whether you are a plaintiff or defendant?

15 MR. JOHNSON: Correct:

16 THE HONORABLE JUDGE KYLE: This 8 percent does not
17 include lawyers?

18 MR. JOHNSON: No, that's my next point.

19 Each of these documents, however, have to be
20 individually reviewed by paralegals and attorneys for questions
21 of privilege or responsiveness and then organized both by issue
22 and witness, and then legally analyzed. In addition, a modest
23 portion of deposition costs are related just to specific going
24 through the documents of the particular witness at hand, even
25 though they are not directly related to what the lawyer wants

1 to question him on.

2 I mean, basically what occurs is, you have a witness.
3 The paralegal does the search: Give me every document that has
4 the name Jim Johnson on it, either as the writer or a copy
5 recipient. And they take those documents, and they go through
6 them because they try to understand, well, why is this and how
7 do you operate this business, et cetera. It's just wholly
8 apart from deposing me on what the issues are in the case.

9 So a certain part of these costs are captured in those
10 numbers as well. And that on average is 40 percent of our
11 total litigation budget. So --

12 THE HONORABLE JUDGE NIEMEYER: Over and above the 8
13 percent.

14 MR. JOHNSON: Correct. So the total would be 48
15 percent of our litigation costs are directly dependent on the
16 number of documents produced. This means P & G spends on
17 average over \$14 million a year in directly related document
18 costs.

19 I should say parenthetically that, of course, the real
20 costs are much higher than that. We have all our in-house
21 attorneys. But much, much more important are --

22 PROFESSOR MARCUS: Can I ask one further clarification
23 question? Did you attempt in gathering this information to
24 determine the impact on those costs of searching on
25 electronically stored information?

1 MR. JOHNSON: No, but that is a huge emerging problem.
2 And if you'd like me to discuss that, I will. It's --

3 THE HONORABLE JUDGE NIEMEYER: Let me say this about
4 that: We are very interested in the electronic problem. These
5 rules changes do not address the problem. But we have heard
6 again and again that it's growing geometrically --

7 MR. JOHNSON: Yes.

8 THE HONORABLE JUDGE NIEMEYER: -- every year.

9 MR. JOHNSON: Right.

10 THE HONORABLE JUDGE NIEMEYER: And one of the
11 suggestions made by one witness at our last hearing was that
12 there may be a way to describe a document differently when it's
13 electronically developed. Such as, for instance, if a
14 document, an electronic data, is intended to be deleted by both
15 the sender and the receiver, then that be treated as an oral
16 document or oral evidence until there is a showing that it is
17 needed. That was one suggestion.

18 But if your organization has ideas about how to handle
19 discovery electronically, either in the definition or the scope
20 or the search or the cost, we would be enormously interested.

21 MR. JOHNSON: I have not addressed the question. It's
22 a huge issue, and I would be delighted to give it some thought.

23 THE HONORABLE JUDGE NIEMEYER: It's an emerging
24 problem, and we actually have a subcommittee that we have
25 looking at it. We are not purporting to address it in these

1 changes. And I say that not only to you but to anybody here in
2 this hearing, that we need a lot of help, not just
3 understanding the problem but on ideas how to address them.

4 MR. JOHNSON: Just the issue you raised, deleted
5 documents, you get about five levels of deletions. The first
6 level is you take off the marker so it can't be searched. How
7 do you get those documents?

8 THE HONORABLE JUDGE NIEMEYER: We actually heard that
9 even if you go down through all levels of deletion, you can go
10 to the disk drive and retrieve it by --

11 MR. JOHNSON: Right.

12 THE HONORABLE JUDGE NIEMEYER: -- enhancements. And
13 you have multiple computers with that --

14 MR. JOHNSON: Correct.

15 THE HONORABLE JUDGE NIEMEYER: -- and so it's not a
16 question of whether you are able to get it. It's whether there
17 is a way to define the limits --

18 MR. JOHNSON: Yes.

19 THE HONORABLE JUDGE NIEMEYER: -- because there is a
20 corporate document that states the final records, and there is
21 the document where I send you and say, I will meet you for
22 lunch in the lobby. And you write back, I will be there, and
23 we both delete it. Is that intended to be a corporate
24 document? In the old days that used to be a telephone call.
25 Now it's on the computer, and most people think it's a

1 document.

2 MR. JOHNSON: Well, I will just go to my last part
3 first, right now. And that is to say, my proposal to the
4 committee was -- and I will go through the rest of my
5 presentation -- was that you make some additional comments in
6 the Note 34, proposed Rule 34, that says that it recognizes
7 that cost bearing can be a source of case management discovery
8 control by the court. And when it appears that that's the
9 case, that the court should freely grant it under those
10 circumstances, I would --

11 MR. SCHREIBER: Doesn't the court have that power? If
12 you look at the manual for complex litigation, isn't it
13 specifically set out?

14 MR. JOHNSON: Yes, but in our experience they don't do
15 it. And the reason they don't do it is, the assumption is that
16 Procter & Gamble sales are \$37 billion a year. And once they
17 hear that, the cost sharing -- it doesn't compute to them.
18 Cost sharing only computes in the context where you have an
19 individual suing a company, for example.

20 And so at a practical level, I don't think you have to
21 be 37 billion before you just don't really receive much
22 sympathy from the court. And I understand that. But the fact
23 remains that the system as it currently exists, the way it's
24 organized, where you -- you know, rent seeker's paradise. You
25 get the benefit and the other party pays the cost. And I think

1 if you put that into the thinking of the judges, they will see
2 that there is a different issue here rather than just the issue
3 of whether or not Procter & Gamble can afford this case under
4 these circumstances.

5 MR. SCHREIBER: What are we going to do with the
6 individual?

7 MR. JOHNSON: Well, what I do with the individual,
8 obviously each case has to be decided on their own merits. And
9 each judge is going to decide that, and again, in the context
10 of my company, we are not going to get a lot of sympathy.

11 Except the court should recognize one thing: If you
12 tell the plaintiff's attorney in a smaller case that they may
13 be required to pay for a portion of the document discovery
14 costs, with one hundred percent certainty they will come to the
15 table and they will negotiate a solution. It's just both
16 parties then have some leverage in the process. And they will
17 say, this is what I really need.

18 What are the implications of my -- I was going to cite
19 this example on the subject matter. What are the implications
20 if I ask you for this kind of information? Well, there is a
21 hundred thousand of those documents all around the company, you
22 know, et cetera, et cetera. So that's my answer.

23 I believe that if you can frame the issue differently,
24 you can produce a systemic improvement. And --

25 MR. SCHERFFIUS: Mr. Johnson, I apologize for

1 interrupting you, but going back to this 48 percent real
2 quickly?

3 MR. JOHNSON: Yes.

4 MR. SCHERFFIUS: I know this might get to the minutia
5 of your data to some extent, but has there been any effort to
6 break out cost in claims and defenses jurisdictions versus
7 scope of discovery jurisdictions?

8 MR. JOHNSON: No, we didn't have enough cases to do
9 that. No, I'm sorry.

10 MR. SCHERFFIUS: Do you know of any study or body who
11 has attempted to do that?

12 MR. JOHNSON: I do not. And I can't imagine that we
13 can actually do that.

14 MR. SCHERFFIUS: I realize it would be difficult.

15 MR. JOHNSON: Statistically meaningful data.

16 THE HONORABLE JUDGE LEVI: I know you have been
17 interrupted a lot, and I apologize. But you are saying
18 something that's slightly different than what we were told at
19 one of our meetings, our meeting in San Francisco. We were
20 told by commercial lawyers that it's the one-way discovery case
21 where one side is seeking discovery but not the other side,
22 that's the problem.

23 In the kind of case you described, that assured mutual
24 destruction takes effect, and so that if Procter & Gamble and
25 another large company are --

1 MR. JOHNSON: Right.

2 THE HONORABLE JUDGE LEVI: -- and of course you have
3 the ability to hurt one another terribly --

4 MR. JOHNSON: Correct.

5 THE HONORABLE JUDGE LEVI: -- and therefore, you
6 don't.

7 MR. JOHNSON: No. No. I think that --

8 THE HONORABLE JUDGE NIEMEYER: You do?

9 MR. JOHNSON: No, I think that you don't think that
10 way. I mean, there is a certain element of that. I mean, you
11 know what happens. You take my CDL, I'll take your CDL. There
12 is a little mad, you know, mutually assured destruction element
13 that goes into that.

14 But my point is, I would rather have us function in a
15 system in which the system drove sensible solutions, rather
16 than a system in which, hey, look at the extreme demands they
17 made upon us. Why do we care how burdensome this is going to
18 be to the other side? And that's the way it happens up to the
19 point of craziness, I suppose.

20 THE HONORABLE JUDGE NIEMEYER: Could I ask one other
21 question about did you find what the cost, total cost, of your
22 discovery was in relationship to your litigation cost?

23 MR. JOHNSON: No, I asked. On the way out the door I
24 said, this number is not consistent with the number that was in
25 front of this committee that looked more like 50 percent for

1 total discovery. And the ball park estimate, and this is just
2 the three people that were sitting in my office last night, was
3 more like 60 to 70.

4 THE HONORABLE JUDGE NIEMEYER: I am going to say, our
5 data, if it's looked at closer, as you get to higher discovery
6 cases, it gets up to 90 percent.

7 MR. JOHNSON: I wouldn't dispute that.

8 THE HONORABLE JUDGE NIEMEYER: This was just a range
9 of cases. All right.

10 MR. KASANIN: The FJC case we had did not include
11 internal cost. It was the external cost of discovery. This is
12 very useful for us.

13 The 34 million, does that include outside counsel?

14 MR. JOHNSON: 30 million total, this year it was 32.
15 Sometimes it's 27. You know, it's roughly 30 million. Those
16 are all my external litigation costs. No settlements. These
17 are just the costs of lawyers and documents and experts.

18 THE HONORABLE JUDGE NIEMEYER: This is litigation
19 aspect, you are general counsel?

20 MR. JOHNSON: Yes.

21 THE HONORABLE JUDGE KYLE: That's both outside counsel
22 as well as your own?

23 MR. JOHNSON: No, not my own. That's another 30
24 million.

25 THE HONORABLE JUDGE KYLE: That's a big number,

1 wouldn't it, your own in-house counsel.

2 MR. JOHNSON: Is 30. Actually my total budget
3 globally is about 75 million, all external, internal, U.S.

4 THE HONORABLE JUDGE NIEMEYER: That doesn't include
5 the payment of judgments, does it?

6 MR. JOHNSON: No, or the receipt of judgments.

7 MR. KASANIN: What you were telling us about getting a
8 hold of the documents, scanning and all the rest, that's
9 internal to the company, right?

10 MR. JOHNSON: Yes. Well, we hire. You know, we used
11 to do it. There are a lot of sophisticated outside providers
12 of that that really have enough critical mass that they can do
13 it more efficiently.

14 Let me turn now to the issue of the scope of discovery
15 by way of an example. We were sued on an alleged -- we were
16 sued on an alleged diaper defect. The plaintiff alleged a
17 piece of glass was embedded in a diaper during manufacturing.
18 And since I am speaking publicly, I just want to add, I should
19 point out the child had a very superficial scratch, was treated
20 with cream.

21 And our analytical test showed the glass could not
22 come from manufacturing because there were not even microscopic
23 slits in the top sheet. And more importantly, there was no
24 glass of this composition in the plant. It was house pane
25 glass.

1 But back to the discovery issue. With the code on the
2 diaper box, we knew exactly the plant which made the diaper,
3 the machine it was manufactured, and the exact time it was
4 manufactured, at least the shift time. Thus the factual issues
5 in this case could not be more perfectly narrowly drawn. Did
6 this piece of glass enter the diaper during the manufacturing,
7 at that particular time, plant and place? If it did, we would
8 be strictly liable of course. If it didn't, we would have no
9 liability.

10 The plaintiff predictably asked for far-reaching
11 discovery on the basis that the subject matter of the case was
12 diapers, diaper manufacturing, defective products. The
13 plaintiff demanded the following: All the documents related to
14 consumer complaints on diapers, documents regarding the entire
15 diaper-making process. These, of course, are extraordinarily
16 proprietary, and if they were disclosed at trial it would be a
17 competitive disaster.

18 All documents related to quality assurance checks on
19 diapers. This was related to the plant. These numbered in the
20 tens of thousands and virtually all of them relate to diaper
21 specification and performance issues, where you keep pulling
22 diapers off the line and you do all these tests on a regular
23 basis.

24 This took over 200 internal man-hours from our
25 manufacturing people to collect, sort, review and produce these

1 documents. These are part of the hidden costs that we were
2 talking about. And finally they asked for the names and
3 addresses of all employees and contractors who worked in the
4 manufacture and packaging and distribution of diapers.

5 Now, would an issues and claims test have made a
6 difference in this case?

7 THE HONORABLE JUDGE ROSENTHAL: May I ask you a
8 question? I apologize for interrupting you.

9 In that case did you seek judicial assistance in
10 curbing the request?

11 MR. JOHNSON: We were told that the chances that we
12 would get relief in this context was zero.

13 THE HONORABLE JUDGE ROSENTHAL: So you didn't even
14 try.

15 MR. JOHNSON: We settled.

16 THE HONORABLE JUDGE ROSENTHAL: You settled rather
17 than go through the discovery.

18 MR. JOHNSON: Right.

19 THE HONORABLE JUDGE KYLE: You were told that by
20 outside counsel --

21 MR. JOHNSON: Outside counsel.

22 THE HONORABLE JUDGE KYLE: -- in this particular
23 district?

24 MR. JOHNSON: Correct.

25 THE HONORABLE JUDGE NIEMEYER: Sort of wind it up

1 here.

2 MR. JOHNSON: My suggestion, let me make a suggestion.
3 My suggestion relates to the committee note on Rule 34(b)
4 relating to cost bearing. I would strongly recommend the
5 committee explicitly recognize in the note that cost bearing
6 can also be an effective tool for discovery management.

7 I would suggest language along the following lines,
8 quote: At a practical level, cost bearing can bring the
9 parties to the table to develop rational self-regulation in the
10 discovery process, thus placing costs on the party receiving
11 the benefit of discovery can introduce an internal check in the
12 process, leading to sensibly negotiating discovery solutions
13 among the parties and without further involvement of the court.
14 Courts should look for these opportunities and grant cost
15 bearing freely when the circumstances so warrant.

16 Thank you.

17 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Johnson.
18 Mr. Jackson, Jeffrey Jackson.

19 MR. JACKSON: The right to broad discovery ought to be
20 limited by the opposing party's right to be free from
21 harassment and the burden of overly broad request. I support
22 this committee's proposal, proposals. I think they are a step
23 in the right direction. And I will address the scope issue in
24 a few minutes.

25 I am vice president and counsel of State Farm Mutual

1 Automobile Insurance Company. I have a dubious distinction of
2 heading up a new division in our law department, the litigation
3 division. Before joining State Farm in 1988, I was a partner
4 in a Peoria, Illinois, law firm of Westervelt, Johnson, Nicoll
5 & Keller, where I was a trial lawyer and an appellate lawyer.

6 State Farm is the largest writer of automobile and
7 homeowners insurance in the United States. We have literally
8 tens of millions of policy holders. The company is organized
9 as a mutual, so we don't have shareholders. In that sense, we
10 are owned collectively by our policy holders.

11 We have 76,000 employees and 16,000 independent
12 contractor agents. We do business in all 50 states and in
13 three provinces in Canada. We do that business not from our
14 home office down in the cornfields of Bloomington, Illinois,
15 two hours south of here, but through 28 regional offices and
16 over 900 claims service centers across America.

17 It is estimated that in 1997 we handled over 15
18 million claims. Due to its size, State Farm or its policy
19 holders find themselves in a lot of state courts and in federal
20 circuits. We have at any one time over 100,000 pending
21 lawsuits against our policy holders who've been sued because
22 they were involved in an auto accident or they were involved in
23 some other mishap at a home, or something that would fall under
24 the homeowner's insurance policy. We also have about 90 class
25 actions pending across America and about 1600 bad faith

1 lawsuits.

2 Based on my experience at State Farm in the last two
3 years, we are seeing increased discovery expense and waste
4 across the entire spectrum of cases that I just mentioned. In
5 the bad faith cases, for example, where lawyers tend to seek
6 money based on a breach of the implied covenant of good faith
7 and fair dealing that most courts read by implication into most
8 insurance policies, we are seeing that transformation in
9 discovery. It's going not to the facts of the case, because
10 these cases involved for the most part pocketbook disputes or
11 value dispute about a personal injury claim or a property
12 damage claim. The transformation is to take that case to
13 connect a wide range of random events spanning years of
14 activity across the United States to make a simple case a
15 complex case.

16 PROFESSOR MARCUS: Can I ask a question at that point?
17 You mentioned a change that has occurred fairly recently in the
18 level of discovery activity. I am wondering if you connect
19 that up with any rule changes or rule differences because you
20 litigate in many jurisdictions. Is it not happening in places
21 with certain kinds of rules while it is happening in places
22 with different kinds of rules?

23 MR. JACKSON: That's a good question, Professor. I
24 don't have an answer to that. But my suspicion is that it's
25 not related to the rules. My suspicion is it's related to

1 other activities by people that look for income by suing
2 organizations.

3 We get discovery requests that are very broad. I
4 included some in my written submission on page 3. Actually
5 that was from a federal court case. But as an example,
6 Professor, the kinds of discovery that we get in some of these
7 cases where we're not really looking at the actual facts of the
8 case, we're looking to see how much information we can get
9 about an organization. All manuals, all salary reviews of an
10 individual that was involved in a case.

11 The subject matter? It's insurance. It's an
12 insurance dispute. And insurance disputes, that can be kind of
13 broad. So the subject matter is whatever a lawyer can convince
14 the judge or magistrate it is. That's the standard.

15 MR. SCHREIBER: What's wrong with that standard, if
16 you have a reasonable judge or a reasonable magistrate who
17 understands litigation, and you will separate the silly
18 requests from the valid requests? Are you suggesting that you
19 are getting so many outrageous decisions against you by judges
20 who don't understand what's going on?

21 MR. JACKSON: I am suggesting that we don't have
22 enough uniformity in the approach that is taken by judges,
23 whether they be federal or state. But primarily the issues I
24 am talking about are in state courts. And they go all over the
25 lot, all the over the lot. So in a perfect world --

1 MR. SCHREIBER: This is the federal civil practice
2 program we are dealing with. Would you limit yourself to
3 federal? Do you find that federal judges or federal
4 magistrates don't understand your arguments and are giving
5 wide, willy-nilly discovery?

6 MR. JACKSON: As a general rule we have a better shot
7 at convincing somebody in a federal court of what is really at
8 issue than we do in the state courts.

9 THE HONORABLE JUDGE ROSENTHAL: Have you felt the same
10 chilling effect that was described by the last witness; that
11 is, not even bringing motions to try to restrict the scope of
12 discovery because you are so pessimistic about your ability to
13 succeed?

14 MR. JACKSON: It goes beyond that, Judge, and I'm glad
15 that you asked that question. In fact, it's worse. We can't
16 bring these motions because it will be twisted to show that we
17 now are trying to fight the discovery and we are stonewalling.
18 That's the problem we've gotten ourselves into. I think the
19 footnote in my comments that this written submission will be
20 subjected to a discovery request, that's the world that we deal
21 in. And it's primarily, back to your question, primarily a
22 state court problem.

23 But the state courts look to the federal court rules
24 for guidance, and on the scope issue, if at least you kept what
25 you are proposing, to at least begin with discovery on the

1 claims and defenses, it might send some kind of a message to
2 folks to look at their cases and work a little bit harder on
3 the front end.

4 MR. SCHERFFIUS: Is the problem poor case management
5 or poor standard, in your opinion? Poor judicial case
6 management or a poor standard?

7 MR. JACKSON: It's probably a little of both.

8 MR. SCHERFFIUS: Do you have experience -- you
9 obviously do in every court. You have been in every court in
10 the nation.

11 MR. JACKSON: I have not been.

12 MR. SCHERFFIUS: Right. What is your view of the
13 difference in jurisdictions that have claims and defenses
14 versus the subject matter rule that it presently is?

15 MR. JACKSON: Most of the experiences that we have is
16 that if you have rules that focus the issues on the actual case
17 at hand, that those cases tend to go through the system faster.
18 That is the general rule.

19 THE HONORABLE JUDGE CARROLL: Let me ask you a
20 question about that. One of my concerns is not these rules. I
21 think they are great changes. Plaintiffs raise this issue of
22 what the defense bar might do with these rules.

23 This issue that you raise about individual cases, we
24 have a lot of bad faith cases in Alabama, even in federal
25 courts. And there is always an issue about so-called pattern

1 and practice evidence; that is, evidence relating to this
2 policy and how it's been interpreted and whether in fact as a
3 company policy you all are intentionally not paying certain
4 kinds of claims.

5 Is that the kind of evidence discoverable under a
6 claim and defense standard, in your judgment?

7 MR. JACKSON: It might very well be, depending on
8 what's the nature of the complaint. The question then becomes
9 perhaps another scope issue. Does that mean we want to go
10 ahead and start getting into evidence what happens in Delaware?
11 Is that relevant to Alabama? Is what happens in Maryland
12 relevant to what happened in Alabama?

13 And beyond that, just the interpretation of the
14 contract, that's one thing. But it goes beyond that. We are
15 not drawing all those fine lines.

16 THE HONORABLE JUDGE CARROLL: Those are still claim
17 and defense issues.

18 MR. JACKSON: Right. And there is no doubt if you
19 wanted to you could sit down and draft a complaint to fit where
20 it is you want to go. I guess the concern that we have is that
21 at least if you propose some kind of burden on the lawyers to
22 focus on the claims and the defenses, that it's a step in the
23 right direction.

24 PROFESSOR ROWE: If I understood you correctly, you
25 were saying that you were generally better off with discovery

1 not being out of control in federal court than in state court.

2 MR. JACKSON: Correct.

3 PROFESSOR ROWE: Now, in federal court now, it's
4 subject matter still.

5 MR. JACKSON: Right.

6 PROFESSOR ROWE: In state courts I don't know what the
7 mix is, but some are subject matter and some are claim and
8 defense, which does suggest you don't at least need the claim
9 and defense limit to have some reasonable control.

10 I am wondering if your experience is quite different.
11 Do the state courts that have claim and defense still get out
12 of control?

13 MR. JACKSON: Sure they do. And even federal court
14 where the subject matter is standard, the lawyer that passes
15 off this kind of request that I put in my written submission,
16 we will not just say, yes, this makes sense. It's subject
17 matter. We'll go in and have a discussion with the magistrate
18 if we can't work this out.

19 Now, our expense -- I heard the gentleman from Procter
20 & Gamble. We haven't gone through and put this pencil to
21 paper, but we are spending a couple million of dollars each
22 year on a group of people that we have employed whose job it is
23 to search for information. And that's all they do. They
24 search for information to present to our lawyers so they can go
25 through this information, determine what it is they need to

1 produce in discovery.

2 It is incredibly wasted. And if we look at the number
3 of these documents that ever get used, it's very little. We
4 get the threat from the plaintiff's lawyers that they are going
5 to go nuclear on us in discovery with document requests and
6 apex depositions of our most senior management. It happens
7 every day.

8 22 years ago George Stigler, the Nobel Prize winning
9 economist at the University of Chicago, Graduate School of
10 Business, told a group of his students, "Each generation has
11 the burden of passing insoluble problems to the next because
12 that's what creates genius."

13 Now, I don't know if these discovery rules issues are
14 insoluble, but somebody could look at the number of lawyers in
15 America today, which is estimated as 645,000 --

16 THE HONORABLE JUDGE NIEMEYER: That's low.

17 MR. JACKSON: Is that low? Okay.

18 The number of lawsuits in state court, about 15
19 million filed, at least by the number I've got, the number of
20 practice-building seminars being held all over the country
21 where lawyers talk about ways to sue people so they can earn
22 their income, and with respect to insurance companies how to
23 set them up to bad faith. And they can look at our discovery
24 rules, and then they can conclude that maybe something was out
25 of whack.

1 But I am more optimistic in that. I think we've got a
2 chance to make some headway, I think your proposed rules are at
3 least a step in the right direction.

4 MR. SCHREIBER: Is it out of whack? I mean, the
5 insurance companies get all their clients by advertising that
6 if you don't have insurance and you get sued, your home is
7 going to be taken away.

8 THE HONORABLE JUDGE NIEMEYER: Let's keep this on the
9 rules.

10 MR. SCHREIBER: Let me finish.

11 Well, okay. But he has made the comment. I will
12 withdraw it.

13 MR. LYNK: Mr. Chairman, can I ask a question?

14 How would you respond to the argument that -- and you
15 support the change and limited scope of discovery, but the
16 argument that really this is not a change so much in the scope
17 of discovery as it is a change in the arguments that must be
18 made by proponents of discovery requests as to why they should
19 obtain material, and that, therefore, all that we are doing is
20 shifting the field of argument. And they will argue now that
21 it's relevant to claim and defense, whereas before they would
22 have argued it's relevant to the subject matter. And they will
23 make the argument they want the document, and you will resist,
24 it's burdensome or costly to provide the document. And that
25 really the change you are hoping for is really not what will be

1 found in this change.

2 MR. JACKSON: You may well be right. I know that the
3 rule change won't affect how many cases we try because I went
4 back and tried to figure out over time. I am told from the
5 '60s through the '90s we tried less than 10 percent of all
6 these lawsuits that I have been talking about. So I don't know
7 that these rules will help in that regard.

8 THE HONORABLE JUDGE LEVI: You know George Stigler
9 once began a conversation by saying, "No lawyer would," and
10 Professor Kurland, the eminent University of Chicago law
11 professor said, George, "Stop right there. There is no way you
12 can finish that sentence."

13 (Laughter.)

14 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Jackson.
15 I appreciate your testimony.

16 Mr. Biskup?

17 MR. BISKUP: Distinguished judges and colleagues, good
18 morning. My name is Robert Biskup. I am senior litigation
19 counsel at Ford Motor Company in Dearborn, Michigan. Before
20 that I was a member of the Sidley & Austin law firm here in
21 Chicago and a member of the trial bar for this judicial
22 district.

23 My colleague, Dick Manetta appeared at the Boston
24 conference, and we wanted to appear here today to offer our
25 views on the proposed amendments based on what we believe is

1 experience that is somewhat unique among U.S. companies.

2 As I mentioned in my written submission, our in-house
3 legal staff handles virtually all discovery requests served on
4 Ford, about 4,000 requests every year. And so my comments
5 today are going to focus on the proposed amendments to Rule 26
6 and also the Rule 34 discretionary cost shifting proposal.

7 Our experience is that excessive document discovery is
8 the main source of delay and wait in litigation. The amorphous
9 Rule 26 standard --

10 PROFESSOR MARCUS: Can I interrupt? These cases are
11 in both state and federal court?

12 MR. BISKUP: Yes, that is correct.

13 PROFESSOR MARCUS: Do you find that focus and
14 limitation of this document discovery in the states which have
15 narrower scopes under their rules really varies from what
16 occurs in federal court?

17 MR. BISKUP: I've got to tell you, the vast majority
18 of states in our experience, the rules, the general entitlement
19 to discovery mirrors virtually exactly that in the federal
20 system. And I am really not in a position to comment on a
21 state that might have a narrow subject matter type standard
22 because I don't think we have very much experience in those
23 kind of states. We need more of that experience.

24 But we do see -- and if I can circle back to the
25 question that you originally asked, we do see a lot of the same

1 issues because, again, it's the same standard. What we do see
2 in federal court that is different is that we have a better
3 opportunity to have the up-front involvement of a judge or
4 magistrate because the case loads are smaller.

5 State court judges work in a very, very difficult
6 environment with a large number of cases and oftentimes a very
7 limited number of staff members. And that really creates a
8 situation that's fraught with peril for a party that is trying
9 to draw attention to unlimited discovery.

10 And what we are finding under this amorphous Rule 26
11 standard is that it's being used a lot both for tactical
12 advantage to courts, economic settlements, to exploit these
13 innocent mistakes and sanctions by -- or innocent mistakes by
14 seeking sanctions and default judgments, and to poison a
15 court's perception of a party. We've got about 4,000 lawsuits
16 pending at any given time. And in literally hundreds of those
17 cases we end up litigating the process, the discovery process,
18 as opposed to the facts.

19 I also want to say that we are seeing it happening in
20 not only the so-called complex cases, however one would propose
21 to define that, but also in the garden variety cases as well.
22 And, Judge Lynk, in response --

23 MR. LYNK: Just Myles Lynk.

24 MR. BISKUP: In response --

25 THE HONORABLE JUDGE NIEMEYER: Judge is okay.

1 MR. BISKUP: I want to respond to the question that
2 you asked the last speaker and share with you a couple
3 real-life examples of why we think the rules in their present
4 formulation aren't working and why the amendments will make a
5 difference. I am not going to belabor this, but I think a
6 couple of examples are illustrative.

7 In May '97, a teenager drove his '96 Mustang into a
8 ditch on his way home from a bar. Fortunately he was unhurt
9 but the Mustang was wrecked. The car was not insured, and the
10 driver sued Ford for the \$9,000 repair bill claiming that he
11 lost control of the car when the two air bags, driver and
12 passenger side, both deployed spontaneously. He denied that
13 the air bags deployed as a result of the crash.

14 But significantly he demanded discovery relating to
15 all claims or reports of defective air bags ever received by
16 Ford without any temporal limitation, for any car or truck, any
17 model, any type of air bag. The court overruled our objections
18 to that discovery and ordered us to produce the requested
19 documents.

20 THE HONORABLE JUDGE KYLE: Federal or state?

21 MR. BISKUP: That was a state court suit, Judge.

22 Because of the impossibility of complying we settled
23 the case at a price that was a lot higher than the \$9,000
24 repair bill. That's an example of the use of the scope I think
25 for tactical reasons.

1 Another real-life example arose out of a head-on
2 collision between a Ranger pickup truck and a Mercury Cougar
3 that had crossed the center line of a highway. Attorneys for
4 the injured plaintiff, who was in the front seat of the Ranger,
5 sued alleging that the front seat belt system was defective.

6 But the discovery demands were not limited to Ranger
7 pickup trucks or even front seat belts. They covered all front
8 and rear belts used in any car, any car or truck, ever produced
9 by Ford, every component of every seat used in any car or any
10 truck ever produced by Ford, and any aspect of field use or
11 accident experience of any car or truck.

12 Again, objection is overruled, and we were ordered not
13 only to produce those documents but to label them, index them,
14 and get it done in three weeks. Again, predictably it was
15 impossible to comply with that order, even though we worked a
16 hundred people every day for three weeks and did manage to
17 gather about three quarters of a million pages of paper.

18 But when we found it impossible to comply, our motion
19 for relief from the court order was met with, you guessed it, a
20 motion for sanctions, for contempt of court and to quash our
21 pleadings.

22 PROFESSOR ROWE: Was that federal or state court?

23 MR. BISKUP: This was another state court.

24 PROFESSOR ROWE: You said without time limit? They
25 wanted information about Model T seats?

1 MR. BISKUP: Anything we had. I don't think we had a
2 lot on the Model T. That's at the Henry Ford Museum in
3 Dearborn. But to the extent we had it, they wanted it. The
4 Model T, of course, did not have seat belts. So we didn't have
5 to go back to look for Model T seat belt documents.

6 But that one took a writ of mandamus and a lot of
7 wasted time and money to establish some ground rules. We have
8 had to locate and produce all seat belt studies from 1955 to
9 present and a case of alleging defective rear lap belt in an
10 '88 Aerostar minivan. And in a case involving a vehicle
11 stalling, we have had to gather and produce the files for any
12 safety inquiry that we ever received from a federal safety
13 agency.

14 Again I can go on and on, but the point is this:
15 First the problem is not limited to the complex cases. It can
16 and does happen everywhere because we think the current rules
17 have kind of roll-the-dice mentality because over-discovery, if
18 I can call it that, sometimes pays off, just like that Mustang
19 case. And second, while these kind of court orders do not
20 occur every day -- I am not here to say that; I would never say
21 that to this panel -- they do occur with alarming frequency, in
22 our judgment.

23 But just as importantly, the abuse of discovery
24 demands do occur every day. That's a point that I have not
25 seen in any of the papers that have been submitted, but I want

1 to emphasize that point because we invariably end up in the
2 same boat. Why do we end up in same boat? Because judges and
3 courts are understandably tired of refereeing these discovery
4 disputes.

5 To some extent perhaps they feel handcuffed by the
6 amorphous Rule 26 standard, even if they were inclined to
7 provide some relief. And they tell us to go work things out in
8 the side conference room with strong body language that you
9 don't want me to rule on this motion. And we are not dumb
10 people. We know what that means. It means, go give them the
11 documents regardless of how abusive and extensive.

12 And that's why, in our judgment, these amendments are
13 necessary. The current rules have created almost a de facto
14 right to boundless discovery, and they really contain no
15 meaningful deterrent to this kind of over-discovery, as I
16 called it.

17 And, Judge Niemeyer, in response to a question that I
18 think you have raised with the first speaker today, we think
19 one important, if can I call it, benefit of these amendments is
20 that it puts the cost benefit analysis up front, where we think
21 it belongs, and not after the fact when you are two or three
22 years into the case. You got this long and sorted acrimonious
23 history that's played out in the field. You got a sanctions
24 request in front of you. And the court is then being asked to
25 delve chapter and verse into the complex procedural history.

1 THE HONORABLE JUDGE CARROLL: What about the argument
2 that you cannot determine the benefits of discovery up front,
3 so that making any sort of cost benefit analysis is difficult?

4 MR. BISKUP: Are you asking me about the proposed --

5 THE HONORABLE JUDGE CARROLL: Cost bearing.

6 MR. BISKUP: -- cost shifting amendment?

7 Well, that is certainly something that we think is
8 integrally linked with the proposed Rule 26 amendment because
9 you don't want to be in a situation where courts will
10 automatically be bombarded with requests to take broad subject
11 matter discovery. And the Rule 34 proposed amendment I think
12 addresses that nicely because it requires the requesting party
13 to engage in a thoughtful analysis beforehand on whether the
14 proposed discovery is likely to yield some benefits, knowing
15 that when the request is made to the court, there might be some
16 discretionary cost shifting that's imposed.

17 MR. SCHERFFIUS: The proposed shifting of the cost
18 appears in 34. Do you see it limited to documents?

19 MR. BISKUP: I think I see it as primarily a document
20 issue. I don't really see it extending in a meaningful way to
21 depositions. I think that would be very difficult.

22 MR. SCHERFFIUS: What if it were moved to 26? Would
23 your answer differ?

24 MR. BISKUP: I think my answer is that I think it
25 belongs in Rule 34. And because it's there, when you link

1 these two together, I think the point, the real important point
2 there, is by having the combination of Rule 34(b) amendment and
3 the Rule 26 amendment, you are going to ensure that you are not
4 going to get a new brand of satellite litigation like that
5 which evolved when Rule 11 was enacted.

6 MR. SCHREIBER: Mr. Biskup, one of the issues that has
7 troubled me is, having been in an adversary system for 45
8 years, while justice is important, when you are litigating, you
9 want to win. That's what you, in effect, want to do for your
10 client.

11 If I were a defense lawyer, wouldn't it make sense for
12 me to always bring a cost shifting or cost bearing motion in a
13 complex case, because it may well be that I will find a judge
14 that will go along with me and then save a hundred thousand or
15 \$200,000 of discovery?

16 MR. BISKUP: I think like any wise counsel, you have
17 to weigh carefully such a request, just as you would moving
18 under Rule 37 or Rule 11. Those are motions that we don't take
19 lightly at Ford. We don't file them regularly.

20 MR. SCHREIBER: But the example of Rule 11 from 1983
21 to 1993 indicates that that motion for sanctions was brought in
22 a huge number of cases because one party had nothing to lose by
23 bringing the motion. The only thing that could be done was be
24 denied.

25 MR. BISKUP: We have a little different procedural

1 context though, remember, because if it works out the way the
2 proposed rules, I think, are designed to have it work out, the
3 discretionary fee shifting issue will be in front of the court
4 when the motion for leave to take subject matter discovery is
5 filed. That's when you're going to get the analysis of the
6 discretionary fee shifting.

7 So I don't see a wide range of fee shifting motions
8 for discovery that's limited to the matters that are framed by
9 the pleadings because it's not permitted under the amendments.

10 PROFESSOR ROWE: Excuse me, Mr. Biskup. I think you
11 may be assuming a link that is not there, or at least was not
12 intended to be there, that the motion to get to take subject
13 matter discovery was meant you are supposed to have to show
14 good cause. That is not that you can take subject matter
15 discovery if you are willing to pay for it under the cost
16 shifting.

17 MR. BISKUP: I understand that. But I think the point
18 I was trying to make, at least, I'm sorry if it didn't come
19 across clear enough, is that that issue of the cost shifting
20 should be joined at the same time.

21 PROFESSOR ROWE: In other words, if you have --

22 MR. BISKUP: If there is a motion before the court to
23 take broad subject matter discovery, based on a showing of good
24 cause, in a close call type situation, it might be allowed
25 based on perhaps some limited sharing. Take as an example a

1 back here and we will begin at 10:45. And then I am going to
2 try to be a little better traffic cop during the next session
3 this morning. And I hope you can cooperate with that.

4 (Brief recess.)

5 THE HONORABLE JUDGE NIEMEYER: Mr. Conway, is Mr.
6 Conway here? We will hear from you.

7 MR. CONWAY: Thank you. My name is Kevin Conway. I
8 am a plaintiffs' attorney. I represent injured victims in
9 somewhat complex product liability cases in federal court and
10 state courts, mostly in this jurisdiction but throughout the
11 country.

12 I would like to read a quote for you, a couple of very
13 brief quotes for you. Quote: This Court has repeatedly
14 emphasized that discovery rules are to be liberally construed
15 to further the ends of justice. Restricting parties to formal
16 methods of discovery would not aid in the search for truth and
17 it would only serve to complicate trial preparation. Discovery
18 should promote the discovery of the true facts and
19 circumstances of a controversy, rather than aid in their
20 concealment.

21 THE HONORABLE JUDGE NIEMEYER: Is that Hickman?

22 MR. CONWAY: No, no. This actually is a brief written
23 by many of the people who are coming in today asking you to
24 restrict discovery.

25 But the case was a case called Best, was an Illinois

1 situation where there is a request to go back and dig up yards
2 and yards of archived electronic data that we'll assume for
3 purposes of this discussion is well beyond the pleadings, would
4 ordinarily be considered, you know, some sort of fishing
5 expedition. But there is a request to take that discovery, and
6 there is at least an attempt at showing of good cause.

7 Perhaps the showing of good cause may not be quite
8 strong enough to push it over the finish line, but the court
9 might allow it contingent on the requesting party being willing
10 to pay the cost of hiring --

11 THE HONORABLE JUDGE NIEMEYER: Costs are linked to
12 areas in discovery which the court otherwise would not allow
13 because it's duplicative or is under 26(b)(2), (1), (2) or (3),
14 whatever those standards are. And it might be that we have to
15 clarify that. But the cost shifting is supposed to be
16 extraordinary remedy for avoiding denying discovery if somebody
17 is willing to pay for it, where a court would otherwise deny
18 it.

19 I think we are going to have to cut you off here at
20 this point, unless you have any further.

21 MR. BISKUP: No, that's okay.

22 THE HONORABLE JUDGE NIEMEYER: We are running late.
23 We are not making good progress. We finished seven witnesses
24 against 32. We are only going to hear witnesses today.

25 I am going to have a ten-minute recess. We will get

1 Supreme Court case where as part of a package of tort reform
2 measures there was an extreme broadening of the discovery that
3 the plaintiff had to provide the defendant. In fact, that
4 discovery in medical issues waived all privileges of plaintiff
5 to any medical records, including records that admittedly had
6 nothing to do with the issues in the case.

7 So it tore down all rules of relevancy, all rules of
8 privilege, and in fact took the court out of the role as
9 arbiter of discovery issues. The brief I read from was the
10 brief of the Illinois -- it was the brief of the Illinois
11 defense counsel who will be talking to you today.

12 What they were saying is there should be no
13 restrictions at all on discovery when discovery was owed to
14 them. This brief was written in 1997. The case was decided
15 December 1997.

16 THE HONORABLE JUDGE NIEMEYER: The morale of that is,
17 it really doesn't matter what the label is on the lawyer. The
18 asking party is always going to want more from the defending
19 party.

20 MR. CONWAY: Absolutely. My point is this: Changing
21 the rules is going to hurt somebody. It's going to help
22 somebody. When they wanted to change an existing rule the
23 other way, they were going to benefit. In this rule, by
24 changing it it's going to benefit people with documents. That
25 seems to be a particular concern of many of these people. It's

1 going to hurt those who are seeking the documents.

2 And I want to talk a little bit about logic. Who is
3 in the best position to determine whether or not the record
4 should be produced or not produced? Is it the person who
5 doesn't even know what the records are, who doesn't even know
6 what exists? Or is it the person who has the records and can
7 say, look, we know what we have, and they are not relevant?

8 Who should have the burden of coming in and telling
9 the Court, your Honor, these are not relevant because they have
10 nothing to do with this case. They can't even lead to anything
11 that has anything to do with this case. And it's going to cost
12 an arm and a leg literally. It's the person with the documents
13 who knows the burden on that person.

14 What you are doing -- or I am not saying what you are
15 doing because you haven't made a decision. But what the
16 proposal would do would change that burden to the person
17 seeking what he has no idea of. What he's saying or she is
18 saying --

19 THE HONORABLE JUDGE NIEMEYER: Which particular
20 proposal are you focusing on?

21 MR. CONWAY: I'm sorry. In my written matters, I
22 confined my written materials to 26(b), to the scope. And I
23 thought that's what I would really confine the talk to and that
24 would be the scope. Changing the scope of discovery I find
25 would be an extreme loss.

1 THE HONORABLE JUDGE NIEMEYER: Shifting the subject
2 matter to court supervision as opposed to attorney?

3 MR. CONWAY: No, I think it's already court
4 supervision.

5 THE HONORABLE JUDGE NIEMEYER: Of course we allow
6 subject matter discovery.

7 MR. CONWAY: Right.

8 THE HONORABLE JUDGE NIEMEYER: With court approval.
9 What --

10 MR. CONWAY: Absolutely. And restrictions. I mean,
11 the court brings in reasonable restrictions all the time.

12 As to the attorneys, you may not think so from the
13 attorneys before you, but they often talk and work out a lot of
14 these problems themselves, not only as to what they want but
15 also as to the expense. For instance, I have a hundred
16 thousand documents but they are in Pittsburgh, and they are in
17 a warehouse. And for me to bring them to Chicago would be
18 prohibitively expensive. But I would make them available to
19 you Monday to Friday next week and you and whatever group of
20 paralegals you have can go to our warehouse and look at our
21 documents. That is very typical of what happens to reduce
22 costs and bring them down to something we have at least
23 determined by agreement to be reasonable under the present
24 rules.

25 PROFESSOR ROWE: Were you here before the break when

1 Mr. Biskup from Ford was speaking about some of the example
2 cases he was mentioning that seats would go back to the Model T
3 if they had the records? And he was saying they couldn't get
4 court restraint on those and that forced them into unwarranted
5 settlement. And I don't know what your response is.

6 MR. CONWAY: I have had cases personally against Ford,
7 and I even had cases with -- I am aware of other cases that
8 because of discovery against Ford, liability of Ford was found
9 that they had denied, they had mentioned were privileged, they
10 had mentioned they couldn't find. You may know -- I will give
11 you an example you probably all know about, the Ford Pinto
12 crash cases, where when the Ford was hit in the rear, a Pinto,
13 that flames went into passenger compartments.

14 And in a particular case in the discovery it was found
15 out there were four or five crash tests. Every crash test
16 resulted in flames in the passenger compartment. That case was
17 a big national trial, huge verdict.

18 PROFESSOR ROWE: Did you have any trouble getting that
19 information under relevant to claim or defense?

20 MR. CONWAY: Let me give you the example of what
21 happened in a typical product liability case and what I think
22 may have happened without this rule; and that is, when you
23 first get the -- the plaintiff first is aware of the accident,
24 very rarely do they have the product. If they can't find the
25 product, basically the only knowledge they would have of how

1 the accident happened may be their dead victim, their injured
2 victim, witnesses at the scene and then documents.

3 So what they do is they ask some discovery saying, we
4 would like the information on claims of exploding cars or
5 claims of fires in these kinds. Well, there aren't any claims,
6 but there is testing data. And at the same time you might say,
7 we want Ford's testing data. Ford would say, we didn't have
8 testing data. We had a company outside with test data. They
9 say they don't have it.

10 But if you have very broad subject matter, you can
11 say, any testing data regarding fires that occurred in your
12 cars as a result of crashes. Well, if I said, gee, we got to
13 go back to Model T and everything else, well, I don't think
14 they did those kinds of tests back to the Model T. And I don't
15 think those are dead owners.

16 The truth of the matter is, they usually know what we
17 want and what we are looking for. And if they have a lot of
18 the documents, what happens is, they say, we have warehouses of
19 documents. We say, fine, let's work on some way to limit that.
20 Let's work on some way to limit them in scope. How about the
21 last ten years of documents? Where can we get those?

22 You can get them in Dearborn, Michigan. Well, fine.
23 How will you make them available to us? You can come up and
24 take a peek at them, you know, on these days.

25 MR. SCHERFFIUS: Mr. Conway, something I haven't heard

1 anybody with a comment on from your perspective or the
2 perspective that you are offering is, when you make these
3 discovery requests and assuming they are broad, and necessarily
4 broad, there is a tremendous expense to the person who is
5 requesting the documents to then do whatever needs to be done
6 also. So that's a check in place.

7 MR. CONWAY: Absolutely.

8 MR. SCHERFFIUS: Am I missing the point here?

9 MR. CONWAY: Not only is there a check in place, but
10 the system is that if we are looking and don't find anything,
11 we don't get paid. Okay. So actually the efficiency -- we are
12 very much in favor of efficiency. But we don't want the
13 efficiency told by them as to how we should be efficient. And
14 that's why I think they are in favor of this rule.

15 MR. SCHERFFIUS: I know if I am going to have to have
16 four paralegals and three lawyers spend six days in Dearborn or
17 somewhere going through documents, that's going to cost me a
18 lot of money and I will try to be reasonable about that.

19 MR. CONWAY: Not only that, but the economics of the
20 cases are such, unless we have a few deaths or some very
21 serious injuries, I wouldn't be up in Dearborn with a few
22 attorneys and a few paralegals. So it's only a small amount of
23 cases where I seek those types of documents.

24 I'd like to give you some --

25 THE HONORABLE JUDGE LEVI: If I can just interrupt --

1 THE HONORABLE JUDGE NIEMEYER: About a half a minute,
2 and I am going to cut everybody off. So if you can go --

3 THE HONORABLE JUDGE LEVI: Well, you are describing an
4 example where by mutual agreement you have agreed to cost
5 share. And you say when you have cost sharing, it imposes a
6 restraint on them.

7 MR. CONWAY: I am not saying cost sharing. I am
8 saying, what we do is like all discovery when there is some
9 dispute, we get together and try to figure out a reasonable way
10 to get where we are going. And we don't share cost, but what
11 we say we will do is we will make it very convenient for you.
12 We want to see them. We will go and we will do what it takes
13 to see them.

14 THE HONORABLE JUDGE LEVI: At your expense.

15 MR. CONWAY: And our expense we will go there and we
16 will bring our people. We aren't asking you to copy it at this
17 point. We'll try and limit. You still have to get them for us
18 or you still have to tell us where they are so we can get to
19 them.

20 You said I have half. Could I have half a minute to
21 give you an anecdote?

22 THE HONORABLE JUDGE NIEMEYER: Well, okay.

23 THE HONORABLE JUDGE CARROLL: If it's a good one.

24 MR. CONWAY: Well, this is one of the best I have
25 because it involved 300 cases in this district. The asbestos

1 litigation against Johns Manville. There is a plant in
2 Waukegan. And I asked very early on in the 1970s, when I
3 became an attorney for medical information they had as to the
4 dangers of asbestos. And first of all they said, we didn't
5 have any. I said, no, no. You have in-house doctors. I want
6 their information as to what they knew. And they go, it's
7 privileged because they are doctors. But Johns Manville isn't
8 your patient. I got through the privilege.

9 Then they told me, well, you know, we really don't
10 have any studies or any information, et cetera. There was a
11 strike in 1979 because I told the workers at the Johns Manville
12 plant about it, and they got their own medical records. And
13 you know what they showed? They showed medical exams by the
14 in-plant information, the information to be transferred and
15 told to the medical director in Denver, Colorado.

16 Anybody with an asbestos disease was red-tagged on
17 their medical records, and they were told to stay away from the
18 asbestos. Pretty hard since that's all they used in Johns
19 Manville in Waukegan. In addition, they had doctors writing
20 back from Denver to Waukegan saying, you know, tell them to go
21 to the TB sanitarium when they are sick.

22 It ended up that we originally started this case as
23 the dangers of asbestos. That was our original theory. Those
24 were our original pleadings. We ended up developing by getting
25 these records a medical fraud case because in hiding the

1 dangers of asbestos, it wasn't just a matter concealing
2 documents. It was a matter of lying, invading the
3 physician-patient relationship, and misinforming the patients
4 of plant doctors as to what their problems were with breathing.

5 And I tell you what, it took many years for us to find
6 that. I started in '76 getting that. In about 1980 I got it.
7 It blew the case wide open in many ways. And if I didn't look
8 at hundreds of thousands of documents, I would have never
9 gotten there.

10 And by the way, 300 cases did settle in this
11 jurisdiction, okay, not only with Johns Manville but with the
12 suppliers of the asbestos to Johns Manville. I only tried one
13 of those cases.

14 THE HONORABLE JUDGE NIEMEYER: You know, we can't
15 through rules cure abuse, and every example that you have given
16 is basically someone who didn't do the job. If they had gone
17 and giving those documents, they are all relevant, they should
18 have been produced. And it took you a while.

19 All right. I am going to cut you off. I have already
20 gone three or four minutes past, and I am not going to do a
21 very good job. What I am terribly afraid of, and I need to let
22 everybody know this, is I am going to end up cutting off people
23 at the end of the day. And we don't have any more hearings,
24 and so we have to move it along.

25 MR. CONWAY: Thank you.

1 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Conway.
2 Mr. Kopon.

3 MR. KOPON: Good morning, your Honor, members of the
4 committee. My name is Andy Kopon, and I practice here in
5 Chicago.

6 I am a current chairperson of the products liability
7 committee for the International Association of Defense Counsel.
8 My law firm is a small law firm of approximately 21 lawyers.
9 We act as national trial counsel for different product
10 manufacturers throughout the country. We also serve as
11 regional counsel for product manufacturers. And I currently
12 serve as national counsel for a self-insured risk-pulling trust
13 that includes universities and colleges around the country.

14 As a result, as part of my responsibilities I have to
15 review their bills as far as local counsel is concerned. So I
16 think I can agree with the committee that the overall goal here
17 of the proposed changes to lower the cost of discovery is a
18 worthy goal. It's something that needs to be done because the
19 cost of discovery is explosive.

20 And I would like to start -- I will keep my comments
21 brief -- picking up with what Kevin was talking about with
22 respect to restricting the scope of discovery. I think that's
23 a very worthwhile proposal and one that will help to cut down
24 on the cost of discovery.

25 Where defendant has to respond to discovery requests

1 that are not relevant, that's the person who's being hurt.
2 It's when the plaintiff goes on a fishing expedition to seek
3 records that are not relevant to a claim or defense, that the
4 defendant is injured. It's not trying to keep records secret
5 from an injured plaintiff where the records are relevant to the
6 claim or defense.

7 I handled the product liability case involving a
8 coffee maker, where the claimed defect of the coffee maker was
9 a thermostat. It was no issue as to that. And the discovery
10 request was for all claims, complaints and lawsuits involving
11 the coffee maker. We tried to restrict that to involving the
12 thermostat that was in the coffee maker that allegedly resulted
13 in a fire and burned down the building.

14 When we came into court seeking protections, our
15 motion was denied. And as a result we had to turn over all
16 complaints and claims and lawsuits involving the coffee maker,
17 whether it was a cracked coffeepot or any other cause for the
18 complaint. We produced boxes and boxes of records.

19 My client was put to a cost that really did not give
20 any information to the plaintiff to help the plaintiff's case,
21 that he could not have gained without seeking complaints or
22 lawsuits regarding the defective, alleged defective,
23 thermostats.

24 We're in a jurisdiction, I would like to focus on the
25 automatic disclosure rule. Practicing here in Chicago, which

1 has opted out of the automatic disclosure rules, I think we
2 have a good system here. I think it works. I think that's a
3 compliment to our judiciary, which is very active in case
4 management. We report to the Court at the outset of the
5 litigation. The Court tailors the discovery to the case.

6 If it's a case that is not appropriate for discovery
7 -- recently we had a couple ADEA cases that the Court looked
8 at, where the person who had been terminated found a job
9 quickly after having been terminated. The Court said, this is
10 a case that should settle, and rather than going through the
11 discovery process met with us and the case did resolve quickly
12 without having to go through an automatic disclosure procedure.

13 I think it's that type of intervention by the
14 judiciary, taking a hands-on approach to litigation, that is
15 the most effective way of controlling cost in today's
16 litigation. I think the cases that are not monitored by the
17 court, where the parties, particularly in employment law cases,
18 where parties may have very hard feelings and become
19 self-righteous in the positions, that litigation becomes
20 protracted and the costs become astronomical.

21 The self-insured risk-pulling trust that I was talking
22 about, the most costly piece of litigation is the employment
23 law case involving professors who don't receive tenure. The
24 very purpose of tenure is to give you the job, right? They
25 don't get the job, and so they file a lawsuit costing us

1 hundreds of thousands of dollars.

2 MR. SCHREIBER: Or the ones involving sexual
3 harassment.

4 THE HONORABLE JUDGE NIEMEYER: Yes.

5 MR. SCHREIBER: Tell me, however, if the judges are
6 doing a good job here in Chicago in federal court, why do we
7 need the changes?

8 MR. KOPON: Well, my personal experience is that the
9 automatic disclosure rules, I would prefer not to have the
10 automatic disclosure rules as proposed. But if we are going to
11 have automatic disclosure rules, I think the proposal by this
12 committee is better than what we have right now.

13 And if the committee is determined that this will save
14 cost in the broad picture -- I do not practice in jurisdictions
15 where there is automatic disclosure. So if there is a cost
16 savings there, it jump-starts the litigation, causes the
17 parties to come together to resolve the matter quickly or focus
18 the litigation, I can see that being a worthwhile undertaking.

19 THE HONORABLE JUDGE LEVI: Some of the judges in this
20 district apparently opted in on their own, so you got a
21 different practice from courtroom to courtroom?

22 MR. KOPON: Yes. And first we find out what the
23 judge's practice is. And regardless of what the judge's
24 practice is, they all will meet early with counsel. And there
25 are some variances, but the variances are not enough, I think,

1 to require automatic disclosure.

2 Then with respect to the seven hour limitation on
3 depositions, I think that's also a very good proposal by this
4 committee. I think that it should not apply to retained
5 experts though. I think there it becomes unworkable,
6 particularly in multiple-party litigation cases. But I would
7 think most depositions can be concluded within seven hours.

8 THE HONORABLE JUDGE NIEMEYER: That's because you guys
9 want to spend two days on the qualifications. Thank you, Mr.
10 Kopon.

11 Mr. Mulgrew.

12 MR. MULGREW: Thank you for hearing me, honorable
13 panel members. I will be very brief.

14 I am a practitioner from Peoria, Illinois. I work in
15 the trenches, in a mid-sized district. My firm is a defense
16 firm. And we operate in all of the courts of Illinois, with
17 largely the exception of the court we are in right now.

18 I believe that these rules changes are a good idea. I
19 have operated in the Central District of Illinois myself ever
20 since 1993, when the current 26(a)(1) was enacted. And in
21 representing defendants in large cases involving business
22 torts, in virtually every product liability case, the first
23 thing you're confronted with is how are you going to get the
24 documents that are contemplated by Rule 26(a)(1), given the
25 scope of that requirement?

1 Well, largely you can't. You try your best. You tell
2 your company that you have got to make corporate sweeps. It's
3 going to cost you a lot of money, et cetera. They tell you
4 they are doing this, but they are not, unless they are a
5 litigant all over like Ford Motor Company, et cetera. If they
6 manufacture hydraulic cylinders, for example, they don't
7 believe you when you say you've got to do a corporate sweep.
8 So you've got to see to it that they do the corporate sweep.

9 And then when you get all of the documents, you don't
10 really know if they meet the test. So usually the best thing
11 to do when you've got these documents is to give them over
12 under the subject matter test, because if you don't, you made a
13 mistake as to scope, then you may have your client sanctioned.

14 I believe that the narrowing of the scope under
15 26(a)(1) is a really good idea. And I hope, I hope, that it
16 happens. It's a lot easier and a lot more reasonable for each
17 party to look at the materials that support its claim or its
18 defense and give them over voluntarily. After that discovery
19 is concluded, then the lawyers, they can look at the holes in
20 the situation, and they can formulate appropriate additional
21 discovery further seeking matters relating to the claims and
22 defenses.

23 And then when they get that discovery, if they don't
24 think that they have got enough -- and in a lot of cases they
25 will think that they have enough. If they don't think they

1 have enough, they don't yet have the smoking gun, then they can
2 ask the court for help. And in most cases, certainly in the
3 Central District of Illinois, the court is going to be
4 reasonable. The court is going to be objectively reasonable.

5 I believe, however, that the courts might not be as,
6 quote, reasonable in favor of giving discovery when these rules
7 are adopted as they have been because it's been my experience
8 through the years that the scope of discovery has enlarged,
9 enlarged, enlarged, and while we are still using the same
10 subject matter test. I believe that this is an excellent step
11 in the right direction.

12 Now, with respect to depositions. I think everyone
13 can say that a seven-hour day, one seven-hour-day rule, is not
14 going to work in all instances. In the state court in
15 Illinois, as you have heard, we have a three-hour rule. That
16 doesn't work in many instances, particularly if you are
17 deposing an expert.

18 However, I believe this is a good presumptive rule.
19 The existence of the rule will probably shorten depositions
20 significantly. In cases where more than seven hours is needed,
21 the lawyers are going to agree because of the fact that it's
22 *comme ci comme ca*. So I think that it's a good rule, but it
23 should simply be presumptive.

24 With respect, however, to requiring the agreement of
25 the deponent, I think that just is unworkable. If a deponent

1 is being harassed -- and usually he is being paid. These
2 experts are being paid. Their time is not being stolen from
3 them. I believe that if a deponent believes that he or she is
4 being harassed, then he, through aid of his own counsel, can go
5 to the court and ask for a protective order.

6 Based on what I have seen of these rules and based
7 upon all of the materials that I have read supporting them and
8 condemning them, I think on balance this is an excellent step
9 in the right direction. And I thank this committee for
10 formulating them.

11 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Mulgrew.
12 I appreciate having your comments.

13 Mr. Wesely, is it?

14 MR. WESELY: Wesely.

15 THE HONORABLE JUDGE NIEMEYER: And Mr. Ausili?

16 MR. WESELY: Mr. Ausili will share my time, your
17 Honor.

18 THE HONORABLE JUDGE NIEMEYER: Yes, sir.

19 MR. WESELY: May it please the committee, my name is
20 Edwin Wesely.

21 THE HONORABLE JUDGE NIEMEYER: I'm sorry for messing
22 up your name.

23 MR. WESELY: No problem. Your Honor, I have come to
24 see that there are at least 11 different ways to spell Wesely.

25 In any event, I chair the courts committee on civil

1 litigation in district court to the Eastern District of New
2 York and have done so since inception more than 16 years ago.
3 I am joined by Peter Ausili, who is a member of our committee
4 and who will address some of the specifics in the report. I
5 wish also -- I wish also to salute our committee member who has
6 made really key substantial contributions to the work of the
7 court and the work of the committee, Sol Schreiber.

8 Now, what is also important is that our report, which
9 I believe has been provided to you, I provided it to Mr. McCabe
10 more than a month ago, that our report which was prepared after
11 very considerable discussion and consideration, was delivered
12 to Chief Judge Sifton on November 19. And at a meeting of all
13 of the board of judges in the Eastern District of New York, the
14 report was unanimously endorsed and approved.

15 Now, the committee on civil litigation and the court
16 commends this committee for their efforts to try to be
17 responsive to concerns of the bar, for your efforts to assure
18 that the Federal Rules of Civil Procedure be, in fact, national
19 rules. We had under the Civil Justice Reform Acts extensive
20 experimentation and across the board including many matters
21 which this committee, advisory committee, is addressing in
22 these proposals. A goodly number of them were highly
23 successful.

24 But even with respect to successful local procedures,
25 we opted to go with the national rule and have done so within

1 every case but one and that's because of the specific way in
2 which civil litigation is handled and pre-trial activity is
3 handled in the Eastern District of New York. I have to say
4 that a majority of the committee believes that most changes
5 would provide at best marginal benefits and many would do no
6 more than restate existing rule.

7 Now, I have been engaged in civil justice reform for
8 three decades, and there is one thing I have learned down to
9 the tips of my toes, and that is that institutional change is
10 glacial, glacial. And quite curiously, I, in connection with
11 reading for another matter, ran across the following comment by
12 Professor Robert Putnum, who is a professor of government at
13 Harvard, has written widely. And I take this quote from him:
14 "Where institutional building is concerned, time is measured in
15 decades."

16 And that notion of the glaciality of institutional
17 building permeates much of our report and the pieces
18 particularly, some of which, the Eastern District committee and
19 court are at odds with the committee.

20 Now, I will address -- Mr. Ausili will address other
21 pieces. I will address mandatory disclosure. First off, I
22 have to say that we have conducted extensive surveys of the bar
23 in the Eastern District of New York, have met with all of the
24 district judges and magistrate judges. And, No. 1, that in our
25 interviews with the judges and magistrate judges, they were

1 very strongly in favor of the view that mandatory automatic
2 disclosure had a positive effect on reducing cost and delay in
3 civil litigation.

4 And it is important to bear in mind that -- I also
5 chaired the court civil justice reform act advisory committee.
6 And we put in place -- as did Sol and Peter were on it -- and
7 we put in place what we then thought was going to be the
8 Federal Rules of Civil Procedure; namely, the 1991 advisory
9 committee draft amendments, which were much broader than what
10 actually went into place in '93. Our plan went into place in
11 '92, following this committee's recommendations of 1991, from
12 which it walked away in 1993.

13 Now, the judges and magistrate judges have noted for
14 us that mandatory automatic disclosure requirements, A,
15 encourage parties to communicate with each other earlier than
16 otherwise; two, provide an early exchange of information;
17 three, reduce contentiousness, and hence the need for judicial
18 intervention in discovery; and four, facilitate settlement
19 discussions.

20 Now, that's a pretty strong view and that's a view
21 that's held by the judges and magistrate judges of the court.
22 In our surveys of the bar, the lawyers were not quite nearly as
23 enthusiastic as was the courts. We had a survey in the spring
24 of '92 and fall of '93. And the results of that suggested that
25 mandatory automatic disclosure did not only have a significant

1 impact on reducing cost and delay, notwithstanding what the
2 judges believe. Less than 50 percent of those surveyed felt
3 that disclosure had reduced cost and delay, but the clear
4 majority felt that the disclosure requirements had had no
5 negative impact on civil litigation.

6 I have a comment in this area with respect to the Rand
7 study and the Federal Judicial Center study in these matters.
8 I believe that the Rand study is a more trustworthy study --
9 the Federal Judicial Center is a more trustworthy study than
10 the Rand study because it was later in time.

11 This is where glaciality comes into effect. And as
12 you all know, the FJC study showed that in districts where
13 mandatory disclosure was operational the lawyers liked it, and
14 in districts where it was not in use the lawyers did not like
15 it. I think that says a good deal.

16 The balance of my time I give to Peter Ausili.

17 THE HONORABLE JUDGE NIEMEYER: Mr. Ausili.

18 Thank you, Mr. Wesely. I appreciate your comments.

19 MR. AUSILI: Members of the advisory committee, my
20 name is Peter Ausili. I am a member of the Eastern District
21 Civil Litigation Committee. I'm currently a law clerk to a
22 federal district judge, Leonard Wexler in the Eastern District
23 of New York, where I have been for about five and a half years.
24 Prior to that I practiced in New York City in a large Manhattan
25 law firm, where my practice was primarily in commercial

1 litigation, mainly from the defense side.

2 I was just going to touch on a couple of the proposed
3 amendments and the committee's recommendations, which were
4 adopted by the court's board of judges. One was the length of
5 deposition. The committee does not support the proposed
6 amendment. Principally the committee believes that the
7 amendment is unnecessary given the court's existing power to
8 limit depositions under Rule 26 and Rule 30(d)(2) and the power
9 to impose sanctions as well for abusive conduct.

10 In the main, the court -- in my experience and in
11 discussing these matters with the magistrates and other law
12 clerks, the number of motions made to limit discovery or to
13 limit depositions are quite infrequent and rare. I would have
14 thought that was surprising, but it turns out most of the
15 attorneys are willing to work within the present system and to
16 limit discovery, limit the lengths of depositions on an
17 agreement basis or to seek the court to impose a limitation on
18 particular cases where there may very well be abuse. There are
19 certainly the cases where --

20 THE HONORABLE JUDGE NIEMEYER: Is a week-long
21 deposition under the rules an abuse?

22 MR. AUSILI: It can be in certain situations, yes.
23 And I think a week-long deposition in most situations probably
24 is an abuse.

25 THE HONORABLE JUDGE NIEMEYER: We heard from witnesses

1 from New York in particular who talked about that sort of being
2 the norm in complex cases.

3 MR. AUSILI: It probably should not be the norm.

4 THE HONORABLE JUDGE NIEMEYER: There is no norm, there
5 is no standard, under current rules. So to call that an abuse
6 or normal is hard to say in the absence of some standard.

7 MR. AUSILI: I think that Mr. Wesely referred to the
8 practice in the Eastern District. The practice is that when a
9 case is assigned initially, it is -- excuse me. When a case is
10 filed initially, it is assigned to both a federal magistrate
11 and to a federal judge. And there is very early judicial
12 involvement in the case, setting an early discovery deadline,
13 setting at least a prospective early trial date. So the
14 parties, in their initial conference, in their initial
15 scheduling order and scheduling conference under 16(b) are
16 encouraged to agree to the limitations as to discovery, and
17 also the lengths of depositions.

18 The committee felt that the creation of discovery
19 plans with the court and subsequent conferences with the court,
20 that adjustments can be made in the discovery plan. And if
21 there are abuses or if there are significantly lengthy
22 depositions or depositions that are of too great a length given
23 the circumstances of the case, that those things can be
24 corrected throughout the process by the attorneys and with the
25 court's involvement.

1 THE HONORABLE JUDGE NIEMEYER: One more minute.

2 MR. AUSILI: Okay. On the scope of discovery, the
3 committee also opposes adoption of that amendment. It's been
4 the experience in the district that the subject matter standard
5 is at least reasonably well understood, if not well defined,
6 and predictable and capable of manageable application by the
7 magistrates and judges.

8 THE HONORABLE JUDGE LEVI: Excuse me. Does the
9 district agree that there should be uniform national rules?

10 MR. AUSILI: Absolutely.

11 THE HONORABLE JUDGE LEVI: It's just what form those
12 rules take?

13 MR. AUSILI: Absolutely. We wholeheartedly endorse
14 the amendments that do seek to create national uniformity.

15 THE HONORABLE JUDGE KYLE: When you say "we," what is
16 the composition? Is it just the judges or is it the judges and
17 lawyers?

18 MR. AUSILI: The composition of the committee? The
19 composition of the committee are lawyers, court personnel
20 including the clerk of the court, myself. I am the only law
21 clerk on the panel. It is a variety, a broad spectrum of
22 practitioners. Law professors. I don't believe there are any
23 judges or magistrates. Ed?

24 MR. WESELY: Chief Magistrate Judge Chrein is an ex
25 officio member.

1 PROFESSOR ROWE: The list is at the end of the
2 statement, page 18.

3 THE HONORABLE JUDGE NIEMEYER: I think that's --

4 MR. AUSILI: Thank you very much.

5 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Ausili.
6 Mr. McCallister.

7 MR. McCALLISTER: Good morning, Judge Niemeyer,
8 members of the committee. I have submitted written materials,
9 and I will just shorten it to five or six minutes, given our
10 press of time.

11 I have practiced since 1975. I am licensed in
12 Illinois, Colorado and Kansas. I've practiced under both
13 notice pleading and fact pleading. I didn't come here with a
14 couple of observations, but I have learned and thought of a
15 couple as I have listened to some of the comments this morning.

16 I practice primarily in the areas of personal injury,
17 professional liability cases, products and antitrust and
18 business tort cases. And I have practiced across the country
19 in a variety of jurisdictions.

20 I'd like to address my remarks initially to the
21 narrowing of discovery under both Rules 26(a)(1) and (b)(1). I
22 oppose your proposed narrowing. I am concerned about the
23 changing of the burden. Mr. Lynk indicated, aren't we just
24 changing the obligation and focus of the arguments from subject
25 matter to the claims and defenses?

1 Well, I am concerned about the restriction of the
2 discovery. The subject matter rules, I think, are working
3 quite well. We have heard the defense and Procter & Gamble and
4 others here this morning say it has been a major burden upon
5 us. The FJC study, which seems to be the best empirical
6 evidence that we have before us, suggests to the contrary. And
7 most of the people find that the respondents indicated that the
8 discovery was working well, that it was not overly burdensome,
9 and that the right amount of information was being produced.

10 We have an undercurrent of information, you know, the
11 currents that are also going on in the discovery rule, and that
12 is, in my view, the proliferation of abuse of protective orders
13 and the withholding of information that we are not able to
14 otherwise find. I oftentimes am unable to know what it is that
15 I precisely need to ask for, and oftentimes they fall outside
16 of the claims and the defenses.

17 Other similar incidents, in automotive litigation, one
18 classic example. Alternative designs that are squelched as a
19 result of acquisitions of patents in commercial litigation and
20 antitrust matters are also matters often not directly within
21 the claims or the defenses.

22 The burden should remain on the respondent to the
23 request for production. They have the ability to come in. The
24 judges, in my experience, in the federal courts in particular,
25 are doing well to marshal the areas of discovery.

1 With regard to the uniformity of rules, I think that
2 it should occur. I came after 20 years of practice in Kansas,
3 and we would have cases ready for trial in a year to a year and
4 a half. Came to the Northern District of Illinois. And we had
5 the mandatory disclosure requirements in Kansas. It worked
6 well. We come here and I suggested often to the judges, even
7 that haven't adopted by their own personal rules. And they
8 seemed to be willing to do that, and it works well.

9 We have had cases here in Chicago where I would ask
10 for mandatory disclosures and/or under discovery plans, and we
11 would get virtually no information. I just concluded a case
12 against General Motors in federal district court in Wichita,
13 Kansas, and my mandatory disclosure response from GM, given
14 that I knew a little bit about the CK pickup truck fire cases,
15 resulted in 20 boxes of trial-ready exhibits. None of the
16 relevant crash tests, none of some of the other issues that
17 would have been involved concerning other similar incidents
18 which then went into direct discovery on five or six issues
19 that became the subject of motions to compel and protective
20 order, but it was very pointed.

21 Had that same case been filed in the Northern District
22 of Illinois, I can assure you I would not have gotten 20 boxes
23 of trial-ready defense exhibits in response to those mandatory
24 disclosures.

25 I also come before you as an advocate for your

1 proposed amendment for the seven-hour rule. The presumptive
2 seven-hour rule, I think, will cut across most all of the
3 cases. If we need to come back to the court for purposes of
4 expanding that, it can be done. The three-hour rule, in my
5 experience, in Illinois does not work particularly well, but
6 accommodations are made in 98 to 99 percent of the times to
7 allow for the deposition to occur in an orderly process and in
8 a timely manner.

9 PROFESSOR ROWE: Do you think we should exempt
10 experts?

11 MR. McCALLISTER: I think experts frankly should
12 perhaps be rolled into the 26(f) conference that's required and
13 allow the parties in the first instance to decide how long am I
14 going to have to take with those experts. I can tell you I can
15 take the experts that GM puts up in most every fire case of CK
16 pickup trucks in three to five hours.

17 MR. SCHERFFIUS: Would you eliminate what I call the
18 deponent veto?

19 MR. McCALLISTER: I would be quite concerned about the
20 deponent veto frankly. Perhaps if there is some -- I would
21 oppose that.

22 PROFESSOR ROWE: Oppose keeping it in, oppose taking
23 it out?

24 MR. SCHERFFIUS: You want to take it out?

25 MR. McCALLISTER: I would propose to take it out. I

1 would just as soon have the deponent not do that, if I am going
2 to have them make their own record. And then we take that
3 before the court as well.

4 But the uniformity of the rules, I think, is something
5 that is very important. The one point that I want to leave you
6 with, it's the burden, the burden and the knowledge, that they
7 must disclose the information ultimately when they appear
8 before you, is what triggers ultimately our ability from the
9 plaintiff's side to be able to get the documents. It's the
10 knowledge that they know it's probative, that it's relevant and
11 that they have that ultimate burden of candor when they come
12 before you. And if you change that mix by these proposed
13 amendments, I am afraid that you are unnecessarily and
14 inappropriately reducing and narrowing the scope of discovery.

15 Don't lose sight of how powerful your comments are to
16 the deciding judges on these issues. Thank you very much.

17 THE HONORABLE JUDGE NIEMEYER: Thank you. I
18 appreciate your comments.

19 Mr. Wise. Mr. Wise is appearing in lieu of Mr.
20 Demetrio.

21 MR. WISE: Thank you, committee members. I will be
22 brief because I think a lot of what my predecessor here just
23 spoke about is what I also agree with.

24 First and foremost, I think the seven-hour rule is a
25 pretty good rule. But with respect to Rule 26(b)(1) amendments

1 to narrow the scope of discovery from subject matter relevancy
2 to claim and defense relevance, I disagree with that. With
3 respect to the cost shifting proposals, I disagree with those,
4 and here is essentially why.

5 With respect to the narrowing of discovery from
6 subject matter to claim and defense, we are as a plaintiff
7 going to be into a horrible disadvantage because, No. 1, we are
8 heading into some of these cases a little bit in the blind. We
9 rely on some information received through discovery. We don't
10 have all of the claims or perhaps all of the defenses set forth
11 in the initial pleadings.

12 And what this proposal will do, I submit, is -- and
13 listening to some of the other people who were speaking before
14 me, I have noticed that some of these gentlemen are higher up
15 in the corporate sphere or strata. And then they come down and
16 they talk about what they think the rules will produce.

17 As one who's in the trenches more often than not, I
18 think what we will find is a blizzard of discovery disputes
19 about what the claim is, what the defense is, what that
20 specific discovery request is, what documents are being called
21 for, whether or not that fits within this discoverable range of
22 claim and defense or if it's outside in this general subject
23 matter. And we don't have too much guidance in those committee
24 notes as to exactly how do we analyze that, number 1.

25 Number 2, I think that all this time which is being

1 spent by these judges determining whether or not this
2 information on this particular case in a particular request,
3 that work done by the judges determining those rulings isn't
4 going to help future cases because they are so separate from
5 each other. And I think that instead of getting information
6 all up front, we are going to be slogging through issue after
7 issue after issue, discovery dispute after discovery dispute,
8 because people who want this proposal are the people who have
9 all the documents. That's the defendants generally.

10 THE HONORABLE JUDGE CARROLL: Is that happening now,
11 or you think just this change from subject matter to claim and
12 defense?

13 MR. WISE: I think we are having no problem right now.
14 I think the problem, to the extent there is one, is lawyers who
15 do not know what they are doing making ridiculous discovery
16 requests, or judges who are overworked and haven't got the time
17 to sift through line by line what should or shouldn't be
18 disclosed.

19 I have had privilege, I guess, listening to this. I
20 guess I've been the luckiest lawyer in here. I haven't had too
21 many problems. You sit down with the defense attorney.
22 Whatever you can't work out you talk to the judge. And he asks
23 you pretty succinctly --

24 THE HONORABLE JUDGE CARROLL: Why do you think that's
25 going to change?

1 MR. WISE: I think it's going to change because of
2 this: Here is going to be an opportunity now for defendants
3 not to have to turn over documents. They don't want to turn
4 over a lot of those documents in the subject matter, which is
5 broad, because many times when we are heading into these
6 discovery -- and I am going to talk about product liability
7 because that's mostly what I do in federal courts.

8 We request certain documents. They lead you in a
9 certain direction. All of a sudden you are like, this is new.
10 This is something that's good. Is it a claim or a defense?
11 Not in the initial pleading, but it is one now.

12 And when these plaintiffs have a right to exercise
13 their -- when they have a right to file this claim against the
14 motor manufacturer, whomever it is, and they have a right to
15 prosecute the claim for damages, maybe they learn things in
16 discovery. And I noticed in the committee notes, it seems as
17 if it's purposely aimed at discouraging clients or plaintiffs
18 from amending their complaints from the original pleadings to
19 add new claims or defenses. And I don't think that's right.
20 That's what I take from it, and I think --

21 MR. SCHREIBER: Counsel, you said that there are no
22 real problems. Have you done a statistical or a computer check
23 to see how many 26(b)(1) cases were brought to opinions in
24 1998?

25 MR. WISE: No, I do not. But I think this --

1 MR. SCHREIBER: Wait. Permit me, Mr. Chairman, to
2 testify for a moment.

3 I asked my librarian to do a computer check yesterday
4 of how many cases were reported on 26(b)(1) in 1998. And he
5 came up with 12, 12 written opinions. I asked him to do it in
6 1997, and he came up with seven. Maybe he doesn't know what
7 he's supposed to be doing. But on the other hand, I am just
8 wondering, does that fit your category that there were no real
9 problems? Or have the defendants just given up making those
10 motions?

11 MR. WISE: I don't know. But I don't think that these
12 rule changes are going to fix -- if there is a problem, the
13 problem is lawyers not cooperating and the judges not having
14 the time to fix the problems. These rule changes aren't going
15 to do anything except, I think, to the extent those problems
16 are already here, it's going to encourage a few more hoops to
17 jump through.

18 Now we are going to have to talk about what the claim
19 and the defense is, what these particular production requests
20 are, the particular interrogatories. And then if we can't
21 squeezed it into the claim or defense argument, now we've got
22 to establish good cause. We are going to have to brief that
23 issue. And we are always doing this in the blind a little bit
24 because we don't know what documents it is that we are looking
25 for. We don't have it. That's my problem with 26(b)(1).

1 With respect to Rule 34, the cost shifting, I think
2 there is already a mechanism in place that if somebody is being
3 unfair or is harassing or is oppressing the defendant, which
4 is, I think, the most people who have a problem with production
5 of documents, that there are mechanisms in place where the
6 judge can enter the appropriate order, whether he doesn't allow
7 the discovery or whether he makes the plaintiff pay for it or
8 the requesting party pay for it if it's unnecessary or
9 burdensome.

10 Here what you are doing, I think, is sending a message
11 to the litigants, to the defendants, tag those plaintiffs, make
12 them pay for it. And the plaintiffs are going to sit there and
13 go, I cannot afford to charge Mrs. Smith \$87,000 for these
14 documents. And I know it, so I am not going to go forward on
15 that.

16 And when the question is, you know, Ford comes up here
17 and says, this is costing us millions of dollars, it isn't
18 costing -- I think it is not costing Ford anything. Ford is
19 passing that cost on through the way it does business. State
20 Farm is in the business of litigating insurance claims. They
21 know exactly what it costs to litigate an insurance claim.

22 PROFESSOR ROWE: Didn't you say you thought the
23 authority existed already?

24 MR. WISE: Pardon me?

25 PROFESSOR ROWE: Didn't you say you thought the

1 authority existed already for the court to --

2 MR. WISE: Yes, I do. I think sufficient authority is
3 there.

4 PROFESSOR ROWE: Including the court ability to impose
5 costs?

6 MR. WISE: Yes. And when it's required, when its
7 required to stop abuses. That's the only time it ought to be
8 done. Here --

9 PROFESSOR ROWE: This is tied to the unduly burdensome
10 part of 26(b).

11 MR. WISE: I see that, and I think the way it can be
12 interpreted is that discovery, which is not technically claim
13 or defense related but is subject matter relevant, could now be
14 taxed and produced at the expense of the requesting party.

15 THE HONORABLE JUDGE ROSENTHAL: Could we clarify the
16 advisory committee notes to remove that link, make exclusive
17 that you cannot be required to bear the cost of discovery that
18 is found to be supported by good cause? Would that ease your
19 concern about the proposed change?

20 MR. WISE: It would.

21 THE HONORABLE JUDGE NIEMEYER: Okay. Thank you.

22 Thank you, Mr. Wise.

23 Mr. Beal or Beal. You can give me the correct
24 pronunciation.

25 MR. BEAL: John Beal.

1 THE HONORABLE JUDGE NIEMEYER: All right.

2 MR. BEAL: May it please the committee, my name is
3 John Beal. I have my own practice in Chicago. I do
4 plaintiffs' employment, civil rights and criminal defense. And
5 I am here as the chair of the Chicago Bar Association Federal
6 Civil Procedure Committee. We have submitted a written
7 statement, and there are two issues I'd like to address today.

8 The first one is to tell you that we support the
9 proposal for the seven-hour deposition. I will say we found
10 this to be a very controversial proposal, and generally with
11 the defense bar opposing it and the plaintiffs' bar supporting
12 it. But the Chicago Bar Association Board of Managers voted to
13 endorse this based primarily on the experience in Illinois with
14 the three-hour rule. There are a number of judges on the Board
15 of Managers and practitioners with extensive experience in the
16 state court. They believe the Illinois rule is working well,
17 and that seven hours is ordinarily sufficient for a deposition.

18 I personally have had a number of employment cases
19 recently where plaintiffs were deposed for three days where I
20 thought it could be done in one. And so I would certainly
21 welcome the rule.

22 We did note two points. One is, if you do have a
23 seven-hour rule, and it's a deposition taken out of the
24 district for a case in this district, then the question may
25 arise of how much time each party is entitled to if it's going

1 to be presented at trial, either read at trial or used as a
2 videotape. And that's not an issue if you don't have a limit.
3 And we don't have any specific language, but perhaps something
4 to the effect that both parties should have a reasonable
5 opportunity to depose the witness or something of that effect,
6 or perhaps the committee comments but where you have a --

7 THE HONORABLE JUDGE NIEMEYER: An assay type
8 deposition? They have been an assay deposition, one which can
9 be used as testimony at trial?

10 MR. BEAL: That's correct.

11 THE HONORABLE JUDGE NIEMEYER: I would think the
12 lawyers would be willing to agree to that, but certainly
13 courts. In other words, if you, both of you, were going out to
14 Toledo, Ohio, to depose a witness, and both of you said, well,
15 let's treat this not as a discovery but as an assay type
16 deposition, each of us will question as if we were in court,
17 and we won't put the time limits on. Wouldn't both of you
18 agree to that?

19 MR. BEAL: Well, the witness may, if you've got the
20 witness.

21 THE HONORABLE JUDGE NIEMEYER: That's the witness
22 veto, and I must say we are hearing so much problem with that,
23 I can tell you that the discussion among members is already
24 wondering whether we made a wise thing there, particularly in
25 view of the fact that Rule 45 gives a witness avenues to the

1 court.

2 But your main problem is with the witness himself
3 vetoing?

4 MR. BEAL: Well, I can frankly see in very contentious
5 cases the lawyer that served the subpoena saying, this is my
6 deposition. I am going to use all seven hours, and now if you
7 realize that beforehand you can go to the court. But if you
8 end up in Toledo and you realize there is a problem, then what
9 do you do? So some guidance on that might --

10 THE HONORABLE JUDGE NIEMEYER: One of our ideas is to
11 make the rules national. So the Toledo judge would be applying
12 the same rule.

13 PROFESSOR ROWE: Does the Illinois three-hour rule say
14 anything about time division between parties?

15 MR. BEAL: No.

16 PROFESSOR ROWE: So that has to be handled by
17 agreement among the lawyers.

18 MR. BEAL: Yes, that's correct.

19 THE HONORABLE JUDGE KYLE: Does it draw any
20 distinction between so-called discovery deposition and the
21 trial deposition?

22 MR. BEAL: Well, in Illinois you have to put in the
23 notice that it's an evidence deposition beforehand if that's
24 going to be the case. So it's --

25 THE HONORABLE JUDGE KYLE: It just strikes me that the

1 trial deposition, if there is such a thing, ought to be shorter
2 than the discovery deposition. At least in my court it better
3 be shorter than the discovery deposition.

4 MR. BEAL: It could be edited.

5 THE HONORABLE JUDGE NIEMEYER: Okay.

6 MR. BEAL: In any event, those are our observations on
7 that rule, but the rule itself we do endorse.

8 On the Rule 26 provisions, however, we oppose that.
9 And we focused on the opt out, that in this district it works
10 well. Basically we are taking the position, "If it ain't
11 broke, don't fix it."

12 I personally think there is actually a little bit --
13 it could exacerbate the problems rather than help them from the
14 perspective if you view the court as a chain and the chain is
15 only as strong as its weakest link. I think that the weaker
16 judges in the district court, and I have appeared in front of
17 every judge in this district, now have trouble keeping up with
18 their motions to dismiss and summary judgment motions. Now you
19 are going to be dumping a whole load of discovery requirements
20 on them in every case. And these judges generally try to stay
21 out of discovery disputes, and I think that you are going to
22 exacerbate the --

23 THE HONORABLE JUDGE NIEMEYER: Was it Mr. McCallister
24 who practiced here and outside, who just testified a few
25 minutes ago? And he thought it worked pretty well even here

1 with the judges who were using it.

2 MR. BEAL: Well, there aren't very many that use it.
3 And I think that -- I mean, we don't have any opposition to a
4 judge being allowed. The district has opted out, and then a
5 couple of judges have opted in.

6 THE HONORABLE JUDGE NIEMEYER: I guess my question is
7 really focussed on whether your committee is just opposed to
8 change because it's working well, or whether you are opposed to
9 disclosure? Because apparently those who are using disclosure
10 seem to find it successful and okay. And then the question
11 becomes, all right. If it's an acceptable thing, what's the
12 service, what is the function it serves and should the
13 committee, this committee, make it a national rule?

14 MR. BEAL: We have a number of judges who explicitly
15 don't allow disclosure, who require authorization of all
16 initial discovery. And they are very effective judges. And
17 what we think you are doing is imposing on them a different way
18 of doing things and things work well now.

19 So we like the present system. We think it works
20 well. We think that the proposals will cause problems as well
21 as solve problems. And I was just suggesting one problem is
22 giving additional discovery dispute to judges that don't need
23 them -- not discovery disputes, discovery matters, I mean,
24 having to deal with every case.

25 And so we think that -- I mean, I understand your

1 question. But from the point of view of the Northern District
2 of Illinois, we don't think we need it, and we actually think
3 it would do some harm, I mean.

4 THE HONORABLE JUDGE NIEMEYER: Okay. Thank you very
5 much.

6 MR. BEAL: I just have one other comment, and that is
7 that with respect to out-of-district practitioners, the
8 Northern District has a fine website in which every judge has
9 his or her standing order. And so it's very easy to find out
10 how each judge handles these matters by simply going to the
11 court's website in your own office in Wichita and finding out.

12 THE HONORABLE JUDGE LEVI: It's really more
13 fundamental than that. I don't want to debate it with you, but
14 you practice in the criminal area. You think it would be
15 plenty odd if Brady versus Maryland applied in the Eastern
16 District of California and not in the Northern District of
17 Illinois.

18 And so some districts have this civil disclosure rule
19 which is similar to the Brady rule, and it affects the entire
20 pre-trial practice so that's it's not just a question of
21 finding out how they do it. It's that they are practicing --
22 their Federal Rules of Procedure for federal law is radically
23 different. And it can be in some cases outcome determinative.
24 So you don't have a national system anymore.

25 Now, your Judge Aspen, a good friend of mine, has

1 accused me of trying to put a golden arch over every federal
2 courthouse in the country, and I suppose I plead guilty to
3 that. I think there should be uniformity. It's not just a
4 question of transaction cost. It's a question of having
5 uniform procedure for uniform substantive law.

6 MR. BEAL: I think you should have uniform discovery
7 substantive rules, but I think that the procedure, that there
8 is room for variation, and that the variation in Illinois is
9 effective, it's efficacious and should be left the way it is.

10 THE HONORABLE JUDGE NIEMEYER: All right. Thank you,
11 Mr. Beal.

12 Mr. Pfaff.

13 MR. PFAFF: Good morning. I am Bruce Pfaff. I very
14 much appreciate the opportunity to be here.

15 I am the current Illinois chapter president of the
16 American Board of Trial Advocates, which is a group of
17 plaintiffs' and defense lawyers nationwide who are interested
18 in the Seventh Amendment right to jury trial and enhancing
19 professionalism. I am also a plaintiffs' personal injury
20 lawyer. Most of my practice for the last 20 years has been
21 medical malpractice and product liability.

22 The discovery issues that I see and the reasons I have
23 to object to some of the proposals is that what we may do as a
24 group, what this committee will end up putting in comments,
25 will be looked at very seriously by judges, by defense lawyers

1 and plaintiffs' lawyers, and I think that limited discovery
2 will reduce the ability of plaintiffs to get information they
3 are entitled to under the present rules and that will enable
4 the parties to reach a just determination of their cases.

5 You have some rules proposals that I very much favor.
6 I simply want to comment on the seven-hour rule. We have had a
7 three-hour rule in Illinois for three years. I have taken or
8 defended approximately 300 depositions in that time, doctors,
9 engineers, neurosurgeons and the like. I have taken three
10 depositions that have exceeded three hours. I produced three
11 witnesses whose deps took longer than three hours.

12 This is not a problem. These are serious cases
13 involving lots of money. And big lawyers get stepped on. If
14 there is a judge around and you need more than three hours, you
15 get it done. We are all grown-ups here. Paul Price who
16 testified earlier --

17 THE HONORABLE JUDGE NIEMEYER: Sounds to me like our
18 seven-hour rule is too long.

19 MR. PFAFF: I think it is.

20 PROFESSOR ROWE: Any difference with experts?

21 MR. PFAFF: No problems at all. I have had cases
22 where the defense lawyer called me and said, you know, it's
23 going to be longer than three, and I said, fine. If I am
24 accorded the same courtesy, it doesn't matter. I have had
25 cases with Ford. Recently I took one of their engineers in

1 five hours. He is the spokesman on seat design. It took five
2 hours.

3 Beforehand I called the lawyer and said, this is the
4 way it's going to go. You will be accorded the same courtesy.
5 That situation, that rule that you have, works terrifically. I
6 think the seven-hour proposal is wonderful. I think
7 witnesses --

8 THE HONORABLE JUDGE NIEMEYER: I wish we had had you
9 on our field trip. We go around the country and talked about
10 some other places that don't have the experience. I think
11 there is enormous fear about the rule, and we've acknowledged
12 during these hearings in other places that if we have made a
13 mistake, we are going to fix it.

14 But it seems to me most lawyers are not interested in
15 hassling each other. They want to get on with the business.
16 And if we give them a norm, they will try to work within it.
17 And it gives a norm as opposed to now we don't quite know what
18 the norm is.

19 MR. SCHREIBER: Counsel, what do you do with multiple
20 parties who have separate defendants' counsel?

21 MR. PFAFF: They have to work out their time.

22 MR. SCHREIBER: How much time do you give them?

23 MR. PFAFF: It's a three-hour deposition. If they are
24 deposing -- for example, I have a case where five defendants
25 were deposing the parents of a child who died in the hospital.

1 The deposition took about three and a half hours. One lawyer
2 took about two and a half hours. The others all agreed. They
3 worked in their time.

4 MR. SCHREIBER: You can do that with an expert, too,
5 when you have five separate defendants?

6 MR. PFAFF: Five separate defendants, I would expect
7 not. I would expect those lawyers would call me before the
8 deposition and say, Bruce, we are going to need more time. And
9 I will say, certainly. I mean, we just have to be realistic.
10 I think the lawyers are working out a lot of the problems.

11 I do have problems, and I put them in my papers, with
12 some of the corporate defendants, including some of the people
13 who testified here today. With respect to the Traxler versus
14 Ford opinion, which I have enclosed, I would very much urge the
15 committee to read page 2. There is a strategy of stonewalling
16 and dumping that goes on in products cases that I see all the
17 time. I have enclosed three --

18 THE HONORABLE JUDGE NIEMEYER: Stonewalling is too few
19 documents and dumping is too many?

20 MR. PFAFF: At the end of the case they will dump. In
21 the Traxler case, Ford dumped 62 boxes of relevant discovery
22 that the trial court had ordered on the plaintiff just before
23 trial. The trial court called that conduct a lot of different
24 things, but those findings were affirmed on appeal.

25 That particular type of conduct I see all the time. I

1 have attached three product liability document requests. And
2 you will see the standard response, which is, it's vague,
3 overbroad. We are not going to give you anything. Or it's
4 vague, overbroad. You want all the documents concerning the
5 design of the Ford seat? They will give you five design
6 drawings.

7 Or how about the design memos? How about the design
8 analyses? These are things you don't get as a plaintiffs'
9 lawyer without motions. And my concern -- and obviously there
10 are abuses on both sides, but my concern is if you limit the
11 scope, as a practical matter a lawyer goes to court, and the
12 judges have to hear these motions if the lawyers don't agree.
13 I see judges giving half a loaf, and I think that's human
14 nature. The plaintiff comes in and says, I want all these.
15 And Ford says, it's a big burden, so, you know, the judge tends
16 to come down in the middle.

17 We are not practicing today, I don't think in most
18 cases, with the wide, broad discovery that we have in Rule
19 26(b). I think as a practical matter, between lawyers in most
20 cases the discovery is narrow, because if I ask for a group of
21 documents and the defendant has 100 pieces of paper that
22 comply, I will probably get those hundred pages.

23 I don't know if the defendant has a hundred thousand
24 pages that meet that document request, but if they do, that
25 lawyer will bring it to my attention, to bring it to the

1 court's attention, and there will be a reasonable resolution.

2 But because of the tendency to give half a loaf, or a
3 requesting lawyer to accept half a loaf, if you make the loaf
4 smaller it's going to hurt everybody in terms of getting a fair
5 resolution of their cases.

6 MR. SCHERFFIUS: Physically the claims and defense
7 change, or is it the shifting of the burden, or is it both that
8 you object to?

9 MR. PFAFF: The claims and defenses is, I think, the
10 key vice of the proposed rule. I think if we go to that narrow
11 a standard under 26(b), there will be a whole category of
12 documents that plaintiffs aren't going to see in these types of
13 cases.

14 MR. SCHERFFIUS: Then you are saying, given the claims
15 and defenses change, you would then object also to a shifting
16 of the burden?

17 MR. PFAFF: Absolutely.

18 MR. SCHERFFIUS: If you had claims and defenses, could
19 you leave burden where it is; that is, on the one not
20 producing?

21 MR. PFAFF: There is a real problem because a
22 requester will not know what he or she is not getting. And if
23 the burden is on the requester to show good cause to give me
24 something I don't know about, it's a Catch 22. How do you
25 prove that there is something good out there, that's within the

1 wider sphere unless you know what it is? And only the
2 responder is going to know what's within that sphere that you
3 are not getting.

4 THE HONORABLE JUDGE ROSENTHAL: How hard is it to find
5 out that information? For example, how hard is it for you to
6 learn when you have been given design drawings that you have
7 not been given design memos and you have not been given other
8 form of documents that may be claim or defense related or
9 may --

10 MR. PFAFF: Or they may not be.

11 THE HONORABLE JUDGE ROSENTHAL: But by the same token,
12 you might be able through the same steps that you take to find
13 out that there are other kinds of drawings, related materials
14 or support materials out there, that there are documents out
15 there which you would need to determine whether there is a
16 basis for you to assert additional claims or defenses, which is
17 one way perhaps to think about good cause.

18 MR. PFAFF: Well, the issue is always going to relate
19 to if a party gives you everything you are entitled to under
20 claims and defenses, then the issue will not be as hard to show
21 some good cause. The everyday practice of law doesn't work
22 that way. Unfortunately the everyday practice of law, the
23 requester has to initiate the Rule 37 conference, has to
24 initiate, tell me what you've got, tell me why I'm not getting
25 it.

1 I think the shoe frankly is on the other foot under
2 Rule 37. Anyone not producing, in my view, the plaintiff or
3 defendant, should have the burden to meet and confer with the
4 requester to say, you have asked for this world of 100,000
5 pages, and we think you ought to narrow it to this.

6 THE HONORABLE JUDGE CARROLL: That exists under the
7 present rule, doesn't mean requirement to file a motion to
8 compel or a motion for sanctions.

9 MR. PFAFF: And it's on the part of the requester, and
10 the requester doesn't know what's behind closed doors.

11 THE HONORABLE JUDGE CARROLL: I am losing your point
12 somewhere.

13 MR. PFAFF: The document response that you got says,
14 we are going to give you the five design drawings, and
15 everything else we object to as vague, overbroad, irrelevant,
16 whatever. The plaintiff doesn't know what's back there. We
17 don't know what documents are out there. They haven't --

18 THE HONORABLE JUDGE CARROLL: This has nothing to do
19 with the claim or defense subject matter rule changes. This is
20 life.

21 MR. PFAFF: This is the stonewalling life. But if you
22 do narrow the scope, you are still going to have the same
23 problem of judges understandably hearing both sides and
24 awarding half a loaf. And half of a large loaf is a lot better
25 than half of a small loaf if you are trying to prove your case.

1 THE HONORABLE JUDGE CARROLL: You have four examples
2 in your materials. I am not sure I agree with all of it, the
3 change has anything to do with the problem here. Have you got
4 any more examples of how the change adversely affects your
5 practice?

6 MR. PFAFF: Other than those that I gave in writing,
7 no.

8 THE HONORABLE JUDGE NIEMEYER: Okay. Thank you, Mr.
9 Pfaff.

10 MR. PFAFF: Thank you very much.

11 THE HONORABLE JUDGE NIEMEYER: I am told that
12 arrangements for the lunch for the committee will require us to
13 adjourn for lunch at 12:10 because we are going to try to get
14 in and out. And I am going to adjourn at 12:10 until 1:15 for
15 that. And there is also one witness that got left off of the
16 list, and I think that it's an appropriate time to insert that
17 witness. Mr. Todd Smith, is he here?

18 Why don't we hear from you, and depending on how long
19 you go, we will probably reach Mr. Beisner, is he here, at
20 1:15. Does that work okay?

21 MR. SMITH: Thank you very much. I appreciate you
22 recognizing me at this time. There is a number of people I
23 know that are waiting as well.

24 Again, my name is Todd Smith.

25 THE HONORABLE JUDGE NIEMEYER: Waiting for your

1 testimony or waiting for --

2 MR. SMITH: I will try to be brief. I heard some
3 things that I will speak consistently with. I tell you who
4 those people are. Mr. Pfaff, in fact, Mr. McCallister.

5 I practice here in Chicago, I am here, however, on
6 behalf of ATLA, the Association of Trial Lawyers of America. I
7 serve on their legal affairs committee and have for a number of
8 years. I just returned from the meeting in which we discussed
9 these rules. And --

10 THE HONORABLE JUDGE NIEMEYER: Excuse me. You know
11 ATLA did work with us at Boston College, and I think we even
12 had the president out at our San Francisco meeting.

13 MR. SMITH: Mark Mandell, perhaps?

14 THE HONORABLE JUDGE NIEMEYER: So I am happy to have
15 you here to receive your testimony.

16 MR. SMITH: Thank you very much. I speak on behalf
17 of, Mr. Mandell and the legal affairs committee, but basically
18 addressing the Rule 26 and 34 changes. We believe that those
19 changes -- by the way, we will submit written materials on
20 February 1, Monday, February 1.

21 We believe, generally speaking, taking together the
22 amendments will contribute to a degradation of access to
23 justice in our country presently enjoyed by plaintiffs in tort
24 actions, which are predominantly who we represent for the most
25 part. We do represent other areas of the practice. We

1 represent both sides of family law practitioners and commercial
2 matters, but primarily in tort actions we represent the
3 plaintiff.

4 We also believe that the reasons for these proposals
5 have been exaggerated to a great extent. And I think that was
6 pointed out just a bit ago. In my view, 12 decisions in a year
7 is not that extensive. In my view, seven decisions in another
8 year is not that extensive.

9 MR. SCHREIBER: I hope these figures are right.

10 MR. SMITH: I am willing to accept them. But I do
11 know that there is a significant exaggeration going on here. I
12 don't think the amount of paper, the length of depositions, the
13 dollar cost of discovery proceedings, the difficulty of
14 identifying and obtaining the assistance of qualified, credible
15 experts, or the challenges of obtaining a discovery for the
16 opinions on opposing experts is really the major thrust.
17 What's really going on for the most part is a failure in tort
18 litigation to obtain discovery.

19 I think these rules are going to narrow even more the
20 ability of the tort plaintiff to obtain access to justice. I
21 think you can see it in a number of cases that have been
22 decided. In our papers we will provide to you on Monday, there
23 will be citations on this matter.

24 Secondly, we have seen a long-standing practice, and
25 Mr. Pfaff pointed it out, of stonewalling, and I think this

1 does assist in the stonewalling that will go on, the claims and
2 defenses primarily, narrowing that down. I think also what you
3 are going to find is, you are going to move de facto away from
4 notice pleading, and you are going to have to have a much more
5 extensive fact pleading type of --

6 THE HONORABLE JUDGE NIEMEYER: We have heard about
7 stonewalling and dumping and nuclear discovery. And I am
8 absolutely confident that there is a lot of abuse out there.
9 Discovery is a tool used to obtain some other end or punish.
10 And there have been efforts made over the periods of time to
11 try to get at it. One of them was Rule 11 and Rule 37. And I
12 don't know if it's time for us to look at that again. A lot of
13 districts talk about codes of conduct and civility and ethics.

14 But I have heard from several witnesses today about
15 abuses which I am not sure, it's interesting to hear them and
16 we should be hearing them, but I am not sure that they go to
17 the architecture of the rule when used by fully compliant and
18 proper practice. In other words, if you have attorneys on both
19 sides trying to actually follow the rule the way it was
20 designed, do we get to a good result?

21 And I am not sure we are going to find those two
22 lawyers in a single case, but that is sort of what we are
23 trying to aim at and then see if we can't get the lawyers and
24 the bench to try to enforce it in that way.

25 MR. SMITH: Well, I am not sure if I am hitting your

1 point here, but when it was raised a bit ago, I believe the
2 Ford counsel raised the Model T and the seat belt discovery on
3 that, I suspect we shouldn't be driven by those kinds of
4 anecdotes in making changes. The exceptional, the rare,
5 occurrence out there should not be the reason for making
6 changes in the rules.

7 THE HONORABLE JUDGE CARROLL: Can you give any
8 concrete example where this change really makes a difference as
9 you posited it, affecting the rights of plaintiffs, litigants,
10 in those sorts of cases?

11 MR. SMITH: Where the claims and defense --

12 THE HONORABLE JUDGE CARROLL: Is it a perception that
13 this is going to go on, or is it really a difference?

14 MR. SMITH: I think because we haven't really
15 practiced it, I think it to a great extent is a perception.
16 But if you are responsible for keeping the discovery that
17 narrow, I mean, given the opportunity, I think you are going to
18 have that happen and that you are completely shifting away from
19 the way discovery is intended to be broad and calculated to --

20 THE HONORABLE JUDGE CARROLL: You suggested it's that
21 narrow. I don't know that I share that view with anybody else
22 that any of us intended it was going to be that narrow.

23 MR. SMITH: I think that is the perception certainly
24 that virtually every member of the committee that I just came
25 from had with regard to where this was going, that claims and

1 defenses was really narrowing it substantially. That's the
2 perception that's out there.

3 MR. SCHERFFIUS: We also hear repeatedly from other
4 interests, shall we say, that it's sending a message. It's a
5 change of philosophy, and all of a sudden maybe perception
6 becomes reality.

7 MR. SMITH: Yes, I would say that's true. We do hear
8 that as well.

9 THE HONORABLE JUDGE CARROLL: But there again, to
10 follow up on Judge Rosenthal's question to another person, if
11 we were to make clear the comments that this wasn't supposed to
12 be a significant narrowing of the motions of relevance, would
13 that help with your problem?

14 MR. SMITH: I suspect that it would. I think that
15 would have to be awfully clear out there that that's not what
16 was intended. You know, the fact, that it is actually being
17 narrowed to that, I think that's going to be readily
18 interpreted in that fashion.

19 MR. SCHERFFIUS: Unlike everybody that has pushed
20 historically for this change, certainly views it as a
21 narrowing. I am talking about organized groups. I don't mean
22 individuals.

23 MR. SMITH: I think that's absolutely correct. And
24 it's my perception that that's been the argument that's been
25 made as well, that there essentially needs to be a narrowing.

1 THE HONORABLE JUDGE KYLE: Even if you assume, as I
2 think you can, that it does represent a narrowing, by showing
3 good cause you are right back where you were under the old
4 rule.

5 MR. SMITH: Well, the response naturally to that is
6 what you are creating is satellite litigation. You are coming
7 in and having to establish the good cause. And if it's an
8 intent to narrow in the first place, there is going to be a
9 natural reluctance to provide that opportunity for further
10 discovery.

11 I think what you are really going to have is a lot
12 more litigation revolving around the discovery issue after you
13 have attempted to narrow in this way. And I am not so sure
14 that you want to be providing that. I think it was pointed out
15 earlier, the nature of the burden on the federal judges as it
16 is already and the kind of delay that may be associated in
17 civil cases because of the criminal calendar.

18 THE HONORABLE JUDGE KYLE: Put aside -- I know you
19 don't put them aside. That's one of the reasons for these
20 changes. Put aside the cost for time and expenses for going
21 into court to make that showing of good cause. Are you
22 concerned that you will not be able to establish it, that a
23 federal judge or a federal magistrate judge is not going to be
24 receptive to broadening out the discovery?

25 MR. SMITH: I think there is a natural tendency to try

1 and limit the discovery. I think that's the way this rule is
2 going. So will I able to establish good cause? I think that
3 will be not so much that I won't believe and believe indeed
4 that I have good cause, but that will be a natural tendency to
5 limit it and not provide it, despite the fact that I may get to
6 that threshold.

7 I did want to comment just briefly, and I know we are
8 running over, it's on to the Rule 34(b). ATLA is opposed to
9 that change. There has always been a tendency, and our
10 position has been strong in this regard, not to impose costs on
11 individuals across this country for obtaining access to
12 justice. This is yet another proposal that does indeed do
13 that.

14 THE HONORABLE JUDGE NIEMEYER: I gather you do
15 understand that that cost is available only where discovery
16 would not otherwise be available.

17 MR. SMITH: I understand that that is the proposal. I
18 think it does, though, nudge our system yet further in that
19 direction. And I think it's a dangerous direction for us to
20 go. The kinds of costs that are associated with product
21 liability cases are legitimate cases. And by the way -- well,
22 the legitimate cases I don't think that we want to be going in
23 that direction.

24 THE HONORABLE JUDGE LEVI: Does ATLA support the 26(a)
25 proposal?

1 MR. SMITH: Yes.

2 THE HONORABLE JUDGE LEVI: You do.

3 THE HONORABLE JUDGE NIEMEYER: Disclosure?

4 THE HONORABLE JUDGE LEVI: Disclosure, the uniform
5 national disclosure. Will you be supporting that?

6 MR. SMITH: They didn't get into the discussion of
7 that specifically.

8 THE HONORABLE JUDGE NIEMEYER: When you go back --

9 MR. SMITH: I am sure we can submit in the writing we
10 will submit to you on Monday the answer to that question.

11 THE HONORABLE JUDGE LEVI: Some of us think it's very
12 important, and the ATLA representative in San Francisco --

13 MR. SMITH: Mr. Smoger perhaps?

14 THE HONORABLE JUDGE LEVI: -- indicated generally that
15 he agreed it should be a uniform federal practice.

16 THE HONORABLE JUDGE ROSENTHAL: Is it safe to say
17 there is no opposition?

18 MR. SMITH: Pardon me?

19 THE HONORABLE JUDGE ROSENTHAL: Is it safe to say
20 there is no opposition?

21 MR. SMITH: I am not personally opposing it. I don't
22 believe that -- if Mr. Smoger said that, I suspect that that's
23 where we are going. He was in the meeting the other day with
24 me. I suspect --

25 THE HONORABLE JUDGE LEVI: You might want to remind

1 him of that.

2 MR. SMITH: And I'll make sure it's in our comments on
3 Monday in the papers we will file.

4 PROFESSOR COOPER: Could I ask a question back on the
5 cost bearing, 34(b). This may be beyond your brief, but if you
6 assume that there is to be a cost bearing provision added to
7 the rules, do you have any position whether it should be in
8 Rule 34 or Rule 26(b)(2) so that it could apply to other
9 devices in document discovery?

10 MR. SMITH: In that we are so adamantly opposed to
11 this kind of shift at all, that we never got to a discussion of
12 that. It's just not something that we see as being
13 appropriate. I think it really limits -- it's going to limit
14 access to justice, and that's where we pretty much ended.

15 MR. SCHREIBER: Counsel, if it's limited to the
16 exceptional case, the unusual case, the large case, why would
17 you be opposed to it?

18 MR. SMITH: To cost shifting? Well, the large case is
19 the case, of course, exceptional case, is nonetheless a case on
20 behalf of individuals where it becomes enormously expensive.
21 And so if you are shifting the cost --

22 MR. SCHREIBER: You are paying for it as counsel.

23 MR. SMITH: No, ultimately that does tend
24 traditionally come out of the plaintiff's recovery in the case.

25 MR. SCHREIBER: No, because the plaintiff's recovery

1 would include all the expenses and costs of discovery. Isn't
2 that taxable costs?

3 MR. SMITH: Well, what I am saying is, the costs are
4 incurred by the plaintiff. Maybe I am misunderstanding the
5 question, but that's where ultimately the costs are born.

6 MR. SCHERFFIUS: Mr. Chairman, may I ask one more
7 question?

8 THE HONORABLE JUDGE NIEMEYER: Yes.

9 MR. SCHERFFIUS: Time limits.

10 MR. SMITH: I am from Illinois. I agree with everyone
11 on the Illinois matter. I think we worked it out exceeding
12 three hours. ATLA did not take a position on that, but I think
13 for the most part what you will find from a plaintiff's
14 perspective we like that rule. And I think ATLA would probably
15 be consistent with me on that.

16 THE HONORABLE JUDGE NIEMEYER: I think it may be ATLA
17 or some members of ATLA that may have suggested that as a major
18 problem, being expensed by deposition. The defendants usually
19 came in and complained about being expensed in documents.

20 MR. SMITH: What you are saying is that ATLA agrees
21 with me on that.

22 THE HONORABLE JUDGE NIEMEYER: Yes. I don't know if
23 it was ATLA's official position.

24 MR. SMITH: I think that would probably be true.

25 THE HONORABLE JUDGE NIEMEYER: We are going to take a

1 recess to 1:15 for a lunch break. We will begin promptly.

2 (Whereupon, the within hearing was recessed until 1:15

3 o'clock p.m. of the same day.)

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PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF CIVIL PROCEDURE

JANUARY 29, 1999
COURTROOM 2525
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS
1:15 o'clock p.m.

BEFORE:

- THE HONORABLE PAUL V. NIEMEYER
- THE HONORABLE RICHARD H. KYLE
- THE HONORABLE DAVID F. LEVI
- THE HONORABLE JOHN L. CARROLL
- THE HONORABLE LEE H. ROSENTHAL
- PROFESSOR RICHARD L. MARCUS
- PROFESSOR EDWARD H. COOPER
- PROFESSOR THOMAS D. ROWE, JR.
- MR. SOL SCHREIBER, ESQUIRE
- MR. MARK O. KASANIN, ESQUIRE
- MR. ANDREW M. SCHERFFIUS, ESQUIRE
- MR. MYLES V. LYNK, ESQUIRE

COURT REPORTER:

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1 THE HONORABLE JUDGE NIEMEYER: Is Mr. Beisner here? I
2 think we have enough members here. I think if you are ready,
3 we would like to begin.

4 MR. BEISNER: Absolutely.

5 My name is John Beisner. I am with O'Melveny & Myers
6 in the Washington, D.C., office. And at the outset, let me
7 just add my thanks to those who expressed thanks to all of you
8 for the attention you are giving this issue today. I have
9 submitted a written statement, so I will just make a few brief
10 observations.

11 First and foremost, I would urge the committee to
12 recommend adoption of the text of the rules as proposed. I
13 think like any set of proposed rules, a longer incubation
14 period might cause some positive changes, but I think those
15 would be modest. And I think that the urgency of making
16 changes in this area sufficiently should be adopted as they
17 are.

18 I think based on the discussion I have heard today,
19 also in Baltimore, I think obviously people perceive the most
20 important amendment as being the proposed recasting of Rule
21 26(b)(1) to define the scope of party-controlled discovery. I
22 happen to agree with those who contend that this change will
23 cause the district courts to become more involved in the
24 discovery process at an early time. And I think that's quite a
25 positive development.

1 In preparing my remarks I found some evidence of that.

2 THE HONORABLE JUDGE NIEMEYER: You know, the initial
3 reaction of the judges is it's not so positive, until you tell
4 them that really we are just trying to figure out a way to get
5 you involved.

6 MR. BEISNER: Well, I think, though, it is positive,
7 and that was really the main point I was trying to get to. I
8 was looking at some of the earlier decisions. Some years ago
9 the current version of Rule 26(b) defining the scope of
10 discovery came into play. The mantra that you see in those
11 early decisions is that the discovery process is intended to
12 narrow issues. And as you look at the evolution of those Rule
13 26 cases over time, you see that mantra disappearing because I
14 think the realization came in with the breadth of scope as it
15 is now, it doesn't tend to narrow the issues.

16 In fact, I think it's probably the great
17 procrastinator's provision. I think it causes parties to wait
18 before really deciding what the case is about, what the issues
19 are, what is the evidence that I really need to try this case.
20 And I think the effect of the provision that is being proposed
21 by the committee, to put this in terms of claims and defenses,
22 is going to have the benefit of defining those more clearly at
23 an earlier time in the case.

24 Indeed, I was reminded of the testimony of the
25 gentleman whose name I forget now who came before the committee

1 in Baltimore from the Eastern District of Virginia and was
2 concerned about the damage that he thought these changes on
3 uniformity would do to the rocket docket in that district. And
4 in thinking about that -- I don't practice all the time in the
5 Eastern District of Virginia but I have had a window on some
6 cases there. And it seems to me that the real difference in
7 that district of what moves cases along is the need for you to
8 define the issues in the case and get direct to the discovery
9 that you really need to try the case much earlier than you do
10 in other districts. And I believe that these proposed changes
11 are going to have that benefit.

12 Now, I have to agree with some who say, well, there is
13 going to be more motion activity perhaps in this setting. You
14 may have motions to compel more frequently, at least in the
15 early going. But I think that the focus of those motions are
16 going to be different. Mr. Schreiber was mentioning earlier
17 doing the Lexis search and being able to find many cases of
18 late on scope or on Rule 26(b)(1), as he mentioned. I think
19 the reason for that is, assuming he is correct and I have not
20 done that research -- but assuming he's correct it's because I
21 think that's become a meaningless limitation on discovery.

22 If you look at the case law, particularly the recent
23 case law from the last several years, I don't think courts view
24 that scope restriction as being particularly meaningful. Such
25 debate --

1 PROFESSOR ROWE: Excuse me. I was wondering, you have
2 an impressive footnote. Somebody did the research and turned
3 up on the bottom of page 6 over to page 7 --

4 MR. BEISNER: A lot of cases --

5 PROFESSOR ROWE: -- cases that seem to be cited for
6 the proposition that the courts are saying no fishing
7 expeditions.

8 MR. BEISNER: Right, and that's why I am a little
9 concerned about --

10 PROFESSOR ROWE: Which would seem to cut against the
11 need for a narrowing of scope.

12 MR. BEISNER: Well, but I think if you look at those
13 cases, there is a lot of referencing of no fishing expeditions.
14 That principle is out there. But in a lot of those cases, the
15 declaration is, this isn't a fishing expedition. It's not
16 quite at that point. And I think in the end, even though that
17 principle is out there, I am not sure that the current scope
18 restriction is really viewed as all that meaningful by many
19 courts.

20 Putting it another way, I think that the battle over
21 the scope of discovery in most cases now is really shifted to
22 arguments over burdensomeness, privilege and other issues. If
23 I'm a defendant and I want to limit the scope of the case, I am
24 going to go to burdensomeness argument much sooner before the
25 scope argument because there is really not much to argue there

1 on scope. The principle at the moment is so broad that most of
2 the debating, I think, is really over burdensomeness.

3 PROFESSOR ROWE: What is your batting average on
4 burdensomeness arguments?

5 MR. BEISNER: Not very high, but it's higher than it
6 is on scope, I can assure you.

7 And I think that that's why I think this change is
8 really quite positive because I find that courts spending time
9 debating burdensomeness in cases is really quite wasteful. I
10 mean, you are basically, as somebody else talking this morning
11 put it, you are basically having to, a judge, act as an
12 economist instead of a judge.

13 It's much more productive, I think, to have the
14 district court talking about the scope of the case. What is
15 this case about? And in an early time making some rulings that
16 are defining what are the real issues in this case? And I
17 think that's going to be a side benefit of these proposed
18 changes.

19 Judge Rosenthal, you asked earlier a question about
20 whether this may yield -- favor complaints, whether this will
21 be the result of these rules. I am not so sure that is the
22 result here. And really the example that the gentleman from
23 State Farm gave this morning, for another purpose, I think,
24 really, caused a light to turn on for me on that anyway. I
25 think if you have a very vague complaint, you may actually be

1 limiting the scope of discovery in a lot of cases if you would
2 be permitted under the new standard.

3 For example, the State Farm case that was mentioned
4 this morning had to do with failure to pay on a claim. And I
5 think if you came in and just filed a complaint and said, I had
6 a State Farm insurance policy and I wasn't paid on it, the
7 discovery in that case may be fairly narrow limited to your
8 policy and so on. If you really wanted to make it a pattern
9 and practice sort of case where you're saying, they did to me
10 what they did to everybody else, you are going to need that
11 allegation in the complaint or you may not get there under the
12 claims and defenses case.

13 THE HONORABLE JUDGE CARROLL: What about if you make a
14 claim for punitive damages? Won't you get that broader
15 discovery if you are applying for punitive damages in the state
16 statute?

17 MR. BEISNER: You might if that's permitted. But what
18 I'm saying is, I don't think that these changes are going to
19 have that much of an impact in the nature of pleading practice
20 that occurs. I think that in most cases people are pleading
21 claims as consistent as they can with Rule 11. I think that
22 these threats of, you know, we will have to plead claims that
23 aren't real, is going to change all that much. And I think,
24 frankly, in a lot of cases it's going to result in people
25 making more specific complaints or, as you get into discovery

1 process, parties having to be more specific about what their
2 claims and defenses are.

3 If you have a discovery issue, the court is going to
4 say, okay, what is your defense? Tell me what this is so I can
5 understand whether you need discovery on this.

6 THE HONORABLE JUDGE ROSENTHAL: Some have argued that
7 there is indeed going to be a perception of the need to file
8 more detailed complaints with a more specific assertion of the
9 basis for the claim or defense, and that that is at odds with
10 notice pleadings. Would you care to comment on that?

11 MR. BEISNER: I think that's going to be a
12 case-by-case determination, and I think it's going to be a
13 strategy decision for the parties in the case as much as it is
14 now. I mean, some complaints you get are extremely thorough
15 because the party filing the complaint has a strategy in mind
16 in the case. Others it's bare bones because they don't know
17 much about it.

18 I don't think this is going to cause any sort of
19 change in that strategy, maybe another factor. But to say this
20 is going to cause us to move away as a general matter from
21 notice pleadings I don't think there is really any basis for
22 that.

23 One last thing I did want to comment on that came up
24 this morning was the concern that these amendments are going to
25 have some major effect in increasing abuses with respect to

1 discovery. And I have to confess -- and several members this
2 morning have made the same comment. But I guess I wanted to
3 stress, I don't understand the relationship between these
4 proposals and any concern about abuses, stonewalling, things of
5 that sort.

6 If a party makes a demand for documents, there is a
7 specification that says, here are the documents you are to give
8 me. And unless the court intervenes to say, that's too broad
9 or that's inappropriate or whatever, or the parties agree to
10 tailor that request in some way, that's what you are obliged to
11 provide.

12 This is not going to change any of that and I don't
13 think in any way would contribute to any abuses of the system
14 at all. The requests are going to define what the demand is,
15 and unless you get that change, you as the plaintiff or
16 defendant are obliged to provide that discovery.

17 Thank you very much.

18 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Beisner.

19 On an earlier list, Mr. Janssen, as I understand, you
20 appeared on it, and somehow it got omitted from this. You were
21 on the California list, and we will restore you here. So we
22 will hear you now.

23 MR. JANSSEN: Thank you.

24 THE HONORABLE JUDGE NIEMEYER: So it's Larry Janssen
25 at Steptoe & Johnson.

1 MR. JANSSEN: I was on the agenda for I believe it was
2 last Friday in San Francisco and two things happened. And I'll
3 tell you just by way of apology. I got held over in court, but
4 I made it to LAX on time, but the San Francisco airport
5 wouldn't let me land. And I apologize for that. I will keep
6 my comments brief.

7 But I did want to go out of my way to come and give
8 some testimony because in my practice, discovery issues of the
9 kind which you are addressing here in these proposed changes
10 play just a predominant part of my practice and, in all
11 honesty, are the source of probably the most tension I have in
12 the kind of work that I do. So I just want to get some things
13 off my chest here.

14 I'm a civil trial lawyer. From 1967 until 1990 I
15 practiced out of Portland, Oregon. From 1990 to today, and
16 hopefully for a few more years, I will continue to practice in
17 Los Angeles, California. I am a member of Steptoe & Johnson.

18 My practice for about 15 years has been limited to
19 toxic tort litigation, with a heavy emphasis on what is known
20 now, I guess, as mass toxic tort litigation. I defend the oil
21 and chemical companies, the people that I think are often
22 accused of stonewalling, but that's a discussion to be had in
23 another day.

24 In that kind of litigation, as you know, there are
25 oftentimes hundreds, typically hundreds --

1 THE HONORABLE JUDGE NIEMEYER: Someone was in here
2 this morning and said that the threat from the plaintiffs' side
3 is to nuke or to file some kind of a nuclear attack, a nuclear
4 bomb or anything to knock down a stone wall.

5 MR. JANSSEN: I wasn't here to listen to that, but
6 that's very interesting to me because my experience is
7 absolutely to the contrary, and that the best thing that we can
8 do in defending these cases is to get them to trial as soon as
9 we can because they tend to just be giant holes in the ground
10 into which you pour time and money.

11 Now, I don't purport to be an academician or a deep
12 thinker about these discovery issues, but I do try a lot of
13 cases. I tried over 250 to jury verdict. And I currently have
14 cases pending in 20 jurisdictions. So I see how these matters
15 are actually handled in the pits. And I am here to tell you
16 that the combination of subject matter discovery and the notion
17 that you can get your hands on and discover anything which may
18 possibly lead to evidence which may be admissible, has created
19 a mind set and a tendency in both the federal and state courts.

20 Remember, the state courts by and large look to,
21 sometimes verbatim, the Federal Rules of Civil Procedure for
22 their civil codes. It's a mind set that, you know, just almost
23 anything is discoverable as a practical matter. I just had
24 that happen this week, although it was in Texas, so maybe
25 that's an aberration. But in any event, I heard just about

1 that comment: Well, anything goes.

2 THE HONORABLE JUDGE ROSENTHAL: Was that state or
3 federal court?

4 MR. JACKSON: You probably know the judge. That was
5 in Beaumont, Texas.

6 But the reality of it is that either judges and
7 magistrates just aren't -- in today's climate with the rules as
8 they are being interpreted, not interested in discovery
9 disputes. They are just not interested. They are given short
10 shift. They want you to go out there and act like ladies and
11 gentlemen and professionals and resolve these things, not
12 knowing that sometimes you can't do that.

13 These proposed rules, the changes that you are making,
14 and particularly on the scope of discovery, I think are very
15 important because at least they will give a framework and a
16 platform to encourage them to at least give this something
17 other than short shrift. And I strongly endorse the change in
18 or from and away from subject matter discovery in the first
19 instance. If you can show good cause, so be it. That's fine.

20 Now, I also -- and I'll limit my comments to a couple
21 other things. I also support the initial discovery changes or
22 disclosure changes. I think they are both good. I'd like to
23 see uniformity because I don't like the notion that I may get
24 trapped in some jurisdiction that I am not quite familiar with.
25 I would like to see uniformity.

1 I like the idea of being responsible to disclose
2 material documents which I know are relevant to my case and not
3 have to guess about what's relevant to the other side. So I
4 think that that's useful.

5 Now, there is a couple things -- well, one thing on
6 that before I leave it. I would suggest that changing the note
7 a bit on the initial disclosure requirements to more strongly
8 encourage opt outs in complex litigation would be a good thing,
9 because -- again this is empirical, but case management orders
10 with phase discovery, I think, are just the best way to go in
11 complex litigation, rather than document dumps where everybody
12 is guessing.

13 And finally, on the expert witness limitation, I'm
14 less enamored with that, and I'd ask that you folks consider
15 whether a seven-hour limitation, a prima facia limitation, at
16 least on experts is really worth putting in that rule. In
17 toxic tort litigation I can't cover in this mass litigation all
18 of the things I need to cover with these experts. I just can't
19 do that, and I am reluctant to make the expert a party to my
20 ability to extend those -- the length of those depositions.

21 MR. KASANIN: Doesn't the fact that you have to have a
22 report from the expert help you, though, in the deposition in
23 federal courts? In the state court in California we don't have
24 that.

25 MR. JANSSEN: I know that. But in toxic tort

1 litigation and major litigation, there are probably -- I am
2 going to exaggerate for a fact, but the number of experts that
3 appear on a regular basis around the country for the plaintiffs
4 in mass toxic tort litigation can probably be placed if not the
5 fingers of both my hands at least my fingers and my toes.

6 So I see them all the time, and their reports all
7 sound the same. And the reports themselves don't do me that
8 much good. I've got to really go in and take their testimony.

9 MR. SCHERFFIUS: Mr. Janssen, doesn't the rule address
10 probably the problems with 95 percent of the depositions and
11 their length, and you are really dealing with more or less
12 special cases that can be case-by-case managed under the
13 changes that are being provided? I can see the toxic tort
14 expert depositions, it may well be a great example where seven
15 hours is not long enough, routinely not long enough. But there
16 are other provisions that allow you to manage that, allow a
17 court to manage it, either by agreement or order or whatever.

18 MR. JANSSEN: I think you are generally right.

19 MR. SCHERFFIUS: So if you are trying to really
20 address the problem of 95 percent of depositions, would you
21 agree that a time limit would be useful?

22 MR. JANSSEN: Yes, yes.

23 THE HONORABLE JUDGE NIEMEYER: All right. Thank you,
24 Mr. Janssen.

25 MR. JANSSEN: Thank you.

1 THE HONORABLE JUDGE NIEMEYER: Mr. Cuneo.

2 MR. CUNEO: Thank you, Judge Niemeyer, for the
3 opportunity to appear before your distinguished panel. I've
4 submitted a written statement, and I am not going to repeat
5 what's in there. I know that the committee will study it. In
6 fact, I know that you will study it in such depth that my
7 deceased mother would be extremely proud.

8 Instead, I hope not to take my full ten minutes here.
9 I just wanted to try to make a couple points very quickly. I
10 think you are grappling with some extremely difficult issues.
11 In some areas I think you are doing this against a back drop of
12 tremendous technological change.

13 Judge Niemeyer, you pointed that out last week, and so
14 I think that what you have proposed are a series of proposals.
15 And what I would urge you to do is to look at each one
16 individually and decide whether it meets a balancing test in
17 your own mind about whether that's something that should go
18 forward and become the law.

19 Magistrate Judge Carroll said this morning, you raised
20 the concern that putting these proposed changes cumulatively in
21 the hands of the defendants could send a message that the
22 committee really does wish to cut back on the scope of
23 discovery more than I think you really intend to do. Each of
24 the limitations, or each of the proposals in some way limits,
25 or has the potential for limiting, access to information either

1 in some form or other. That is why I think that you should
2 consider them individually and determine whether in fact each
3 one is really ripe for your review.

4 Now, the one I want to stress most and the one I think
5 that, in my view, is most worthy of at least a deferment in
6 your consideration is the change in the scope of attorney
7 matters discovery. And the reason I say that is, I listened to
8 the witnesses. And when you listen to the witnesses, mostly
9 what they say is that this is something in which they are
10 trying to control the costs of document discovery.

11 We heard general counsel after general counsel or
12 counsel for various corporations come up and give anecdotes
13 about what they consider to be over-broad discovery requests.
14 Now, I can tell you from my own practice, I could give you
15 similar anecdotes about what I consider to be abuses on the
16 defense side. I am not going to take up the committee's time
17 in doing that. But rather what I want to say is that in the
18 past ten years or so, the last 15 years, we've seen a
19 tremendous amount of evolution in the way that information is
20 stored and transferred in our society. And that applies in
21 litigation as well.

22 The term optical scanner I know is a term that
23 certainly I have heard since I graduated from law school. CD
24 Rom I'm sure is a term that I have learned since I started my
25 own firm in 1986. Search engine is a term of the 1990s.

1 And so I think that to some extent, the changes that
2 you are trying to make have a potential confluence with the
3 kind of inquiry, Judge Niemeyer, you were speaking about last
4 week in electronic formats. I am wondering and I ask whether
5 if you make these changes in order to cut back on the burdens
6 of discovery, whether you might not find yourself in some way,
7 or the committee might find itself in some way, in some way
8 superceded by some kind of technological development that will
9 make these kinds of information collection, transfer and even
10 separation decisions much easier.

11 Now, I don't purport to have the answer to that
12 question. But it does seem to me that it's worthy of the
13 committee's consideration, that you are attempting to make a
14 rule of general applicability against a dynamic and changing
15 technological background, which is something that I think is
16 worth noting and worth of the committee's consideration.

17 Now, some of the changes, I think, are fully ripe for
18 your consideration. For example, the deposition, seven-hour
19 proposed deposition limitation. That is something that no
20 amount of technology is going to increase or decrease the speed
21 at which people ask questions or respond to them. And it seems
22 to me that that is something that is fully ripe for your
23 review.

24 Now, it seems to me, I want to say this and this is a
25 little repetitive of what other witnesses said this morning,

1 but that in the change with respect to attorney matters
2 discovery, what we are talking about is substituting one set of
3 rules, the current set of rules, which has its own ambiguities,
4 for a new set of rules, which has another set of ambiguities.

5 And there is going to be a tremendous amount of
6 litigation over whether there really is a change and if so how
7 much, what does good cause mean, under what circumstances
8 should it be found? And I think that we may find ourselves
9 back here considering some of the same issues in a few years if
10 the kind of rule making that may be envisioned with respect to
11 electronic information, in fact, is necessary.

12 Now, if I have any remaining time, I was going to -- I
13 cannot resist trying to take on a question that Judge Levi
14 asked this morning about antitrust. I don't know if I still
15 have the time.

16 THE HONORABLE JUDGE NIEMEYER: You do have a couple
17 minutes.

18 MR. CUNEO: Okay. Judge Levi, you asked about
19 antitrust cases in particular. And, you know, I have done a
20 few antitrust cases from time to time. And I think these are
21 typical of many corporate cases. Sometimes it's very hard to
22 tell at the outset who the proper defendants should be and
23 whether there is a proper claim against some potential parties.

24 For example, a manufacturer who has some market power
25 has a dual distribution system, at the same time terminates a

1 discounter, a retailer, who is doing a substantial discount
2 business. And that retailer knows, for example, that the
3 manufacturer has numerous complaints from other full price
4 retailers in its files. Now, does one charge that case as a
5 monopolization case, as a conspiracy to monopolize? Is it
6 vertical price fixing? Are the other retailers proper parties
7 to that case?

8 Those are all questions that I think are unknown to
9 the plaintiff frequently at the beginning of a case. And that
10 is exactly the kind of discovery that I think would become at
11 issue if it were the case that the committee were to send
12 forward its recommendation and it were being adopted.

13 I think that the defendants would clearly raise the
14 issue that that kind of discovery would be improper under the
15 new regime. You'd have to go to the judge in order to get it,
16 and when you did --

17 THE HONORABLE JUDGE NIEMEYER: You don't think that's
18 relevant? Everything you talked about was relevant in
19 antitrust cases, establishing a market and --

20 MR. CUNEO: Your Honor, I think the question of
21 whether that's relevant, this is a specific example, would
22 depend on which parties you joined and what allegations you
23 made at the outset. I think that if --

24 THE HONORABLE JUDGE NIEMEYER: I would hope your
25 complaint would define a market. It's usually one of the most

1 important things to do. And that usually defines the
2 participants and the market, who would be involved and who are
3 not.

4 MR. CUNEO: Yes, sir, it would. The market definition
5 would define market participants. But it wouldn't necessarily
6 define whether those participants were participants or merely
7 beneficiaries of the conspiracy. And that is a key difference.

8 And the question is, if you did not quite have enough
9 evidence to join the competing retailers at the beginning of
10 the case, but they had been tremendous beneficiaries of the
11 conduct at issue, then I think there would be a very
12 significant issue about whether under the proposed regime
13 discovery as to their involvement in the potential antitrust
14 violation would be relevant.

15 THE HONORABLE JUDGE NIEMEYER: Okay.

16 MR. CUNEO: Thank you.

17 THE HONORABLE JUDGE NIEMEYER: Thank you.

18 Mr. Berland.

19 MR. BERLAND: Thank you. My name is Sanford Berland.
20 I am an in-house litigator with Pfizer in New York, and I
21 appreciate the opportunity to address you today. I provided a
22 written statement and I will, therefore, keep my remarks as
23 brief as I can.

24 I should say that my first practical exposure to the
25 discovery rules came when I was a law clerk to a U.S. district

1 judge many years ago. And what that judge taught me was that
2 the federal rules are to be interpreted in the context of
3 Rule 1, and its mandate to just, speedy, inexpensive
4 determination of every action is the goal of the federal rules.
5 And that's how we approached discovery disputes way back in the
6 dark ages.

7 Today, and we are not alone in having this perception,
8 the discovery process has turned into something that often
9 seems completely antithetical to the idea of the just, speedy
10 and inexpensive determination of every action or of the action
11 at hand. On the contrary, what we are seeing is a
12 preponderance of the costs that go into most of the civil cases
13 we have. And we are a defendant or a plaintiff as the case may
14 be. Often stakes in the action for us are as great when we are
15 plaintiffs as when we are defendants. But the system in some
16 respects has put much more emphasis on the discovery process
17 frequently than on any other aspect of the litigation.

18 It's in that context that we think the principle
19 amendments proposed by the committee are salutary; that is,
20 limiting the parties' pre-trial disclosure to information
21 supporting its own position, whether its a plaintiff or
22 defendant, and limiting discovery, attorney-managed discovery
23 at least, to information that's relevant to the parties' claims
24 or defenses. We think these are important steps in restoring
25 reasonableness and fairness to the discovery process.

1 We would add, and I have gone through this in a little
2 bit more detail in the written statement, some additional steps
3 that we think are needed. First, where subject matter
4 discovery is allowed, the Court finds that there is sufficient
5 cause for it, we think the commentary, the note, should make
6 clear that that additional discovery should be ordered on a
7 specific basis, whether by item or by category. And we
8 shouldn't at that point have a reopening of the old subject
9 matter, no holds barred kind of regime that we have today.

10 MR. LYNK: Mr. Berland, in your written remarks and in
11 your comments, you suggest that the changes proposed will help
12 reduce the cost and time of pre-trial discovery and, therefore,
13 the cost and time of litigation. How do you respond to those
14 who testified today that they think that what will happen is
15 you will have a new collateral litigation that will arise over
16 claims by parties to seek subject matter discover, and they
17 have to show good cause before the judge or magistrate, and you
18 will have hearings and pleadings filed on collateral issues
19 that will have the effect of increasing the time and expense of
20 the litigation?

21 MR. BERLAND: Perhaps in contrast to some others, I
22 think there will be a period of time during which our
23 understanding of the new rule will have to take shape. And
24 fairly there will be perhaps some period of time during which
25 there will be an additional motion practice. Now, as others

1 have observed, that kind of practice takes place in the context
2 of motions for protective orders or to enforce discovery or
3 what not. And while the rule that's being invoked may in some
4 respects change, I think over time there will not be additional
5 collateral motion practice over that. Over time the bar and
6 those administering the rules will come to understand what the
7 scope is.

8 MR. LYNK: One other question. Pfizer obviously is a
9 national pharmaceutical company in probably many of the
10 judicial districts around the country from time to time. Are
11 you concerned at all that the new rule will create in a sense a
12 district-by-district, almost judge-by-judge, definition of what
13 is discoverable under the claim and defense standard as opposed
14 to what is discoverable under the subject matter standard?

15 MR. BERLAND: I think there are differences that exist
16 now, as one might expect. I think those differences are an
17 integral part of the system. I would not anticipate that there
18 would be a broader range of differences over time in
19 understanding the new rules than we have under the existing
20 rules.

21 And in any event, we feel comfortable that this would
22 absolutely be an improvement in the way discovery is managed
23 and would aid courts in having a benchmark against which to
24 measure the proper scope of discovery.

25 MR. LYNK: And is it your view it would be an

1 improvement because it would involve the judges more directly
2 in the discovery, in managing the discovery process?

3 MR. BERLAND: We are not alone in believing very
4 strongly that greater judicial involvement in the management of
5 the discovery process will absolutely facilitate the
6 expeditious movement of litigation.

7 In addition to having some sort of handle on the scope
8 of subject matter jurisdiction when it's ordered, we would also
9 recommend that there be sequencing of the disclosure discovery
10 process. As others have said, it makes sense for the plaintiff
11 first to disclose its evidence to give the defendant some
12 opportunity to have a concrete understanding of the plaintiff's
13 case before it produces its material.

14 Third, where there is a threshold determination that
15 will affect the later progress of the case, such as class
16 certification, it would make sense to limit initial disclosure
17 and discovery to matter relevant to that determination, rather
18 than going through needlessly broad exercises. That's
19 something that occurs today, although the rules do require
20 prompt determination of class certification. Often that's
21 deferred and merits discovery takes place, very expensive
22 merits discovery can take place.

23 Likewise, when a case is of a kind where the issues
24 are susceptible to limited discovery and possible motion
25 practice that can limit the scope of the case or even dispose

1 of it, we think it should be made clear that the district court
2 has the power to limit initial discovery to those issues and
3 displace, if appropriate, initial disclosure as well.

4 Fifth, one of the suggestions that had been made by, I
5 think, the discovery working committee was that the producing
6 party have the option when it makes its production or makes
7 documents available for review to requesting party, to
8 preserve -- to reserve privilege without first screening the
9 documents and then have the opportunity to assert privilege
10 after decisions have been made by the reviewing party.

11 We have used that in a number of large litigations and
12 have found that device to be effective. But it only works when
13 there is a meeting of the minds among the parties. It's not
14 something the court currently has the power, at least as we
15 understand it, sua sponte, to order or to order when there is
16 an objection from the requesting part.

17 THE HONORABLE JUDGE NIEMEYER: We are still looking at
18 that possibility. It has some complexity because the federal
19 rules incorporate state privileges. And so to the extent we
20 are affecting state privilege, we are probably not free to do
21 that. We probably have some handle on it by having the power
22 to regulate federal procedure, but we haven't disposed of that.
23 It's just that we haven't been able to figure that out.

24 MR. BEERLAND: No, we recognize it's a difficult
25 question. And where parties are encouraged to enter into

1 agreements and accomplish that effect, it actually facilitates
2 discovery. And it can save not only vast amounts of money in
3 reviewing large document populations, the contents of which
4 tend at the end of the day not to be wanted by plaintiffs who
5 select a smaller set. But it also saves a lot of time. It can
6 facilitate the movement to the action if it can be
7 accomplished.

8 In closing I'd like to say we believe that these
9 provisions do represent very significant improvements in the
10 discovery process and we urge their adoption.

11 THE HONORABLE JUDGE NIEMEYER: Thank you.

12 MR. BERLAND: Thank you.

13 THE HONORABLE JUDGE NIEMEYER: I appreciate your
14 testimony, Mr. Berland.

15 Mr. Krislov.

16 MR. KRISLOV: Thank you, Judge Niemeyer, committee.

17 I always like to follow someone from the defendants'
18 side because I always learn something new. I think if you
19 listened to the in-house counsel that have appeared before you,
20 Rule 1 is to be read as interpreting the federal rules to
21 secure the just, speedy and inexpensive termination of every
22 action. That is a different concept totally.

23 In big corporation, I do what might be called a
24 private attorney general type practice. We've taken on the
25 City of Chicago, the State of Illinois, a number of big

1 corporations, most recently a small corporation on whose
2 behalf -- on behalf of the employees whose shares were stolen
3 back from their ESOP an unfairly low value. And we secured a
4 recovery that will put \$60,000 in every one of their -- on the
5 average, every one of their retirement accounts.

6 So for the statements that class action lawyers don't
7 produce something for the class, I beg to differ. That makes a
8 very big difference. And the fact is, in our type of cases,
9 different from big corporation battles where they each know
10 what each other is doing, they have the evidence at the
11 beginning of the case. They can do practically the whole
12 trial, with certain exceptions, from the get go with the
13 evidence they have in hand.

14 An exception would be the battle between GM and
15 Volkswagen again over whether -- I forget what the gentleman's
16 name is, but when he went from Volkswagen to General Motors or
17 vice versa and took all this inside information with him. And
18 so they sent everybody, no holds barred, to get that
19 information. So when that is at stake, they spend the money
20 and they go after. And they exercise all the rights of
21 discovery.

22 In our cases, we rarely have the important discovery
23 materials that will actually prove the case to begin with. We
24 have good reason to believe; sometimes we have very good
25 evidence. But the key documents, the key things that prove

1 that, are in their files. And since we are in the Northern
2 District of Illinois, you got to fight like crazy to get them.

3 I have visited the website for the Northern District
4 of Illinois. I have visited the courtrooms of many of these
5 people who are pictured on the walls. Many of them are very
6 nice people. But the fact is, they all have different sorts of
7 approaches. Some opt in, some opt out, some have totally
8 different approaches, some give half a loaf, some give no
9 loaves. They as a rule generally don't want to get into
10 discovery issues. And in an opt-out district, that means you
11 just don't get the discovery. You get half a loaf, you've had
12 an enormous success.

13 And we practice many different parts of the country.
14 It is staggering the difference to be in a place where there is
15 mandatory discovery and it's subject matter production. Then
16 there is a rule. The defendant's lawyer has to go to the
17 client and say, look, we have to produce this. You can't fire
18 me and find somebody who's rougher, tougher, rooting, tooting,
19 shooting guy to fight these guys. You got to produce it.

20 And we have had experiences in this building, where
21 lawyers have been fired because they have been replaced by
22 lawyers who obstruct discovery, who hide things, who do all the
23 things that you would say, well, we want those two. We want to
24 find those two guys in that same case who are all acting
25 civilly and that they will all produce.

1 And, of course, it doesn't happen. Unless you adopt
2 an overall rule that says in the federal courts of this nation,
3 no matter whether you're in Waxahachie, Washington or West
4 Chicago, you got to produce it. It just has to be produced.

5 That's the rule that you should adopt. Narrowing it
6 to the claims, as I said before, you are not doing us any
7 favors. We see all those things that you are going to limit
8 mandatory production to on a motion to dismiss. We are not
9 getting anything new out of that.

10 We have at recent times in our firm taken the position
11 that we had a lot to learn from the U.S. against Microsoft
12 case, even though we had no part in it. And that is that all
13 cases -- if that case can be brought to trial in roughly a year
14 from the initial filing and have both sides have a fair
15 opportunity to get their issues out, to get their discovery
16 done, to be prepared for trial in a year, all cases, any case,
17 every case, you can achieve the same thing. There is no
18 exception to that, even a toxic tort case.

19 But that requires not just this speedy termination
20 concept. You don't achieve fairness by just killing off the
21 case or make it impossible to get anything. You can achieve
22 that by, No. 1, making disclosure mandatory, make it subject
23 matter disclosure, make it so there is no question. You got to
24 produce it.

25 No. 2, if you enforce the pleading rules, that you

1 say -- Judge Shadur is an excellent example here.

2 Judge Shadur -- there are other judges who pick up a
3 complaint, call the parties in and say, who wrote this crap --
4 this crummy complaint? I won't sanction you today, but I want
5 you to rewrite it. Or I will sanction you under Rule 11.

6 Judge Shadur to his credit does that to both plaintiffs and
7 defendants, both on complaints and on answers. Makes them go
8 back and rewrite them, makes them comply with Rule 8(b), either
9 admit, deny or tell them why you don't know.

10 Cases can move along quickly, but they can achieve
11 justice, they can achieve a fair result and achieve the just,
12 speedy and inexpensive determination of every action if you
13 apply the mandatory rules across the country, subject matter so
14 there won't be this shell game practice over, well, that's not
15 part of our claim. That you force multiple parallel tracks
16 right from the get go, fighting on all fronts, not as my
17 preceding counsel indicated what you should do is, well, if we
18 can limit your discovery to just the precise terms of your
19 complaint, and then if your case doesn't die by that time, then
20 we'll let you get a little bit of our class certification. And
21 then if you want some more, if you can identify what it is, the
22 documents that are in our -- that are in our warehouse, with
23 particularity, then if you can demonstrate to the judge that
24 you have a right to that, then you may get a quarter of those.

25 That's not the way it should work. This should just

1 work. I mean, we can --

2 MR. LYNK: Mr. Krislov, why would it necessarily work
3 that way though? Why wouldn't you go into court and say to the
4 judge, your Honor, as David Kindel has said in another context,
5 we don't know what we don't know. And that's why we need to
6 get into that warehouse and we think it's relevant to the
7 subject matter and explain why you think it.

8 It seems to me you do agree with the previous witness
9 in that you think greater judicial involvement in the process
10 is useful. You refer in your comments to the rocket docket in
11 the Eastern District and the Microsoft case. And both in the
12 Eastern District and before Judge Jackson in the Microsoft case
13 you had judges who were very actively involved in the discovery
14 process.

15 So I take it you think that's a good thing.

16 MR. KRISLOV: No, I want to get the judges out of it.
17 I want to get the judges out. But the only way you can get the
18 judges out of it is to adopt a flat rule. This is it. The
19 warehouse is there. Go look. And the idea that privilege
20 should be preserved, I understand the problem. I understand
21 people don't want to give up things that they told their
22 lawyer. That one you got to fight about.

23 But from the plaintiffs' side, my guess is general we
24 say, fine, preserve it. No big problem. And for finding
25 things, putting in a protective order, no problem. Establish a

1 protective order in a rule that it can't be used outside of the
2 litigation except coming to the judge, or that it can't be
3 further disclosed. I think that may be, if that's the purpose
4 of the preclusion from filing in advance, that's fine, too. We
5 have no problem with that.

6 But to your answer, if you want to take the judges --
7 if you would like to take the judges out of this, rather than
8 having them have to listen to the whining, which we do a lot,
9 the answer is always going to be, whether it's in Washington
10 State, Miami Beach or here, the warehouse is there. Let them
11 go take a look.

12 MR. LYNK: So your position would be, anything non-
13 privileged should be discoverable?

14 MR. KRISLOV: Yes.

15 THE HONORABLE JUDGE NIEMEYER: Thank you very much,
16 Mr. Krislov.

17 MR. KRISLOV: Thank you.

18 THE HONORABLE JUDGE NIEMEYER: Mr. Clifford, are you
19 in the courtroom? Robert Clifford. You don't look like Robert
20 Clifford.

21 MS. MENAKER: There is little resemblance, I know.

22 Mr. Clifford is on trial right now in state court
23 before Judge Allen Freeman and had prepared some remarks, some
24 brief remarks. And I'd ask if I can either present them to
25 this committee or for the benefit of everybody here I am happy

1 to read them or just submit them.

2 THE HONORABLE JUDGE NIEMEYER: As you like.

3 MR. LYNK: Can we get the witness' name?

4 THE HONORABLE JUDGE NIEMEYER: Yes.

5 MS. MENAKER: My name, I'm sorry, is Pamela Menaker.
6 I am an attorney in Mr. Clifford's office.

7 THE HONORABLE JUDGE NIEMEYER: The spelling of your
8 last name?

9 MS. MENAKER: M-e-n-a-k-e-r.

10 THE HONORABLE JUDGE NIEMEYER: However you would like
11 to do this.

12 MS. MENAKER: I think Mr. Clifford would probably like
13 me to read them in the benefit of everyone here, if that's all
14 right.

15 Good afternoon. I will be reading it in first person,
16 if that's okay, rather than try to edit it. So you will just
17 have to use you imaginations.

18 THE HONORABLE JUDGE NIEMEYER: Can we ask you
19 questions?

20 MS. MENAKER: I am not comfortable actually speaking
21 for Mr. Clifford. His experience in federal court is certainly
22 much more vast than mine. And he did submit remarks earlier in
23 the week that were written.

24 I appreciate the opportunity to address this most
25 auspicious group on an issue that is of great concern to the

1 profession at this time. My name is Robert Clifford. I have
2 been president of the Illinois Trial Lawyers Association as
3 well as the Chicago Inn of Court. I am a member of the
4 International Academy of Trial Lawyers, the American College of
5 Trial Lawyers and the National Judicial College.

6 Earlier this month I was nominated chair elect of the
7 American Bar Association Section of Litigation, but it is as a
8 trial lawyer, having represented people from all walks of life
9 for more than two decades, that I stand before you today.

10 I am scheduled to pick a jury in state court hours
11 from now in the trial of an internationally acclaimed violinist
12 who lost her legs in a tragic train accident. But I feel I
13 must take time out for all victims of personal injury to make a
14 statement to all of you today on the proposed change to Rule
15 26(b)(1), which would require a party to make a good-cause
16 showing to the court before discovery would be allowed relevant
17 to the subject matter of claims and defenses.

18 I must preface my remarks by stating that I am aware
19 of the position of the American Bar Association Section of
20 Litigation. And although I am here as an individual, I
21 respectfully disagree with its stands for a number of reasons.
22 Those reasons are set forth in my written testimony submitted
23 earlier to this committee. I supplement those remarks with
24 some true light cases in point.

25 I hold in my hand here a request I made to defendants

1 in the crash of Flight 4184 in Roselawn, Indiana, a case that
2 was settled during trial in federal district court right here
3 in this building just over a year ago. These documents are
4 representative examples of what savvy corporate defendants can
5 do. The first, second, third fourth, fifth request for the
6 production of the same documents over and over again. We asked
7 for these materials, and here are the responses.

8 Time and again, they dodged the questions, feigned
9 ignorance or used boilerplate language for materials that were
10 due the plaintiffs. But even more disturbing is the notion
11 that even if the defendants answered these straightforward
12 requests, under the proposed rules they would be limited to
13 answering them merely as pertinent to the specific allegations
14 in the complaint rather than the subject matter of the claims.

15 Let me translate that into what that would mean, using
16 the example of a commercial airline crash, an area of law in
17 which I have considerable experience. At the time the
18 complaints are filed within the two-year statute of
19 limitations, the National Transportation Safety Board is in the
20 process of conducting its investigation into the cause of the
21 crash. While that investigation is pending, plaintiffs'
22 attorneys are not allowed to proceed with discovery.
23 Therefore, that means that the complaint is merely a basic
24 allegation of what is known at that time, oftentimes relying
25 upon material from news reports.

1 The NTSB's investigation can take years, as in the
2 case of the Pittsburgh crash in which the NTSB is meeting in
3 March of this year to announce the results of its findings for
4 a crash that occurred five years ago. Plaintiffs are not
5 allowed to be a part of the NTSB's investigatory process.
6 Plaintiffs are not allowed to view the site of the crash.
7 Plaintiffs are not allowed access to the parts. Plaintiffs are
8 not allowed to view any reconstructed aircraft.

9 Keep in mind, though, the defendants are fully
10 participating and working with the NTSB in putting together
11 this report. Plaintiffs have nothing to help explain what
12 caused the crash, yet we have to craft the complaint within a
13 statutory time period and then amend it as discovery is
14 conducted following the release of the NTSB's often protracted
15 investigation. This gives corporate defendants years to do
16 with their documentation and critical information what they
17 will, all this while being privy to the course of the NTSB's
18 investigation.

19 At the time we file the complaint, plaintiffs
20 oftentimes don't even know who all of the responsible parties
21 may be. Discovery actually uncovers those elements of the
22 case. Discovery defines and clarifies the issues as provided
23 forth through notice pleading under the federal rules. Yet to
24 limit plaintiffs to discovery of what is contained in the
25 complaint, as is proposed in this amendment to the federal

1 rules, encourages an uneven playing field. It also alters the
2 focus of discovery disputes, changing it from the subject
3 matter of the litigation to nitpicking what is alleged in the
4 pleadings.

5 It's apparent that discovery is the foundation for the
6 factual basis for a trial and for the ultimate ascertainment of
7 truth. Throughout the litigation process, none of us should
8 lose sight of the ultimate purpose of litigation, to achieve
9 justice for all. Narrowing the scope of discovery, as these
10 amendments do, will serve only to adversely impact those very
11 people who rely upon the civil justice system, those who seek
12 the relief they so desperately deserve.

13 Allowing defendants to take further advantage of the
14 discovery process would be unfair to all those who come in
15 contact with the federal court system. I respectfully suggest
16 that this advisory committee focus its attention on the abuses
17 in the system, what leads to stacks of documents such as these.
18 Changing the rules in this way will not eliminate these kinds
19 of disputes. It merely creates new definitions that can be
20 applied in ways that will continue a contentious process.

21 Thank you for this opportunity to address these
22 concerns that affect all of us.

23 THE HONORABLE JUDGE NIEMEYER: Thank you. You might
24 take back to Mr. Clifford that his cases look like peculiarly
25 complex, important ones, and he might be able to get in that

1 context subject matter discovery from the court, because our
2 rules still will allow that.

3 Thank you for coming.

4 MS. MENAKER: Thank you. I will tell him.

5 THE HONORABLE JUDGE NIEMEYER: Mr. Rice?

6 MR. RICE: Good afternoon.

7 The last witness list I had faxed to me had my name
8 listed as Tim Rice. I don't know if that's been corrected or
9 not.

10 THE HONORABLE JUDGE NIEMEYER: My list shows Thomas
11 Rice. Is that your name?

12 MR. RICE: That's what I prefer to go by.

13 I am a civil litigator with 20 years of experience.
14 Good and bad. Generally we practice on the defense side. I
15 through the hearing have heard defense attorneys such as myself
16 called whiners, schemers, stonewallers, people who hide
17 discovery.

18 I am an attorney. I have the same obligation as any
19 other attorney. I am a zealous advocate under the applicable
20 rules. Yet I follow the code and try to be a gentleman.

21 I understand that on the plaintiffs' side, being a
22 zealous advocate means using discovery rules to their fullest.
23 I have heard plaintiffs' attorney say their clients are
24 entitled to civil justice, fair access to the courts, and right
25 to a fair hearing. So do the defendants. But I really think

1 the nub of the problem is there are two sides, both zealous
2 advocates. And the topic I want to address is in favor of
3 redefining the scope of the discovery and attorney-managed
4 discovery to discovery that's relevant to the claims and
5 defenses in the case.

6 The real problem is that from my perspective in the
7 trenches in responding and preparing and negotiating discovery
8 dispute, the current rule of relevancy to the subject matter is
9 a definition without any practical limitation because there
10 isn't any practical limitation. I'm talking practical
11 limitation. Plaintiffs' attorneys under the rules of ethics
12 are obligated to take that to its fullest extent. The problem
13 is --

14 THE HONORABLE JUDGE CARROLL: Does that mean if we
15 enact these rules you are duty-bound under the code of ethics
16 to take them to their narrowest extent?

17 MR. RICE: My duty is to defend my client the best way
18 I see possible.

19 THE HONORABLE JUDGE CARROLL: How do you answer this
20 problem that's been raised which is if we go ahead and
21 recommend these rules be adopted and they get adopted, that all
22 of a sudden where we never saw problems before, you all are
23 going to be in court saying, wait a minute. Claim or defense
24 means this very tiny, narrow box. And if you want to get out
25 of that box, you got to go to court?

1 MR. RICE: I am glad you asked that question, because
2 it really gets me to the point I want to make; and that is, in
3 attorney-managed discovery, where you have attorneys involved
4 trying to make the decision themselves, if you don't have an
5 objective standard or a standard that is more objective, which
6 I believe the proposed rules are today, are, it is extremely
7 hard for either side to come to some sort of understanding or
8 compromise. A subjective standard, which I believe the current
9 rule is, relevant to the subject matter, whether you have a
10 subjective definition like that, that definition, the scope of
11 it, should be better left to a neutral decision maker and that
12 is the judge.

13 I think you get a much better reasoned, a much quicker
14 resolution of that issue, which is why I am very enamored with
15 the idea of when you get to a realistic scope of discovery
16 dispute, that at that point the court steps in as a neutral
17 arbiter. I don't think that expands the court's obligations in
18 discovery disputes, obligations along with efforts.

19 I think that if we are given, as attorneys, more
20 objective standards, we will be able to handle cases better
21 ourselves without judicial intervention. That's not to say we
22 are not going to have discovery disputes on subject matter
23 where the case merits it. But at least we attorneys aren't
24 arguing it. In the first instance it's very subjective and
25 there are very two emotionally different views on the subject.

1 Examples of what I'm talking about, in my own personal
2 experience, come from product liability cases, personal injury
3 cases. One example, and these aren't the mass sophisticated.
4 They involved serious injuries but a few plaintiffs. One
5 example of the topic is single engine aircraft. Almost always
6 the claim is -- not almost always. An example of the claim is
7 in-flight breakup, a claim called in-flight breakup. In other
8 words, in very layman's term, part of the plane falls off
9 before it hits the ground, or breaks off before it hits the
10 ground. In almost any uncontrolled descent, you exceed the
11 flight parameters, the performance envelope, if you will.

12 Even in cases where the NTSB has decided that it's
13 pilot error, what you end up with are requests that are
14 approved, in my experience, if it involves the model and if any
15 part of the plane fell off during the flight it's discoverable.
16 So you end up with maybe 25 to 30 incidents where a part of the
17 plane fell off, and yet it really doesn't have anything to do
18 with either the defect in question or the claim in question.

19 You end up with a mini trial -- this goes to any
20 product case involving similar accidents. You end up with
21 little mini trials on every prior accident. You end up
22 producing documents, thousands of documents, witnesses from
23 everywhere involved in other accidents.

24 I have been in cases where thousands and thousands of
25 documents were produced. And yet, in one case that comes to

1 mind, not even one of those documents was attempted to be put
2 into evidence at trial. Why? Because for admissibility you
3 have to have similarity to the defect being claimed. In other
4 cases where we produced hundreds of thousands of documents
5 maybe eight get in. It's the same eight that we introduced
6 anyway under the proposed rules.

7 THE HONORABLE JUDGE NIEMEYER: But the 100,000 may
8 still be relevant. A good lawyer just doesn't put them in.

9 MR. RICE: Perhaps you have experience with that. My
10 little experience is that they can get it if they try.

11 THE HONORABLE JUDGE NIEMEYER: Any good trial lawyer
12 that I have ever seen will put in a limited number of documents
13 in a case because it is a limited comprehension of the court
14 and jury.

15 MR. RICE: Well --

16 THE HONORABLE JUDGE NIEMEYER: A 100,000 document case
17 doesn't go anywhere.

18 MR. RICE: I realize that, your Honor, but where I am
19 coming from is where we have in-chamber conferences each day
20 and the attempt is made to get all those documents in and the
21 judge cuts it off due to lack of similarity. I am not really
22 talking about where the experienced trial attorney makes his
23 own decision about making a complex case less complicated.

24 Another problem that I am seeing is that discovery
25 disputes are becoming their own animal. Settlements are being

1 negotiated on the basis of how much more discovery is there to
2 be, as opposed to what the real merits are. And we are
3 starting to even see the focus from the merits of the case to
4 just plain discovery, using the discovery as a weapon. It's
5 something that I don't like to see, I don't like to be involved
6 with. And I am hoping that with these new proposed rules that
7 that will eliminate in some fashion.

8 I appreciate the opportunity.

9 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Rice.

10 Mr. Formeller?

11 MR. FORMELLER: Good afternoon. My name is Dan
12 Formeller, and I am a member of the firm of Tressler Soderstrom
13 Maloney & Priess here in Chicago.

14 My practice is mostly a federal practice, and I appear
15 in a number of jurisdictions around the United States.
16 Although because I live and office here I spend most of my time
17 in this building practicing under the rules as they are
18 interpreted by this district.

19 I guess individually and as a member that primarily
20 appears on the defense side of cases, I view these proposed
21 amendments as a positive step to creating a more orderly
22 discovery process. Rather than approach the rules sort of
23 theoretically, I'd like to do what I can to bring my own
24 experience here as a member of the bar of the Northern District
25 of Illinois to bear and would note first that the Northern

1 District is an opt-out jurisdiction, as you probably know, and
2 that my experience in the main has been that lawyer-managed
3 discovery in terms of disclosure with the intervention of the
4 trial bench when necessary has mostly worked. Certainly in the
5 main cases.

6 There are exceptions and lawyers are good at creating
7 exceptions, and I recognize that. But in the main, in the
8 cases that I appear in, both business-to-business and in other
9 types of cases, that type of disclosure and work under a case
10 management order has been effective.

11 I found that when the trial bench gets serious about
12 energizing and involving the senior lawyers for each party in a
13 case, discovery disputes tend to evaporate and discovery
14 proceeds in a more orderly fashion. Especially when a crafty
15 case management order done by the senior lawyers engaged by
16 each party of the case is entered.

17 In terms of the uniformity of the discovery rules,
18 although I learned to live with the opt-out provision here in
19 the Northern District, I have appeared in many jurisdictions
20 where that has not been the case. And I think that speaking as
21 a practicing lawyer, uniformity has its benefits. Certainly
22 when appearing in jurisdictions that one does not customarily
23 appear in and yet one who bears primary responsibility for
24 being engaged by a client to represent them, uniformity gives
25 us some refuge in terms of knowing how to practice, especially

1 with a number of the discovery rules.

2 I also think it helps alleviate a perception perhaps
3 that venue shopping is something to be looked for and that you
4 can perhaps do better in one jurisdiction than another based on
5 different disclosure rules. And although that may be
6 perception and not reality, I think it exists and it's
7 something that we should be concerned about.

8 I also think that the discussion here, without being
9 redundant, about the imposition of a claims and defenses type
10 of standard is certainly a workable one. I think that that
11 term can have meaning. It can set boundaries for experienced
12 litigators and for the trial bench, and I don't think it adds
13 anything or detracts anything from what we already deal with in
14 fraud case where we have to plead with specificity, where we
15 have to learn to live with those rules on specificity, and
16 where we can conform our discovery to the specificity alleged
17 in the complaint. I certainly have not yet had problems with
18 that in my own practice.

19 Any concerns that the adoption of that type of
20 standard might lead to patterns of pleadings I find to be one
21 that can be handled within the confines of the sanctions
22 already available to us under the rule, and that experienced
23 trial lawyers, I believe, take seriously their responsibility
24 in drafting their pleadings with good faith and become
25 exceedingly defensive when those good-faith standards are

1 challenged and, therefore, don't do it more than once.

2 I'd like to speak for a few minutes about the
3 experience in Illinois, being my home jurisdiction, on
4 durational limits of depositions. In 1994 and '5, when I was
5 the president of the defense bar here, I spoke against the
6 adoption of the three-hour rule in front of the Illinois
7 Supreme Court. I will testify that only fools can change their
8 minds. It has worked. For the most part in the main the
9 durational limits on depositions in the state court system in
10 Illinois has worked.

11 Have there been exceptions? Yes. Do they need
12 intervention by the trial bench on occasion? Yes. Do they,
13 however, for the most part take care of party depositions,
14 witness depositions, fact-based depositions? The answer is
15 yes.

16 In thinking about my comments here today, I was trying
17 to think anecdotally about situations where durational limits
18 have been a problem, where they have required more active
19 management by the trial bench, and I thought of a number.
20 Expert witnesses in complex cases, perhaps. Economic or
21 accounting experts in fraud, professional errors and omissions
22 cases, antitrust cases, security cases, almost always. Again,
23 can be handled by a carefully crafted case management order.

24 Engineering and scientific witnesses in evolutionary
25 design cases, where you're looking at the design of a product

1 over a long period of years, yes. Again, a case management
2 order can handle that. Operational histories, site histories
3 and environmental cases, yes, durational limits are a problem.
4 And cases involving a series of transactions, business-to-
5 business, might require more than the proposed seven hours.
6 Again however, lawyers here in Illinois, I think, operate under
7 the goose and gander theory and seem to be able to work those
8 out by lawyer-managed discovery without the active intervention
9 of the trial bench by recognizing the scope of the witnesses
10 that will testify in the case, the breadth of their expertise
11 and testimony, and crafting those orders with little, perhaps
12 slight, influence of the trial bench as those cases get ready
13 to go into the deposition phase.

14 I think that certainly durational limits can be
15 handled. I recognize seven hours is an arbitrary limit, as
16 would be any finite number an arbitrary limit. But the notes
17 that have been provided by the committee seem to be appropriate
18 in light of the goal that you're attempting to make.

19 PROFESSOR MARCUS: Excuse me. Can I ask a little
20 question about that? Do you find that there is any problem
21 with working things out in situations where, say, there are
22 four, five defendants separately represented so you have got
23 multiple parties that might want to question the witness?

24 MR. FORMELLER: We use convention in Illinois that the
25 three hour limit is a per-side limitation; that is, not a per-

1 party limitation but a per-side limitation. There generally in
2 multi-defendant cases is some discussion about how that's going
3 to be done. Before the rule was put in, I will admit, that
4 there was a practice of what I will call witness churning; that
5 is, multiple questions are asked the same time just by
6 different parties. And I am not sure why that happened but it
7 did. I think that has been not completely eliminated but it
8 has been substantially reduced under the durational limits
9 placed in the cases in Illinois.

10 I think for the most part defendants are able in
11 multi-defendant cases -- and it would be the same in multi-
12 plaintiff cases -- are able to work out the way they are going
13 to stage the deposition and how they are going to allocate the
14 time, knowing -- at least my experience has been people don't
15 bring stopwatches to depositions. They may occasionally glance
16 at the clock. But I don't think anyone puts ultimate
17 termination times on depositions as long as it is proceeding in
18 an orderly fashion.

19 Thank you very much for the opportunity to address
20 you, your Honor.

21 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr.
22 Formeller.

23 Lorna Schofield.

24 MR. SCHOFIELD: Good afternoon. I am Lorna Schofield.
25 I am here on behalf of the Section of Litigation of the

1 American Bar Association. I am required to say that my views
2 and what I say are not the views of the association as a whole.

3 I am also a partner of Debevoise & Plimpton in New
4 York, and I and the section very much appreciate the
5 opportunity to address you today on these changes.

6 THE HONORABLE JUDGE NIEMEYER: Are you speaking on
7 behalf of the section, not the association?

8 MS. SCHOFIELD: That's correct. And we are fully
9 authorized to do that.

10 THE HONORABLE JUDGE NIEMEYER: We understand that.
11 And also I might add that we have appreciated the help of the
12 section through this process. I can't remember whether the
13 section appeared at the San Francisco hearing originally, but
14 it certainly did at Boston College and presented us the papers.
15 And these various associations, ATLA, ABA Litigation Section,
16 American College of Trial Lawyers and many of the others, have
17 been truly helpful to our effort.

18 I just wanted to express that to you and hope you pass
19 that along.

20 MS. SCHOFIELD: Thank you. We have been grateful to
21 have the input.

22 And it's in part because of our ability to participate
23 and express our views that we fully support the recommendations
24 that have evolved out of the discussions within the various bar
25 associations. I won't go through each of the four major

1 proposals in detail here. I have submitted a written report.
2 The reasons we support them are not unlike many of the reasons
3 that I am sure you have heard in your various hearings.

4 There are three issues that I would like to address,
5 one much more important, I think, than the other two. The
6 first is, I'd like to talk about the issue of judicial
7 discretion and judicial supervision and also in part address
8 myself to Mr. Clifford's comments which you just heard referred
9 to my remarks. Second and very briefly I'd like to explain the
10 support of the section of the majority draft of the mandatory
11 disclosure provision and also the section's support of the
12 placement of the cost sharing provision in Rule 26 rather than
13 in Rule 34.

14 Let me address then what I think is one of the most
15 important features of the proposed changes and also an aspect
16 of their being very carefully crafted. And that is, I couldn't
17 help but notice, and I think everyone must, that each of the
18 proposals contains a provision that allows for judicial
19 discretion. That is, although the rules seem to modestly try
20 to contract the scope of disclosure and also what happens in
21 discovery, there is an exception in every case so that a judge
22 can exercise his or her discretion and exclude a case from
23 those provisions. And that, I think, meets the goal not only
24 of having a rule that's flexible but also having courts who are
25 more involved in the cases that particularly need them.

1 I can share a little bit with you about the
2 discussions that we've had within the section and also with
3 various groups in the ABA. Over and over one of the things I
4 heard was, well, these proposals may be good for litigation and
5 litigants in general, but not my cases, not my clients. And in
6 each of those situations my response would be, what about the
7 exclusion? If your case is truly exceptional, there is an
8 exclusion.

9 And one of the things you may not have heard here,
10 because people are too polite to say it to judges, but that I
11 heard because I am not a judge and I don't sit in the same
12 shoes, was, but we are afraid that these judges aren't going to
13 do that. We are afraid that we just can't trust the judges to
14 implement these exclusions.

15 And my first response with the bar association hat on
16 was to say, well, as a bar association we can't make our policy
17 based on the view that we can't trust the federal judges.
18 Moreover, I assume that the federal rule makers are in the same
19 situation. You can't make rules based on the presumption --

20 THE HONORABLE JUDGE NIEMEYER: You can trust the ones
21 in this room here.

22 MS. SCHOFIELD: Present company excepted, exactly --
23 in the same way that you can't, I think you alluded, afford
24 making rules where you have to assume that lawyers are going to
25 abuse the rules. I think when you make the rules, you have to

1 assume that judges are going to enforce them the way they are
2 written and that litigants will follow them. And to the extent
3 that that doesn't happen, you have to use other means to deal
4 with those problems.

5 That is not to say, however, that there is not an
6 underlying legitimate concern, and this I feel as an advocate.
7 All of us who are lawyers and advocates, or who have been, have
8 experiences where you have gone before a judge, see a general
9 rule and say, but, judge, my case is different. Please don't
10 do this to me. And the judge has not agreed.

11 And in all those situations we can't help but fear
12 that that will happen to us again and again. And I think
13 that's the reaction of a lot of people in reading these rules,
14 that judges will seemingly reflexively deny discovery in the
15 way that, with due respect and present company excluded, it
16 sometimes seems that judges reflexively now grant discovery.

17 For that reason, one suggestion that we have that was
18 in part prompted by the antitrust section was for the comments
19 to the proposed rules to include some fairly strong language
20 encouraging the judges to apply the exceptions where it's
21 warranted and explaining that one of the very important reasons
22 for having the exclusions is so that judges will involve
23 themselves in the cases that need the most. And I have heard
24 several people refer to that, but I think that that is one of
25 the most important aspects of the proposal, which is you can't

1 force judges obviously but to encourage judges to be involved
2 in these cases.

3 THE HONORABLE JUDGE NIEMEYER: I think we heard that
4 comment in all the hearings. I think it's a good one, and my
5 expectation is that the reporters, Professor Cooper and
6 Professor Marcus, will be looking at the notes again when it
7 comes to us to try to address some of the specific concerns
8 that have been raised.

9 MS. SCHOFIELD: As a sort of footnote to all of this,
10 I think that it may be harder for judges to reflexively say no
11 to discovery. In some ways, I think, it's easy to say yes to
12 discovery because in a sense there is no harm done. There is
13 no harm to justice, so to speak, because you are not keeping
14 anything from anyone, in the same way that judges -- as an
15 advocate, it seems to me, it's very hard to win motions to
16 dismiss I think for the same reason. Judges think, oh, well,
17 there is no real harm. There will be another chance at the
18 summary judgment stage.

19 I think, though, that when judges are faced with the
20 opposite situation, it's not simply going to be turning the
21 tables, but that judges will say, gee, what I am going to be
22 doing here is withholding some discovery that somebody says is
23 really important. I am going to have to listen and supervise
24 and think about this a little more than I otherwise would.

25 And that gets me back. I think all of that is in some

1 way responsive to Mr. Clifford, who is a friend and colleague
2 and whom I greatly respect, but I have to disagree with him on
3 these issues. As I heard the description of the case that he
4 was making, my reaction was the same as yours, Judge Niemeyer.
5 I thought, gee, I don't practice in that area. I don't know
6 what the answers are.

7 But it sounds to me like that's one of the exceptional
8 cases that should be excluded. And I think that it will be
9 important for judges to have to think about when it's
10 reasonable to deal with these subject -- you know the broader
11 subject matter discovery rather than the claims and defenses
12 discovery.

13 Let me turn very briefly to the other two issues. The
14 mandatory disclosure draft has two alternative proposals
15 essentially. One is the majority proposal for the language
16 "supporting claims and defenses," and the other is language
17 "may be used to support claims and defenses." We support the
18 majority view for three reasons. Only one is in the report.
19 So let me be really clear and tell you what all three are.

20 The first is that "supporting" seems to be a more
21 inclusive term. It makes sense if you want to achieve
22 efficiencies through mandatory disclosure to use the more
23 inclusive term. Second, and perhaps more important, is that
24 "may be used to support" is subjective. To the extent that you
25 are using subjective language, you may be just encouraging

1 gamesmanship.

2 And finally, as I was reading it, it seemed to me it
3 could raise questions of admissibility. And I don't think
4 that's what any drafter was suggesting, that you would only
5 have to provide mandatory disclosure of things that you would
6 be permitted to use to support claims and defenses. So that's
7 our position. We support the majority view on mandatory
8 disclosure.

9 For cost shifting, our view is that we would rather it
10 be in Rule 26 than Rule 34. The reason is that I think it's
11 the view of the committee that already it's the implicit power
12 of the court in all sections with respect to all different
13 kinds of discovery. And our fear is that if the provision were
14 simply in Rule 34 and applied explicitly only to document
15 discovery, that people would thereby assume, notwithstanding
16 any comment to the contrary, that it was not available in other
17 forms of discovery.

18 Thank you.

19 THE HONORABLE JUDGE NIEMEYER: Thank you.

20 PROFESSOR MARCUS: Can I ask one question? Just I do
21 recall that there is a couple references to the antitrust
22 section's views which are a little bit different from the
23 section on litigation. Can you give me some idea what are the
24 relative sizes of those two sections?

25 MS. SCHOFIELD: I can't. I know that the section of

1 litigation is the largest section. I believe we have about
2 60,000.

3 PROFESSOR MARCUS: I heard 60,000, yes.

4 MS. SCHOFIELD: I know that antitrust is smaller. It
5 makes sense. There are fewer antitrust cases than there are
6 general litigation cases, but I don't know how big the
7 antitrust section is.

8 I should also tell you it might help to inform you
9 that as part of the process of getting our remarks approved we
10 had to run them by all the sections in the American Bar
11 Association. And the only one we've heard back from, make
12 whatever that you will, was antitrust. And --

13 PROFESSOR MARCUS: TIPS had no dissent?

14 MS. SCHOFIELD: We heard no dissent at all. We heard
15 no views except from antitrust. And that's why their views are
16 included in the report.

17 PROFESSOR COOPER: Could I ask a question about the
18 "may use" as compared to "supporting information"? And that
19 is, how did you interpret "supporting information"? Suppose
20 you have information, part of which supports your position and
21 part of which does not. Would you be obliged to disclose that
22 under the "supporting information" formulation?

23 MS. SCHOFIELD: I hadn't thought of that issue, but
24 now that you mention it, I would say no.

25 PROFESSOR COOPER: All that that formulation would

1 require is the unambiguously and supporting information?

2 MS. SCHOFIELD: Actually as I think about it, if the
3 language is "supporting its claims and defense" --

4 PROFESSOR COOPER: That supports the claims and
5 defenses of the disclosing party.

6 MS. SCHOFIELD: Then I would think that you would have
7 to provide only those materials that actually support your
8 claims and defenses, but I think of that as a more inclusive
9 term than what a party may use to support one's claims and
10 defenses.

11 PROFESSOR COOPER: Suppose the party's position is, I
12 have 200,000 pages of supporting information and everything
13 supports me, but I only mean to use a thousand pages of it. Do
14 you have to disclose all 200,000 pages?

15 MS. SCHOFIELD: Under the current formulation I think
16 yes, and that's why we support it.

17 THE HONORABLE JUDGE NIEMEYER: Again, I want to thank
18 you, and it's important for our committee to have the bar
19 association's input, various bar associations, because it just
20 doesn't represent the speaker but represents a broad group of
21 attorneys who have thought about it. And obviously, we are
22 trying to adopt rules to facilitate the practice of law by all
23 attorneys. Thank you for your comments.

24 Mr. Riley.

25 MR. RILEY: Good afternoon. My name us Jack Riley. I

1 am here today to speak very briefly on behalf of the Illinois
2 Association of Defense Trial Counsel. This is a group of about
3 1100 lawyers in the State of Illinois, practicing law primarily
4 on behalf of defendants. I am currently serving as president
5 elect of that group.

6 And with me here today is Peter Brandt, who is
7 practicing downstate Illinois, who also has a few comments.
8 And he is first vice president of the Illinois Association of
9 Defense Counsel.

10 We were asked to comment briefly about the experience
11 in Illinois regarding limitations in the length of depositions
12 because apparently we are one of the few states that already
13 has a provision in this regard. And, of course, this relates
14 to the proposal to limit depositions in federal court to seven
15 hours.

16 Very briefly, this restriction, if you will, has not
17 really caused a problem in Illinois for I don't think defense
18 lawyers or lawyers for plaintiffs. I think probably the main
19 reason there has been a balance of terror, mutually a sort of
20 destruction. If one of us were to unfairly attempt to impose
21 this restriction, say, for instance, in an expert, a defense
22 expert the plaintiff was deposing, we would know that when we
23 tender our expert to be deposed, that a similar problem would
24 occur.

25 And what has happened primarily is that parties have

1 reached stipulations. And when it's reasonable for a
2 deposition to exceed in length in three hours, we have exceeded
3 it. Very rarely in my own experience have I had occasion to
4 file a motion to petition before the court to ask the court to
5 order to lengthen the deposition. I would say 99 percent of
6 the cases that we have been able to work that out informally,
7 without even a formal stipulation, with the opposing side.

8 I think that the primary thrust and purpose in the
9 change in Illinois was to prevent unnecessarily long
10 depositions, which are caused frankly, were cause in many
11 cases, by inexperienced lawyers getting their training in a
12 deposition. And this was a common complaint and there was some
13 truth to that.

14 And even though it's common to stipulate for
15 depositions of longer hours, I think that the rule has worked,
16 and the thrust or the purpose behind the change has been
17 accepted by both sides, who recognized that even if there are
18 multiple parties on the defense side, let's say, we reach
19 agreements as to primary questioner. And frankly, many of the
20 questions were repetitive anyway when you have multiple parties
21 involved in the case.

22 So it does force you to work with the co-defendants,
23 try to arrange so there isn't a duplication of questions, try
24 to arrange so that inexperienced lawyers are not practicing.
25 And it also requires some give-and-take among plaintiffs and

1 defendants. Basically it has not presented a problem.

2 THE HONORABLE JUDGE ROSENTHAL: Sir, has it shortened
3 the length of depositions even where you agreed to go beyond
4 three hours?

5 MR. RILEY: Yes, I think so because you realize that
6 every minute over the three hours you are beyond the rule, and
7 even if the other lawyers aren't reminding you of that, you are
8 conscious of it. And you are conscious of the fact that he
9 could at any time raise this and say, hey, I am cooperating,
10 but now you are really going beyond.

11 So, yes, I think it's had an effect to shorten even if
12 it is extended. And again, it has proved also cost-effective
13 for both sides because in terms of an expert's deposition you
14 are paying the expert for every minute of the deposition and
15 then --

16 THE HONORABLE JUDGE NIEMEYER: What about the court
17 reporters? Are they complaining?

18 (Laughter.)

19 MR. RILEY: They managed to raise their prices per
20 hour, so to accommodate that situation.

21 PROFESSOR COOPER: Could I ask you a question? As I
22 understood, I think, it was Mr. Formeller, the rule appears to
23 be written as three hours to be applied as three hours per
24 side. And defendants just sort of work it out among
25 themselves, plaintiffs sort of work it out among themselves,

1 third party defendants might get another three hours and sort
2 of work it out?

3 MR. RILEY: Well, I think the rule itself, which is
4 actually Rule 206 of the Illinois Supreme Court Rules,
5 provides, "No discovery deposition of any party or witness
6 shall exceed three hours, regardless of the number of parties
7 involved in the case, except by stipulation of all parties or
8 by order upon showing that good cause warrants a lengthier
9 examination."

10 And my interpretation, my experience, has been that
11 that's three hours, period. And that caused some consternation
12 when the rule was proposed because defendants thought, my God,
13 if we are three or four parties, we'll never get this done.
14 And that has caused the defendants to make some plans as far as
15 who was the best questioner to go forth and so forth.

16 So the answer to your question is no. It's three
17 hours, period. And as far as the other side needing time to
18 question, primarily the presenting attorney, in my experience,
19 especially with tort cases, normally does not question the
20 witness. So if he does, maybe just very few questions. So the
21 primary crunch has come on the opposing parties who were taking
22 the deposition. And we seem to manage to work that out fairly
23 well. And frankly, if we can do it in three hours, I think
24 most people can do it in seven hours.

25 The only comment I would make is that I noticed that

1 the proposed rule allows a variance if the parties agree,
2 stipulate, and also if a witness agrees. I can see that might
3 cause some problems, and I am not quite sure the purpose behind
4 that. And I would say that if possibly if we are talking about
5 a lay non-party, some poor fellow who was subpoenaed, has
6 nothing to do with the case, maybe in that circumstance it
7 would be justified to require his stipulation. But with a
8 party or an expert, although it certainly could be obtained in
9 most cases, I don't really think that is necessary. It might
10 get a little unwieldy. That would be the only comment I would
11 have on that.

12 PROFESSOR ROWE: You may not have been here before,
13 but we had mentioned that the concern was for basically the
14 parties ganging up on a non-party witness. But we have also
15 been hearing that it might cause too many problems, that it
16 could be handled by protective motions under Rule 45.

17 MR. RILEY: I think it would, and judges are fairly
18 accommodating, magistrates, providing protection for a truly
19 non-involved party. That hasn't been a problem.

20 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Riley.
21 That's very helpful.

22 MR. RILEY: And Mr. Brandt would like to comment with
23 regard to the --

24 THE HONORABLE JUDGE NIEMEYER: You used up almost his
25 time.

1 MR. BRANDT: Thank you. I understand that time has
2 pretty much been used, but I do want to talk about just a
3 couple things.

4 I am currently the vice president of the Illinois
5 defense counsel, as Mr. Riley indicated to you. I just want to
6 touch on a couple things, and I think in light of the time that
7 I have I'll just hit on a couple things anecdotally about our
8 experience in our firm with Rule 26(b)(1).

9 We have had a couple cases, one involving a tire that
10 had the number 500 on it by a company that we represented. We
11 produced documents that dealt with that 500 model tire, a truck
12 tire, every tire that the company made that had that number on
13 it, as a result of the request that we produce those things.

14 And I am in central Illinois. These documents were
15 produced by my client in New York. And it cost the client
16 about \$100,000 to produce those documents. Plaintiff's counsel
17 came out for half a day and said, I'll be back later, never
18 came back. We sought some relief from the court --

19 THE HONORABLE JUDGE NIEMEYER: Did you object to it
20 originally? I mean, if I understand, if it's a Firestone 500,
21 it's a whole line of tires.

22 MR. BRANDT: That is right. We had objected on the
23 ground that it exceeded the scope. Obviously if we are talking
24 about the Firestone truck tire --

25 THE HONORABLE JUDGE NIEMEYER: You did go to the court

1 and you didn't get any relief?

2 MR. BRANDT: We got no relief on that, nor did we get
3 relief when we requested the expenses involved with that.

4 And so we had a similar occurrence with a drug called
5 Allopurinol which was manufactured by a company down in
6 Raleigh. And the production request was that we produce all
7 the materials that dealt with the FDA approval of that
8 medication. Again, very expensive, and again the similar
9 situation occurred where counsel came in and spent very little
10 time in reviewing those documents. We sought some relief from
11 the court to get our expenses back for that because it seemed
12 to us that we had gone through an extensive effort and had
13 gotten very little. Certainly it was for naught in terms of
14 what plaintiff's counsel was looking for.

15 What I'm leading up to obviously is the idea that the
16 new Rule 26(b)(1) as proposed, where there is limits placed on
17 those, that type of discovery request, at least gives the
18 courts some guidance about that type of situation such that if
19 the plaintiffs' counsel feels they need all the information
20 about every truck tire, every Caterpillar tractor tire that
21 bears that number, that we can have some scope to it. I think
22 in it's current form the rule doesn't provide for that. And we
23 found that very problematic. It's also been very expensive,
24 has delayed, I think, in many cases the case getting to its
25 ultimate conclusion.

1 PROFESSOR ROWE: How much do you need that scope
2 limitation if you have the cost bearing that is provided for in
3 Rule 34 in the present proposals?

4 MR. BRANDT: I understand that. I think that the
5 problem that we run into is that, at least in my area, the
6 courts are hesitant, or at least the judges have been hesitant,
7 to award that type of expense, if there is some basis upon
8 which the plaintiff believes that he was entitled to have those
9 documents, that what he reviewed was all that he needed to
10 review, even though production was quite expensive.

11 PROFESSOR ROWE: Of course, under the proposals in the
12 present rule, in order for the plaintiff to get the broader
13 type of discovery, the subject matter discovery, the plaintiff
14 would probably have to show good cause, in which case the court
15 is probably not going to give you expenses.

16 MR. BRANDT: I understand that, but I think it would
17 alternatively limit the scope of that scenario that we had
18 where we're producing a warehouse full of documents, many of
19 which had nothing to do with this -- certainly this incident or
20 this particular tire.

21 So from our perspective we really like what is being
22 proposed here. I think it's a good shaping of the rule and
23 will help the courts, help the judges, define where discovery
24 ought to go in these cases.

25 The only other thing I would add is that once the

1 scope is broadened like that and we produce a warehouse full of
2 documents, or one client does, the problem is that I think at
3 that time you also expand the scope and the number of
4 depositions that are probably going to be taken. So if there
5 is a hand-in-hand here between the two rules on the number of
6 depositions, I think those two go together when you --

7 THE HONORABLE JUDGE NIEMEYER: Don't throw those
8 documents away. You may need them for the next case, right?
9 All right. Thank you, Mr. Brandt.

10 MR. BRANDT: Thank you very much. Thank you for your
11 time.

12 THE HONORABLE JUDGE NIEMEYER: Mr. Milliken?

13 MR. MILLIKEN: Good afternoon, sir. I'm here as a
14 president election of DRI. I am also a fellow of the American
15 College and, maybe of some significance, I've been in practice
16 38 years, which probably at least makes me the oldest person in
17 this room. And I have seen discovery evolve from nothing to
18 everything, and now I think we are seeing it at least approach
19 a move back to something that everyone can find acceptable.

20 As you all know, DRI submitted a rather extensive
21 paper to you for your Boston conference and had participation
22 in that, for which I am very grateful.

23 THE HONORABLE JUDGE NIEMEYER: The thanks that I
24 expressed to the others also extended to DRI. It's very
25 helpful, and we appreciate that input.

1 MR. MILLIKEN: Thank you, sir.

2 Obviously, your proposals did not comport with all of
3 our recommendations, but DRI is here to say that we believe
4 your proposals are an effort to improve the situation and
5 clearly, to me, it is an effort to balance the situation among
6 the competing interests here.

7 In my paper, my statement that I have submitted, I
8 basically tried to address five points. They were that the
9 adoption of the proposed scope rule will make a difference.
10 And I tried to cite to you an anecdotal experience, and I can
11 talk about others if you would like.

12 Secondly, I believe that more court involvement or the
13 prospect or threat of court involvement is needed and will
14 improve the situation. Thirdly, I think we can alleviate Mr.
15 Clifford's concern because, as the chairman has stated, the
16 scope of discovery is not being narrowed by your proposal. It
17 is simply the step one, step two which we think will improve
18 the situation.

19 Fourthly, I believe, contrary to what one of the
20 witnesses said in Baltimore, your proposals are supported by a
21 majority of the lawyers who practice in the federal court. And
22 finally, I don't think the cost bearing provision is either
23 unfair or unwieldy to administer.

24 With respect to the adoption of the proposed rule, I
25 cited, as I said in my statement, one experience where we were

1 noticed for 24 depositions of people involved in other Jeep
2 roll-over accidents all over the country, from California to
3 Maine to Virginia to Texas, and everywhere in between. And we
4 went into court and asked for some relief. And the response of
5 the judge was that he had no power over this type of discovery.
6 And the clear implication was that in his view with the subject
7 matter rule, his hands were tied.

8 PROFESSOR ROWE: Was this in federal court?

9 MR. MILLIKEN: Indeed it was.

10 We went through those 24 depositions, some on the same
11 day, at enormous cost to the parties. Except some people were
12 able to regain the cost because the depositions were later sold
13 as a package. But had the new rule been in place, we believe
14 the judge would have taken a different tact. He would have at
15 least listened to our arguments that the prospect that any of
16 the testimony developed in these depositions would be
17 admissible in our case should at least be considered, and that
18 the plaintiff should have had to make some sort of showing in
19 that regard.

20 It should be remembered, you had to show substantial
21 similarity, and he was not taking depositions of people who
22 could show that the alleged defect in our case was the same in
23 those cases. He was taking depositions of police officers, who
24 are not qualified to say anything like that; of people who were
25 injured in the accidents. And obviously the proponent of that

1 evidence would face an enormous burden on the prejudicial issue
2 under the evidentiary rules.

3 But the point is, I believe that under the proposal
4 that you are making, a different result might have pertained.

5 THE HONORABLE JUDGE CARROLL: The point you made in
6 your paper, which is the point I agree with, is the result
7 might not have been different, because I am not -- I may not
8 agree with you that that evidence otherwise would not be
9 discoverable under claim and defense. But it would bring an
10 objective focus to the inquiry.

11 MR. MILLIKEN: Exactly. And the other point that I
12 really think that I want to make is that court involvement
13 early on in the discovery process, or as I mentioned in my
14 preface, the threat of that involvement, I think, is going to
15 have a very salutary effect. If we know that our actions are
16 subject to examination early on and that judges are not going
17 to put up with approaches that are simply fishing expeditions
18 or harassment and that sort of thing, I think both sides will
19 make an effort, either initially, to frame their discovery to
20 make it more reasonable, or after conferences between the
21 opposing parties, where this is argued out, it will lead to
22 that.

23 Therefore, I do not believe this fear that maybe is
24 being expressed by some of the judges, your colleagues on the
25 bench and the magistrates also, is as dangerous as it might

1 first seem, because I do believe lawyers will react positively
2 to this idea that we are being directed to try to be reasonable
3 in our discovery requests.

4 The fact is, under your proposals the scope, as I have
5 said before, is not being narrowed, and in appropriate cases
6 there is no doubt in my mind that the magistrate, if he is
7 considering it, or the Judge, is going to permit additional
8 discovery if a good cause can be shown. And I don't think good
9 cause is necessarily meaning the Holy Grail, or something like
10 that. I believe Mr. Clifford's example might well be --
11 without knowing the details of those types of cases, might well
12 be easily a way to show good cause.

13 So I don't think the draconian results that are being
14 predicted by the opponents of your proposals are going to
15 really occur. And insofar as the cost bearing thing, and then
16 I am going to stop, I do not believe that this proposal in cost
17 bearing is either a sword to be held over the plaintiffs' head
18 or a shield for defendants. I think you make it perfectly
19 clear in the writings I have read that have emanated from this
20 group, that this cost bearing is only to occur in extreme
21 cases, where the discovery is essentially tenuous. And then
22 you might consider doing that.

23 So I do not think that it's going to be the huge
24 burden on either side, and it seems to be the plaintiffs' side
25 is complaining about this, that --

1 THE HONORABLE JUDGE NIEMEYER: Maybe we can add
2 something to our note or something that might make it clear and
3 eliminate some of the concern. Some of it may just be fear. I
4 heard several people say, well, if we were to clarify the
5 circumstances under which it is to be used, not in the ordinary
6 course and certainly not to get good cause, then it might fly
7 better with everybody.

8 MR. MILLIKEN: I think that would be the case.

9 PROFESSOR ROWE: And the party can always avoid the
10 cost bearing by saying, all right, then I won't pay for it.
11 Then I won't get the discovery.

12 MR. MILLIKEN: Exactly. And if, in fact, it is the
13 type of discovery that I think you have indicated this should
14 apply to, it wouldn't have lost too much. So I do not think
15 that -- I think that provision is an appropriate provision.

16 Thank you very much.

17 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr.
18 Milliken.

19 Let's take a recess until 3:10 promptly. And is Ms.
20 Willett here? Can we take you right after the break at 3:10?
21 All right.

22 (Brief recess.)

23 THE HONORABLE JUDGE NIEMEYER: Ms. Willett.

24 This committee will absorb all of your comments by
25 osmosis, whether they are here or not.

1 MR. WILLETT: Thank you.

2 First of all, thank you for giving me the opportunity
3 to speak to you today. My name is Linda Willett. I am
4 associate general counsel of Bristol-Myers Squibb Company. I
5 am going to focus on some of the same things that many of the
6 other speakers have focused on, the need for a uniform system
7 of rules, a need to modify the initial disclosure requirement,
8 and then a subject near my own heart, dear to my own heart, and
9 that is the streamlining of the deposition process.

10 I suppose I should mention before I begin that prior
11 to going in-house with Bristol-Myers Squibb, I represented the
12 company as outside counsel for seven years. So I have seen the
13 discovery process from both sides, at least the defense side.

14 Bristol-Myers Squibb, as you probably know, is a
15 pharmaceutical, consumer product, health care company. We face
16 a wide variety of litigations as a corporate defendant, as you
17 would expect a corporate defendant would. But most of my
18 comments are going to be based on our facing product liability
19 litigation. A large litigation, many people are familiar with,
20 the breast implant litigation. We also face smaller sized
21 litigations with other pharmaceutical products and those have
22 shaped these comments, too.

23 The uniform system of rules is something that we are
24 highly desirous of. As a national defendant in that breast
25 implant litigation, in order to assure that our responses to

1 discovery were uniform, we hired national counsel to defend us.
2 However, because of the proliferation of local rules and the
3 need to find our way through those local rules in 50 states
4 where many of the cases were filed, we had to also hire local
5 counsel.

6 A corporate defendant facing the magnitude of
7 discovery that that type of litigation presents absolutely must
8 have counsel in every single state, or pay a national counsel
9 to become an expert in the local rules of every single state.
10 Now, surely this cannot be an efficient way to conduct
11 litigation. And we are very much in favor of the proposed
12 rules that would bring more uniformity to that process.

13 With respect to the discovery and disclosure
14 requirements, while we applaud the focus on focusing on that
15 discovery which supports the claims and defenses, we are very
16 concerned about the idea of particularity and would like to see
17 that maintained in the rules. Again, drawing on the
18 experiences of the breast implant litigation, the broad claims
19 that were filed in these complaints alleging product defects,
20 either design or manufacturing defect, without any
21 particularity, brought about a discovery process that I think
22 has not been seen in litigation history in this country.

23 Now, this was, as you know, a litigation that did have
24 some significant judicial intervention through the MDL process,
25 and one would have thought that it would have brought more

1 control to that discovery. But corporate defendants that were
2 subject to responding to discovery -- initial disclosure for
3 all information that would be relevant to any subject matter,
4 literally had to do what one speaker said corporate defendants
5 don't do; and that is, open the doors and say come in and look
6 at documents. I like to rebut the presumption that --

7 THE HONORABLE JUDGE NIEMEYER: That particularity is
8 only on disclosure, right?

9 MR. WILLETT: I guess the proposal is you are going to
10 tie the two together, and what we are saying or what I am
11 saying is that we'd like to see particularity maintained
12 because otherwise if it isn't we are going to lose the value of
13 the proposal.

14 THE HONORABLE JUDGE NIEMEYER: I am missing the point.
15 It says, the disclosure now as proposed is that it supports the
16 claims and defenses unless for impeachment. If it supports a
17 claim, whether you alleged it generally or with particularity,
18 I am not sure what your observation is.

19 MR. WILLETT: I think by focusing the parties'
20 disclosure efforts solely on claims and defense, while that's a
21 good change, often those claims are stated at such a high level
22 of generality, that without the particularity limitation that
23 currently exists, the responding parties are still going to be
24 subject to the same abuse.

25 PROFESSOR ROWE: You are looking at it from the

1 defendant's side, which is fair and understandable given the
2 work you do. But I am wondering if a particularity requirement
3 would actually be unworkable on the plaintiff's side, because
4 the idea behind having the particularity requirement in the
5 existing national rule with opt-out provision was that you
6 could go beyond the usual generality in order to trigger the
7 adversary's obligation to provide negative information. That
8 was if you plead with particularity, then you could trigger the
9 adversary's obligation to provide negative information.

10 But on the plaintiffs' side, if you keep the
11 particularity requirement and you have disclosure, then all the
12 plaintiffs have to do is plead with generality and they trigger
13 no disclosure requirement for anything on the plaintiffs' side,
14 favorable or unfavorable.

15 MR. WILLETT: I think there has to be some modicum
16 between something that is so broad, for example, a pleading
17 that a defendant has breached an express warranty without
18 saying exactly what the warranty is, that would trigger the
19 opening of the doors and we would have to produce all
20 documents, all information, that have to do with the warranty,
21 and something that was so specific that it would hamstring the
22 plaintiffs. There has to be a happy medium there that would
23 control what I am referring to as the opening of the doors.

24 PROFESSOR MARCUS: May I ask a follow-up question
25 about the experience you have had in breast implant? Because I

1 am not clear on why you didn't have a particularity provision
2 in whatever you were dealing with there. The national rule has
3 that now. I am wondering why that wasn't involved in what you
4 were confronting in those cases. And if it was, then why that
5 didn't solve your problem.

6 MR. WILLETT: In some respect it was part of the
7 process or the timing of the way complaints were filed. And
8 there were broad claims of manufacturing or design defect, some
9 of which were pled with particularity, but others that were
10 much broader. At some point during the process there was a
11 recognition that that was perhaps too general and there was
12 judicial intervention to more clearly define that.

13 But still with respect -- and there were discovery
14 disputes with respect to exactly what were the defendants
15 required to do.

16 PROFESSOR MARCUS: Are we talking about discovery or
17 initial disclosure?

18 MR. WILLETT: Well, really it came into play in both.
19 Initial disclosure, the --

20 PROFESSOR MARCUS: I guess the reason I ask, are you
21 suggesting that discovery should also be subject to a
22 particularity requirement?

23 MR. WILLETT: Well, I am suggesting that once -- that
24 the claims and defenses portion should be subject to the
25 particularity. And then --

1 PROFESSOR MARCUS: So you are talking about Rule
2 26(b)(1), definition of the scope of discovery.

3 MS. WILLETT: Yes.

4 PROFESSOR MARCUS: And you are suggesting that our
5 proposal is not good because it does not add particularity
6 where it has never been before?

7 MR. WILLETT: I think that 26(b) disclosure should be
8 tied --

9 PROFESSOR ROWE: Discovery or disclosure?

10 MS. WILLETT: Discovery should be tied to the
11 disclosure and maintain a particularity, because otherwise it
12 defeats I think the proposal for 26(a).

13 PROFESSOR ROWE: But discovery is not tied to
14 disclosure because discovery includes adverse information.
15 Under our proposal, disclosure does not include adverse
16 information. It makes no sense to tie a positive information
17 only provision to a positive and negative.

18 MR. WILLETT: Initial disclosure, though, if it is so
19 broad -- I mean, claims and defenses can still be quite broad.
20 And initial disclosure requirements that then call into play
21 the discovery, if there isn't any particularity, it defeats the
22 purpose. It's just way too broad. And the corporate
23 defendant, I don't see how the rule really changes the
24 landscape or the scope for the corporate defendants, if once
25 the initial disclosure, claims and defenses, which still can be

1 broad, moves into the discovery phase where --

2 THE HONORABLE JUDGE NIEMEYER: I am not sure that the
3 disclosure ever moves that way. The party making the
4 disclosure is the party making the claim. So the party making
5 the claim knows the breadth of the claim. And he has to
6 disclose everything that supports his claim, whether he alleges
7 it particularly or not.

8 So the hope is that, let's say you are the defendant,
9 as a corporate defendant, a plaintiff files his very loosey
10 goosey claim and you can't quite figure out what it is. The
11 plaintiff has the obligation to file everything that supports
12 his claim, and the hope is that you will now see from this
13 disclosure where his claim is. And likewise, when you go to
14 file your defenses, you'll support that.

15 Now, if the case moves on to discovery, that of course
16 has a totally different standard, which is relevant to claim or
17 defense or relative to the subject matter of the litigation if
18 the court orders.

19 MR. WILLETT: I think where we've seen the biggest
20 problem is where the initial disclosure claim itself is still
21 so broad.

22 THE HONORABLE JUDGE NIEMEYER: Under the current rule
23 you have to produce adverse, and that's why linking it to a
24 particularity might have some benefit. But under the proposal,
25 it's only the party making the claim that makes the disclosure.

1 So regardless of whether he has articulated the claim, he still
2 has to make the disclosure as broad as his claim is if he
3 supports it.

4 And I guess I am not sure what your fear is on that
5 front.

6 MR. WILLETT: In operation, I think really what I'm
7 trying to describe is a situation where we did have a great
8 deal of judicial control in the breast implant litigation with
9 the multi-district litigation control of that, where initially
10 the claims made were of design defect or manufacturing defect,
11 arguably a particular claim defect, manufacturing or design.

12 THE HONORABLE JUDGE NIEMEYER: But you would never
13 have to produce documents under disclosure, under our proposal,
14 relating to plaintiffs' claim.

15 MS. WILLETT: The proposal goes a long way, I think,
16 to control it.

17 THE HONORABLE JUDGE NIEMEYER: It eliminates it.

18 MS. WILLETT: But how do we get around from producing
19 documents, negative documents or negative information, if such
20 exists, if the claim is so broad as --

21 THE HONORABLE JUDGE NIEMEYER: Because the new
22 proposed rule doesn't require you to produce anything negative.

23 PROFESSOR ROWE: It says, supporting information.

24 MS. WILLETT: I think I am probably not using the best
25 example here to support what I think I see as -- at least the

1 main point that I was trying to make, and that is that the
2 purpose -- the proposed amendments to Rule 26(a) eliminate
3 that -- to eliminate that guessing game that is part of the
4 disclosure process, we think that's an important purpose. But
5 we also think it's an important purpose to tie 26(a) and 26(b)
6 more closely together.

7 And if I'm failing in my examples, perhaps others
8 would be able to speak to it a little more clearly. But we do
9 think that -- and I'll go back and look at the rules a little
10 more closely with that particularity issue. But I think that
11 there is something there that can be focused on.

12 THE HONORABLE JUDGE NIEMEYER: If you wish to add more
13 and amplify any of this, you can follow up by a written
14 comment.

15 MR. WILLETT: Perhaps if I can shift to the deposition
16 process then.

17 THE HONORABLE JUDGE NIEMEYER: We used a little of
18 your time up, but why don't I give two more more minutes.

19 MR. WILLETT: I think probably the clarify of what I'm
20 trying to say is a little better in the written statement than
21 it is in some of the examples that I am trying to use.

22 But let me just get to the deposition process because
23 I think it is important to streamline it. Here, if I
24 understand the committee's proposal, the seven-hour limit or
25 the one-day limit is certainly a laudable proposal. And we

1 think that again, in light of the things that happened in the
2 breast implant litigation and other mass tort litigation where
3 we have seen dozens, if not hundreds, of deponents facing
4 depositions for hours and hours and days on end, that some
5 limitation certainly is useful.

6 But we are concerned about the seven-hour limitation
7 with respect to certain categories of deposition testimony,
8 primarily expert witnesses that are going to be testifying
9 about such subjects as immunology, epidemiology, chemistry and
10 the like, where one seven-hour day simply isn't going to be
11 satisfactory. What we would hope is that there would be a
12 limitation, but perhaps a two seven-hour day period for certain
13 categories of deponents where they simply need more time.

14 THE HONORABLE JUDGE NIEMEYER: Okay.

15 MS. WILLETT: Thank you very much.

16 THE HONORABLE JUDGE NIEMEYER: Thank you, Ms. Willett.
17 Mr. Freed.

18 MR. FREED: Good afternoon. I'd like to thank you for
19 the opportunity to testify here today. My name Michael Freed.
20 I have offices here in Chicago. And I'd like to confine my
21 testimony to two points.

22 First, the proposal to amend Rule 26(b)(1) to require
23 good cause shown before one can embark on discovery concerning
24 subject matter of the litigation. Second I'd like to briefly
25 address the issue of costs. And I would like to start by

1 saying that my practice, although it is primarily plaintiffs'
2 work in the class action litigation area, I have also done
3 defense work. And I really am not here to try to parse out or
4 define what it is and what makes people take various positions
5 with respect to what they are going to say.

6 What I have done is tried to look at what I think the
7 role of the committee is as it has been defined in the
8 materials which the committee has distributed. I looked at the
9 summary put out by the administrative office, and it says that
10 the scope of discovery defined by Rule 26(b)(1) is retained but
11 divided to distinguish between attorney-managed and
12 court-managed discovery. And I looked at the notes to the
13 proposed draft at page 10, and it says, "As thus developed, the
14 Rule 26(b)(1) proposal is not an effort to narrow the scope of
15 useful discovery. Instead it is an effort to change the
16 balance between the attorney-controlled discovery and
17 court-controlled discovery."

18 Taking that at face value, I believe that I should, it
19 seems to me that what this committee is trying to do is figure
20 out whether there is a way to approve the operation of the
21 Federal Rules of Civil Procedure, in order to have a positive
22 effect on the judicial resolution of litigation. And with that
23 as my guide for my comments, I would like to suggest that the
24 change requiring good cause shown will not do that. And I
25 would also suggest that it may lead to what is sometimes

1 referred to as the law of unintended consequences, which is to
2 say that it may create more problems than it will solve. And
3 I'd like to address it very briefly in three areas.

4 First, in a written statement which I submitted, I
5 pointed out that as a practitioner from the plaintiffs' side,
6 it is likely that if the rule is amended in the matter
7 suggested, I will switch from the notice pleading, which exists
8 today under the Federal Rules of Civil Procedure, to fact
9 pleading. It will not be a hard switch. We have had fact
10 pleading in the state courts in the State of Illinois. And
11 that is something which I can do.

12 I don't believe that would be a positive development,
13 however, for what the committee is trying to achieve. As I
14 point out in the written statement and will not elaborate on
15 here, I think there is a very careful balance which is in place
16 presently and has worked extremely well.

17 PROFESSOR MARCUS: Mr. Freed --

18 MR. FREED: The notice pleading on the one hand --

19 PROFESSOR MARCUS: Mr. Freed --

20 MR. FREED: -- and the present scope of discovery on
21 the other. I think it works very well.

22 THE HONORABLE JUDGE NIEMEYER: I think there is a
23 question.

24 PROFESSOR MARCUS: Mr. Freed, I'm sorry.

25 MR. FREED: I apologize.

1 PROFESSOR MARCUS: Something you are saying reminds me
2 of the previous speaker. Are you suggesting that the changes
3 the committee has proposed are likely to cause plaintiffs'
4 lawyers to provide particularity in their pleadings more in the
5 future than in the past?

6 MR. FREED: I am suggesting that. Yes, I am.

7 THE HONORABLE JUDGE CARROLL: Is that a bad thing?

8 MR. FREED: I think it is a bad thing for the reason
9 that I believe it's going to not achieve the purpose which was
10 intended. And I will get into exactly why I think that is so.

11 Notice pleading will be necessary because you will
12 then want to be able to say, well, I have set forth the claim
13 or defense in my pleading. Therefore, I am not under the good
14 cause part of it related to the subject matter, so you don't
15 need to worry does it come within the subject matter since I am
16 a step before that.

17 I think what that is going to do is introduce these
18 kinds of disputes with the court as to whether or not this
19 comes within the scope of the claim or defense or rather is
20 related to the subject matter and will introduce a new element
21 of argumentation about the scope of discovery, which never
22 existed before. Notwithstanding the fact that's not the intent
23 here at all.

24 PROFESSOR ROWE: Mr. Freed, one thing that puzzles me,
25 what we heard before is that the scope change might encourage

1 more pleading of borderline claims. I can understand that
2 better than I can understand detailed fact pleading.

3 Why would it have the detailed fact pleading effect as
4 opposed to the borderline claims effect? Because it's claims
5 and defenses, not facts, that trigger the --

6 MR. FREED: In order to -- in a typical antitrust
7 case, an area which I do a lot of work -- and I understand
8 there have been a lot of people who testified concerning
9 antitrust cases, which is interesting because sometimes I feel
10 we are a somewhat lonely practice out there -- you plead very
11 generally, particularly in a price-fixing case as opposed to a
12 market structure case. And I used an illustration in the
13 testimony of a situation which occurred in the criminal context
14 here recently, where the defense counsel was arguing that a
15 sales allegation case was different from an output restriction
16 case.

17 Now, in the typical complaint in an antitrust case
18 where we are alleging price-fixing, we won't say it is, quote,
19 a sales restriction case or output restriction or sales
20 allocation. We will allege that the parties got together and
21 did such and such to fix prices. And that has generally been
22 then followed up by the kind of discovery which has been used
23 to define those issues for purposes of the litigation.

24 I think that a concern that if I don't spell out all
25 of the details -- at that point in time I may not have a lot of

1 the details because many of these cases may start with the
2 grand jury indictment but they don't all. Many of the grand
3 juries are secret so you don't know. There is going to be this
4 impetus to put in facts which are neither appropriate at that
5 point or useful for purpose of the case.

6 But I would also like to get to the next point, if I
7 may, which is the timing of the judicial involvement. There is
8 a gentleman who spoke earlier, I think it was Mr. Formeller of
9 the Defense Research Institute. I don't know Mr. Formeller,
10 and I did not know what he was going to testify. But I share
11 with him from the plaintiffs' perspective the belief that the
12 discovery system works very well, at least in the complex
13 litigation, which I have been involved in.

14 And I have been on the other side of the case recently
15 with Bristol-Myers, not a breast implant case but an antitrust
16 case involving the pharmaceutical industry, where over 50
17 million documents were produced and reviewed with a relatively
18 limited amount of judicial involvement, in a relatively short
19 period of time, and seven or 800 depositions taken in the
20 course of less than a year.

21 I believe that if the language of the statute is
22 changed, that there will be an encouragement on the part of the
23 parties, rather than working out their resolution, their
24 problems, and coming to the court only at the point where they
25 truly reached an impasse, there would be an enormous temptation

1 to come to the judge first for an early advisory opinion, so to
2 speak, as to whether or not this comes within the claims or
3 defenses or whether it is within the subject matter.

4 THE HONORABLE JUDGE ROSENTHAL: Sir, in the case that
5 you just described, the antitrust case, were there are multi-
6 parties all taking extensive discovery from each other?

7 MR. FREED: Yes, there were 32 defendants. It was a
8 class action. There were 37 class plaintiffs who were deposed.
9 There was a minimum of judicial involvement in the discovery
10 process.

11 THE HONORABLE JUDGE ROSENTHAL: We have been
12 anecdotally informed in prior hearings and other occasions that
13 in those kinds of cases the incentive is to work things out on
14 a reasonable basis on the what-goes-around-comes-around
15 principle. But in cases where that set of incentive and checks
16 are lacking, is there any substitute for judicial involvement?

17 MR. FREED: Your Honor, I can only operate from my own
18 set of experience, which is many cases of the type that I just
19 described over many years, where the courts have not been
20 required to get involved in the discovery process in any
21 significant way given the magnitude of the discovery process.
22 And I can't really say in a different context if it would -- if
23 these rule changes would help in that context.

24 What I am concerned about is that these rule changes
25 might adversely affect what I perceive personally and have

1 observed personally to be a very effective way to proceed with
2 discovery. And it will cause counsel to, as I say, rather than
3 cooperate and work it out, because of this what-goes-around-
4 comes around mentality, to change the method of response to dig
5 in on the claim that this does not come within a claim or
6 defense, and to accelerate the court's involvement at a time
7 when the court knows the least about the case and is perhaps
8 less able to view the dispute in the context of what the issues
9 are in the case, and focus instead on the somewhat narrow issue
10 of what is pled in the claim or defense.

11 And that's why I think it is going to inspire lawyers
12 to be more factually specific because they will regard that as
13 a more fulsome statement of a claim or defense. And I don't
14 think that that's going to be useful. I think it's going to
15 get the courts involved in disputes they are not involved in at
16 the present time.

17 And one of the questions asked earlier was about
18 collateral disputes, things which have never been disputes
19 before becoming dispute. And there has been a proliferation of
20 that kind of thing.

21 MR. LYNK: Mr. Freed, what about when the gentleman
22 from Pfizer spoke. We had a colloquy on the same point. And
23 his comment was, there may be an initial flurry of such
24 litigation, which would occur with whatever change was made to
25 the rule, as counsel and the courts try to discern what was

1 intended and what the effect was. But that initial flurry
2 would die down as it became apparent in each district how the
3 rule was to be applied.

4 And then the question is after that dies down, do you
5 have a better system than you have now? And the response the
6 proponents would make would be, in your cases, since the scope
7 of discovery would be more defined, you would have less of the
8 million document production type of situations.

9 Do you view that as a positive result after that
10 flurry dies down?

11 MR. FREED: The assumption is that there would be the
12 initial conflict. It would then resolve itself in a way which
13 would improve the system. I am not sure. I have seen certain
14 things which were proposed as improvements. One that comes to
15 my mind immediately is the Private Securities Litigation Reform
16 Act, which was supposed to solve many problems. And those of
17 you who see these securities class actions come before you
18 today know that there are disputes which exist which were never
19 dreamed of.

20 Now, there are endless disputes over who should be the
21 lead plaintiff. There are endless disputes over who should be
22 the lead attorney. This was supposed to simplify, improve, put
23 it in the hands of somebody with a --

24 THE HONORABLE JUDGE NIEMEYER: I am going to have to
25 circumscribe your testimony here. You are over the time.

1 MR. FREED: Thank you very much. I'd like to thank
2 you again.

3 THE HONORABLE JUDGE NIEMEYER: Sure. I do appreciate
4 your testifying for us.

5 Is Mr. Oldham in the courtroom?

6 MR. OLDHAM: Good afternoon. My name is Mike Oldham.
7 I am from Denver, Colorado. I have been an attorney since
8 1964, and I have been practicing principally in product
9 liability litigation since 1966 for the defense.

10 The proposed revisions to the rules, from my
11 perspective as a practicing lawyer are welcome and are badly
12 needed. I fought discovery battles over these years since the
13 mid '60s, in relation to complaints that have not been pled
14 well, and interrogatories and other discovery approaches which
15 were broad and general, consuming a lot of time with a lot of
16 money spent trying to narrow discovery on behalf of the clients
17 that I have represented over the years.

18 So I believe that these proposals are very welcome,
19 that they will bring more reasonableness and fairness to the
20 process than we have seen for the last 35 years that I have
21 been at this business.

22 I also practice in other states, and, therefore, I
23 believe that the uniformity provision that the committee has
24 proposed is very appropriate. I particularly get up into the
25 State of Wyoming with some frequency, and the local rules there

1 are significantly different. And going back and forth from
2 Colorado to Wyoming in and of itself poses the necessity to
3 refresh one's memory every time you do it or every time you
4 have a case up there. So I can imagine what some folks have to
5 deal with when they have to look at 40 or 50 different
6 jurisdictions.

7 I also endorse this committee's observations regarding
8 cost for excessive discovery. Obviously when costs rise to
9 that level, there has to be some means for there to be a fair
10 balance on the discovery that's being called for. Colorado has
11 had a case on the books called Bristol-Myers since the '60s,
12 where our Supreme Court essentially said that and has provided
13 that tool to lawyers since that time in order to spread out
14 cost of discovery when the discovery sought is vast.

15 I also agree with the committee's approach to omit
16 disclosure -- from disclosure those cases that are low end or
17 high end cases and limiting depositions to seven hours in one
18 day. And I'd like to make a short comment about that.

19 In my experience where there are multiple defendants
20 involved, there is usually one defendant, defense lawyer, that
21 turns out to be the lead defense lawyer and will ask 80 to 90
22 percent of the questions that are going to be asked on
23 deposition. She or he is the one that's normally the best
24 prepared, spent the most time getting ready for the deposition,
25 and the other attorneys who are there on the defense listen to

1 that, and then they all have a few follow-up questions. It's
2 generally not a problem for depositions to be limited. And, of
3 course, you have allowed for those odd situations when the
4 parties foresee that the deposition will have to last for a
5 longer period of time.

6 There are a couple of areas of concerns that I'd like
7 to share briefly from the defense perspective. The committee
8 has eliminated the requirement of facts pled with particularity
9 in relation to witnesses and exhibits. In the committee note
10 on page 50, however, the committee states that in relation to
11 denials, if the party has obviously denied the allegations of
12 the complaint, then disclosures will have to be made in
13 conjunction with denials. If no facts have been pled with
14 particularity, the defendant has a built-in problem of
15 determining the scope of disclosure under those circumstances.

16 THE HONORABLE JUDGE NIEMEYER: If you don't understand
17 it, then you don't have an obligation there. I am a little
18 concerned about the understanding of the disclosure proposal.
19 And it's probably useful to point out that the change that we
20 are proposing ends up being fairly different from the current
21 proposal.

22 MR. OLDHAM: Certainly.

23 THE HONORABLE JUDGE NIEMEYER: And what it requires is
24 that each party advancing some position in the litigation
25 provide the support for his position.

1 MR. OLDHAM: Certainly.

2 THE HONORABLE JUDGE NIEMEYER: So if the defense comes
3 in and says, I deny everything, it's not going to impose as
4 much as if he says, there is an assumption of this. You have
5 to show a document of that. Or there is some kind of other
6 defense which you are going to try to develop in the litigation
7 or some alternative theory about it. The driver happened to be
8 drunk that night, and you want to put in documents that
9 demonstrates that. The discovery will pick up all the loose
10 ends.

11 MR. OLDHAM: Certainly, that's true, your Honor. I
12 think the concern that I would have as a defense lawyer is, if
13 the plaintiff alleges that the vehicle was defective and the
14 allegation goes no further than that, or the plaintiff alleges
15 that the brakes on the vehicle were defective --

16 THE HONORABLE JUDGE NIEMEYER: What is your defense?

17 MR. OLDHAM: -- and I deny that allegation, then do I
18 have to produce all of the drawings and all the engineering
19 work and indeed the names of the engineers who designed that
20 brake system to establish that the brakes weren't defective, if
21 I deny that in my answer? That's the only concern if the facts
22 aren't pled with particularity.

23 If they are pled and there is a specific allegation
24 about how the defect manifested itself in the car, for example
25 the brake lining was improper or the improper materials were

1 used in the brake lining, or some other specific allegation, a
2 spring failed, and the shoot didn't retract or whatever it is,
3 then my duty to at that point disclose is far more limited.

4 And that's the concern in relation to --

5 PROFESSOR COOPER: Mr. Oldham, would it help if
6 instead your duty were to disclose those things that you may
7 use to support your position?

8 MR. OLDHAM: Certainly, no question about that.

9 THE HONORABLE JUDGE NIEMEYER: Why is that? It seems
10 to me if you are going to deny the parts are defective, aren't
11 you going to put all that in? Everything you just described to
12 me, it seems to me, you would put in to support your denial,
13 wouldn't you?

14 MR. OLDHAM: Certainly. Later in the case, that's
15 true. The point is, does a defendant have to produce a lot of
16 material early on? It creates a problem for defense counsel
17 that certainly can be overcome with a reasonable application of
18 common sense. But on the other hand, there is a certain level
19 of risk as well. If the defendant has a series of drawings
20 that cover the entire brake system, proprietary or not --

21 THE HONORABLE JUDGE NIEMEYER: Would you put that in
22 evidence if you were trying your case?

23 MR. OLDHAM: No, not all of the drawings. It depends
24 on what the specific defect was, which could be pled with
25 particularity, but is found out later on in discovery after you

1 have disclosed all of the information.

2 THE HONORABLE JUDGE NIEMEYER: Disclose it when you
3 find it. Disclose it when you find it. I mean, disclosure is
4 sort of an ongoing possibility.

5 MR. OLDHAM: That's true, and that would be workable.

6 THE HONORABLE JUDGE LEVI: It seems to me what will
7 happened here is that you will have your 26(f) conference, and
8 you will make the points you just made. You tell the plaintiff
9 that I can't tell whether you want the warehouse or you just
10 want the brake lining. And you either work it out or you
11 don't. If you don't work it out, you are going to object to
12 disclosure, and you are going to exempt yourself from it, and
13 the judge is going to deal with it at the Rule 16 conference.

14 MR. OLDHAM: Point well made.

15 I have a couple more points I'd like to address
16 briefly.

17 THE HONORABLE JUDGE NIEMEYER: Couple minutes.

18 MR. OLDHAM: The request for production right now, as
19 proposed by the committee, are not limited. In fact, I believe
20 there is a comment about the problems associated with providing
21 a specific limitation on request for production. I'd like to
22 submit to you that in many respects these rules are guidelines.
23 I think the reasonable guidelines, they help attorneys evaluate
24 how to start the case. And since that's the case, why not
25 provide a limitation on the total number of documents at the

1 outset that attorneys can ask for, with the understanding that
2 if they believe they need more, they can ask the court for
3 relief to obtain additional documents.

4 In Colorado we have a specific limit on documentation.
5 If the plaintiff's attorney thinks he is going to need more
6 documents than the limit that's prescribed by the rule, he gets
7 together with defense counsel. They talk it over. If they
8 can't work it out, they go to the judge and the judge --

9 THE HONORABLE JUDGE NIEMEYER: What is the limit in
10 Colorado?

11 MR. OLDHAM: 30 requests for production.

12 THE HONORABLE JUDGE ROSENTHAL: 30 requests?

13 MR. OLDHAM: 30 discrete requests for production of
14 documents.

15 THE HONORABLE JUDGE NIEMEYER: Doesn't that encourage
16 the request to be broader? I can give you 60 or 90 requests on
17 a more particular basis, but if I am forced to 30, I am going
18 to start consolidating. I will say, everything dealing with
19 this brake design.

20 MR. OLDHAM: Your Honor, that certainly can happen.
21 But then, of course, the defense takes the position that that's
22 more than a discrete request. What happens is --

23 THE HONORABLE JUDGE NIEMEYER: Everything that relates
24 to the development of the brake design that's at issue in the
25 case, is that too broad?

1 MR. OLDHAM: No, that would be far too broad under the
2 way our rules are handled. I think the point here is that this
3 committee is talking about limiting depositions to seven hours.
4 And the committee is saying, that's reasonable, that's a fair
5 limit, shouldn't go beyond that. And what I am saying to the
6 committee is, this committee can also say to the bar across
7 this country, let's start with 30 requests for production.
8 That's the limit. That's a reasonable limit. If you need
9 more, talk to the magistrate about it. And attorneys then
10 having that guideline will think harder about wide open
11 requests for production. They will think, okay, now what do I
12 really need to ask for here? And that's why I believe a limit
13 on the request --

14 THE HONORABLE JUDGE NIEMEYER: You don't think I could
15 ask for 10 million documents in 30 requests?

16 MR. OLDHAM: Certainly you could, just like you could
17 in 30 interrogatories. But the rules say, discrete
18 interrogatories, and this should be discrete requests for
19 production of documents as well.

20 THE HONORABLE JUDGE NIEMEYER: Your comment provokes
21 some of the discussion that we have had in the committee
22 because the question is, documents are very hard to limit and
23 define because they are sui generis for each particular type of
24 case and claim. Some cases involve a lot of documents, some
25 don't because it's the nature of the claim and the nature of

1 the complaint.

2 It would be interesting, some people suggested seven-
3 year limits on timing. Some people suggested -- but I am not
4 sure that you get to what you are interested in by the request,
5 and that's why I am sort of interested in seeing how Colorado
6 enforces that and whether it works there, because it seems to
7 me it will be hard to identify or to limit documents by
8 limiting the number of requests. All I do is just make the
9 request a little bit broader and I've got a lot more of what I
10 need.

11 MR. OLDHAM: I'd also like to tell you, your Honor, in
12 my practice before the United States District Court in
13 Colorado, all of the --

14 THE HONORABLE JUDGE NIEMEYER: It works?

15 MR. OLDHAM: -- case scheduling orders prescribed the
16 number of documents which can be sought by request for
17 production. The magistrates require that in every order.

18 THE HONORABLE JUDGE NIEMEYER: Hammer it out.

19 MR. OLDHAM: The parties hammer it out, your Honor,
20 and it works at the outset. I haven't had a problem. Once the
21 parties sit down and they talk it through initially, and both
22 sides know that they are going to have to hammer this out. So
23 what I am suggesting to the committee is that a prescription up
24 front can help resolve a lot of problems, can drive the parties
25 together and help them resolve this vast search for documents

1 which costs the court system so much money.

2 PROFESSOR COOPER: Now, is this a case scheduling
3 order, I think you described it as number of documents, not
4 number of requests?

5 MR. OLDHAM: No, not in the U.S. District Court.

6 PROFESSOR COOPER: In the district court, the case
7 scheduling order is number of documents or number of requests?

8 MR. OLDHAM: Number of requests.

9 Now, the last thing I'd like to mention, if I may, is
10 that I also believe that there should be a presumptive temporal
11 limit on how far you can go back on requests for production of
12 documents. Most corporations destroy documents somewhere
13 between five and seven years, but not all. But most do. And I
14 think if this committee were to adopt a presumptive limit in
15 that area of time, that again would bring reasonableness into
16 the rules.

17 PROFESSOR ROWE: Which would have to be inapplicable
18 in every one of the hundreds of thousands of asbestos cases,
19 wouldn't it?

20 MR. OLDHAM: Certainly. But in those kinds of cases,
21 an order could be sought for going back further under those
22 circumstances. That's the point. I guess it would be a matter
23 of evaluating how many cases total require you to go back
24 reasonably further than that period of time. And certainly in
25 my practice, it's limited to products. It's rare that a court

1 will make me go -- that is the kinds of products that I deal
2 with, which are principally automotive and other transportation
3 types of products. In those kinds of products, it's rare that
4 we go back more than five years or seven years, or that it's
5 reasonable to go beyond that period of time.

6 THE HONORABLE JUDGE NIEMEYER: I think we have already
7 run over a little bit. I appreciate your testimony.

8 MR. OLDHAM: Thank you for hearing me.

9 THE HONORABLE JUDGE NIEMEYER: Mr. Grandstaff?

10 MR. GRANDSTAFF: Good afternoon. I am Doug
11 Grandstaff. I am here on behalf of Caterpillar.

12 I thought just up front I'd let you know I am not the
13 general counsel. I am not a vice president, and I am a
14 litigation attorney. So to those that were commenting earlier
15 that the big corporations are only sending someone from up
16 above who doesn't have a day-to-day experience with these types
17 of cases, I am the counter-argument.

18 I manage a broad case load for Caterpillar. That
19 includes antitrust cases, product liability cases,
20 environmental cases, and intellectual property cases. And I
21 have filed written comments, and I would like to just focus
22 right now on the 26(b) scope issue as there is a couple of
23 issues that have been raised during the course of the day I'd
24 like to address.

25 Firstly, we are strongly in favor of the proposed

1 rules. We think they make a significant step forward. And
2 they are a significant step because there is a significant
3 problem. And we've heard two different things today as
4 rationales as to why there is no problem, both of which I find
5 troubling and both of which I kind of like to mention to you.

6 One of those was the notion, and I quote, that
7 anything non-privileged should be discoverable. We have 60,000
8 employees who produce I don't know how many documents each per
9 day. But it's a lot of documents. And if a plaintiff files a
10 complaint and his viewpoint is that he should be able to go in,
11 the attorney, and view every document we have produced even in
12 the last five years, I guess that would be one way of keeping
13 him busy for quite some time. But on the other hand, it's
14 hardly relevant to the ends of justice and the ends of the
15 claim he is trying to make.

16 And that ties very closely with the other problem that
17 I had with one of the statements made earlier, and that was
18 that it's really no cost to the corporation because they can
19 pass that on to the consumer. Well, I am a consumer too, and I
20 realize that every time I buy a box of diapers or a foreign car
21 or I don't personally buy Caterpillar machinery because it's a
22 little too expensive for my needs, but if I were to do that and
23 the businesses they do, they make highways, there is a portion
24 of that cost that we are paying for. And so it's a cost to
25 society; it's not just a cost to the company. Or it's also an

1 internal cost to the company as well.

2 I will give our products liability cases as an
3 example. A lot of the requests we get deal primarily with
4 engineering issues. Was it designed and manufactured in the
5 precise manner that it should have been? We have a staff of
6 six engineers that work with our products liability group just
7 in helping us to understand the documents that we are receiving
8 from our engineers. That is a cost to the company.

9 And one of the points I'd like to make is, ten years
10 ago we had one third more cases, products liability cases, than
11 we do today. However, we now have one third more of the
12 engineers today than we did in the past. And the reason for
13 that is that the types of requests that we see have gotten
14 broader and more general, and we have had less and less success
15 at using the court system to bring them back to what I think is
16 the purpose and the goal of discovery, which is to get
17 information that relates to the claim and defenses.

18 THE HONORABLE JUDGE ROSENTHAL: We have heard some of
19 the witnesses describe a lack of success in the court system to
20 the extent of not seeking assistance from the courts. Has that
21 been your experience?

22 MR. GRANDSTAFF: That has been our experience as well.
23 I thought that through as I heard that myself. And maybe to
24 kind of give you a background of how it generally plays out, we
25 were receiving a request, for example, let's say it was a

1 bulldozer. An accident happened on in, and the request will
2 ask for every incident and accident involving a bulldozer, a
3 Caterpillar bulldozer.

4 Well, we make some hundred models of Caterpillar
5 bulldozers, and we've made them since the turn of the last
6 century. So we find that a little overbroad, and there is many
7 different types of accidents. Someone can drive off the edge
8 of a cliff, and they can back over someone. They can have
9 falling down and stepping off of the machine.

10 So we would like to break it down more narrowly to the
11 type of claim that is being brought and to the type of specific
12 machine and the model and the year it was made where it would
13 be relevant. And generally we will try to negotiate that with
14 the other side, sometimes with some success. There are
15 reasonable attorneys on both sides, but not always.

16 So the next step is, we will go to the magistrate
17 generally. Especially in the federal court system, we rarely
18 see the district court judge on discovery issues. The
19 magistrate generally will help us narrow, but not in every
20 instance. And at that point in time you weigh whether you want
21 to go before the district court judge. A, do you want to be a
22 nuisance the first time you appear before one yourselves?
23 Because the general view that we seem to get is, this is a
24 small plaintiff. You're a big company. You have a deep
25 pocket. Go ahead. It's not going to cost you anything to

1 produce all these documents. You've got these engineers
2 sitting around waiting to help you with them.

3 Sometimes we will go forward, and the judges I believe
4 quite honorably rely upon the magistrates and say there is a
5 lot of discretion in discovery. Well, the rules provide a lot
6 of discretion. And that's why I think it's very useful where
7 the rules, if they start us at the point where you want to end
8 up, help provide a focus for the discovery process. And I
9 think it will be very useful in that respect.

10 There was mention that this may be the exception
11 rather than the rule where Ford would be asked for seats going
12 all the way back. I would say in my experience it's the other
13 way around. It's very exceptional -- it's the exception when
14 we actually get a request that is aimed at the specific claim.
15 Generally they are much broader and they will go as broad as
16 you will produce documents for.

17 And I guess that comes to the idea why there are so
18 few opinions out there, as raised earlier. I think at a
19 certain point, because it's the discretion, generally the
20 opinion you get from a judge is just an affirmance of the
21 magistrate's decision. There is seldom a written opinion on
22 that. Many times we just don't seek to come before a judge and
23 especially then to appeal it on up on a discovery issue because
24 there is so much discretion provided to the district court
25 judges on these issues.

1 There is mentioned also whether it was worth having
2 half of a big loaf or half of a small loaf. I guess in my
3 view, if you have a loaf that's three quarters sawdust,
4 information that's not relevant, or if you can get a full loaf
5 of bread, and I guess that's where I see the difference between
6 just broad opening the doors to discovery, you are going to get
7 a lot of sawdust, and you still have to scoop that sawdust into
8 buckets and produce it to the other side.

9 But if you can produce a baked loaf of bread which
10 actually relates to the claims and defenses, we are saving
11 money and we are still getting the end result, which is to get
12 the evidence both sides need to be able to pursue their cases.

13 THE HONORABLE JUDGE NIEMEYER: Does that about cover
14 it?

15 MR. GRANDSTAFF: That about covers it. The only last
16 comment I wanted to make, and this goes back to the point in
17 terms of where all the money goes and being passed on. And
18 just thinking about this, I realize I wish I would have been
19 wearing a T-shirt I have at home that says, "Trial lawyers
20 don't make the products you buy; they make the products you buy
21 more expensive."

22 (Laughter.)

23 MR. GRANDSTAFF: And I think the same could be said
24 today of the discovery rules, and they are not going to make
25 it -- the present rules do not make the discovery more

1 efficient or more fair. But your proposed rules will.

2 Thank you very much.

3 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr.

4 Grandstaff.

5 Mr. Langone.

6 MR. LANGONE: Good afternoon. My name is Chris
7 Langone. I am appearing today on behalf NACA, the National
8 Association of Consumer Advocates. NACA is a non-profit group
9 of attorneys and advocates committed to promoting consumer
10 justice and curbing abusive business practices that bias the
11 marketplace to the detriment of consumers. Its membership is
12 comprised of over 400 law professors, public-sector lawyers,
13 private lawyers, legal service lawyers, and other consumer
14 advocates. NACA has filed written comments that explore the
15 subjects of my testimony today, and my remarks are going to
16 touch on three main points.

17 First, being the scope of discovery, NACA believes the
18 proposal to narrow the presumptive scope of discovery will
19 increase the cost of discovery on behalf consumers because it
20 will encourage parties to raise more improper objections to
21 discovery requests. Second, with respect to the mandatory
22 initial disclosures, NACA believes the existing mandatory
23 disclosures should be unchanged except to prevent local
24 opt-outs. And third, NACA supports the proposal to restrict
25 the time limits of the single deposition, but adds that some

1 clarifying amendments should be addressed.

2 First as to the scope --

3 THE HONORABLE JUDGE NIEMEYER: The third one you say
4 you support or oppose?

5 MR. LANGONE: Yes, with some clarifying amendments as
6 to whether --

7 THE HONORABLE JUDGE NIEMEYER: Support or oppose?

8 MR. LANGONE: Support, yes.

9 As to the scope of discovery, NACA strongly opposes
10 any efforts to modify the existing rules and jurisprudence on
11 that issue. The express purpose of the proposed amendments to
12 the rules reducing the time and cost of discovery will not be
13 met by narrowing the scope of permissible discovery. It's the
14 experience of NACA members that defendants often now resist
15 even discovery requests that are, in fact, relevant to the
16 claims and defenses of the parties, as the draft proposes. And
17 the reason for this is clear. Defendants don't want to provide
18 the plaintiff with the documents that are going to prove the
19 plaintiff's allegations.

20 In consumer cases this is especially important because
21 consumer cases, truth in lending type cases and fraud cases,
22 are essentially document driven cases. Without the documents,
23 you really can't prove the case. And, you know, there is cases
24 under the Fair Debt Collection Practices Act where in 15 USC
25 1692(k) the statute explicitly says, a relevant factor in

1 determining statutory damages is prior wrongdoing by the
2 defendant.

3 But if I as a practitioner propound a request for
4 prior litigation involving the Fair Debt Collection Practices
5 Act, even though that's explicitly stated by the statute as a
6 relevant factor, the defendant's response is, not relevant,
7 overly broad, unduly burdensome.

8 THE HONORABLE JUDGE NIEMEYER: Isn't that more an
9 example of abuse rather than going to the suggested change?
10 Because you are pointing out that it's relevant.

11 MR. LANGONE: Yes, that is an example of abuse, but
12 the proposed changes don't discourage abuse. In fact, they
13 limit the scope of discovery. And another example --

14 THE HONORABLE JUDGE CARROLL: We are against abuse.

15 MR. LANGONE: Obviously. But the second point that I
16 want to address is the issues of the mandatory initial
17 disclosures. And NACA supports strongly the proposal to
18 eliminate local opt-outs for the reasons of uniformity. And an
19 anecdotal story that as a practitioner in the Northern District
20 of Illinois I can relate in that regard is, since most judges
21 in the Northern District have opted out, one of my standard
22 discovery requests is, "Please identify all witnesses with
23 knowledge of the facts as alleged in particularity in the
24 pleadings."

25 And the response that I get 50 to 75 percent of the

1 time is, "Vague, overly broad and unduly burdensome." And one
2 that especially amuses me as a practitioner is vague because
3 here is, you know, what most jurisdictions require as a
4 mandatory disclosure, which this committee had worked very hard
5 to propose or to draft, and the defendant's response is, it's
6 vague. What does that mean, facts alleged with particularity
7 in the pleadings?

8 I don't think that the current proposal, you know,
9 documents that support the claims and defenses, is going to get
10 beyond that issue of vagueness any more. There is still going
11 to be the objections that the disclosures are vague, that they
12 are overly broad. And of course, the good-cause exception, I
13 think, is going to add increased satellite litigation because
14 then there is going to constantly be motions to find the good
15 cause to propound discovery as it relates to the subject matter
16 of the litigation.

17 PROFESSOR ROWE: But aren't you overlooking the
18 incentive of setup created by the change in the disclosure
19 rules that when the requirement was to produce adverse
20 information, the incentive was to try to find a way off it.
21 When the requirement is to produce favorable information with
22 the sanction of being unable to introduce it at trial, then the
23 incentive changes to it's the stuff that the parties are going
24 to want to use. So they have the incentive to be forthcoming.

25 MR. LANGONE: Well, I mean, if there was confidence

1 that that was actually going to happen, but I think the
2 empirical evidence --

3 THE HONORABLE JUDGE NIEMEYER: What difference does it
4 make? If you are the defendant and the plaintiff doesn't give
5 it all to you, he can't put it in the case at trial. You are
6 in pretty good shape. And if you are the plaintiff, same thing
7 on the defense.

8 MR. LANGONE: True. I guess my point is that since --
9 I mean, plaintiffs don't usually win cases by their own
10 supporting documentation. They usually win cases by obtaining
11 adverse information.

12 THE HONORABLE JUDGE NIEMEYER: But you get that from
13 discovery. That's not a disclosure function. The discovery,
14 you can just ask them for it.

15 MR. LANGONE: The message seems to be by narrowing the
16 scope, that really the message being sent would be that
17 discovery should be narrowed.

18 MR. LYNK: Mr. Langone, to put it another way, is it
19 your position that 26(a) and 26(b) taken together means that in
20 26(a) you will get disclosed exculpatory material from the
21 defendant, and in 26(b) the proposal means you will have
22 greater difficulty in getting incriminating information from
23 the defendant. At the end of the day you will be left with all
24 their documents that say why they didn't do it and with not
25 enough of their documents that you can use to show that they

1 did to it?

2 MR. LANGONE: That is exactly right. I guess the
3 opposition to 26(a) would not be as dangerous if 26(b) wasn't
4 going to be narrow simply to claims and defenses. And there is
5 a lot of concerns to that. There is issues about since if a
6 judgment is entered, res judicata is going to say that all
7 claims that were asserted or have been asserted --

8 THE HONORABLE JUDGE NIEMEYER: If you want to get the
9 subject matters discovery, just ask for it.

10 MR. LANGONE: And then you will have all kinds of
11 satellite litigation on what is good cause.

12 I'd like to use another example, anecdotal example, in
13 a consumer context. If I bring a truth in lending claim, then
14 an odometer disclosure statement is not going to be relevant to
15 the claim asserted, truth in lending.

16 But all documents relevant to the transaction, the car
17 transaction at issue, would result in the odometer disclosure
18 statement being produced. And if upon learning that there is
19 odometer law violations in the disclosure statement, Rule 15(a)
20 would say, the pleadings, you know, motions to amend the
21 pleadings should be liberally granted. So the motion to add an
22 odometer count should be liberally granted because of the
23 information learned in discovery under the current --

24 THE HONORABLE JUDGE CARROLL: Is it right, therefore,
25 to fish for odometer violations with a TILA claim? In other

1 words, file a TILA claim, throw out the net, see if we bring an
2 odometer violation in with it?

3 MR. LANGONE: But you are not really fishing because
4 they all stem from one automobile transaction. And arguably, a
5 judgment on the TILA claim is going to bar the odometer claim
6 because --

7 THE HONORABLE JUDGE NIEMEYER: What about a warranty
8 claim? Ask about that in the case too. Would you be entitled
9 to that?

10 MR. LANGONE: Well, there is some serious concerns
11 about whether the judgment or the sentiment on the breach of
12 warranty claim now bars that odometer claim or TILA claim under
13 principles of res judicata. So that's one serious concern
14 where an injustice can result.

15 Secondly, it seems contrary to the intent of Rule
16 15(a), which says that amendments to the pleading should be
17 liberally granted, usually to add claims that you learned about
18 in discovery. That's why most people seek to amend their
19 pleadings.

20 As a final point on this issue, it's not going to
21 reduce the costs of discovery to the defendant because all the
22 documents are still going to have to be reviewed. When I was a
23 practitioner on the defense side, I spent days and days and
24 days reviewing tens of thousands of documents, and we generated
25 a bill for that, and we didn't produce those documents but we

1 reviewed them all.

2 The cost of the defense side is not in the physical
3 production of the documents. Actually that imposes a cost on
4 the plaintiff. But the documents are going to be reviewed
5 regardless of whether they are produced. So I don't think
6 there is any cost reduction by narrowing Rule 26(b) in the
7 proposed manner.

8 Finally, on the issue of the deposition time limit,
9 NACA thinks that is a good idea, with three clarifying
10 amendments. And that would be, first, the amendment should be
11 clarified that no side may exceed the seven-hour limitation.
12 Second, the amendment should explicitly state that brakes are
13 not included. And third, the amendment should also explicitly
14 state the seven-hour limit applies to each witness designated
15 by a corporation under Rule 30(b)(6).

16 Some of those issues have been litigated by me as an
17 Illinois practitioner under the three-hour time limit, which
18 others have spoken of. There can be --

19 THE HONORABLE JUDGE NIEMEYER: How did it come out on
20 the corporate designation? You get three hours for each person
21 designated?

22 MR. LANGONE: For each person designated typically.
23 But to avoid the risk that people are going to be fighting over
24 those issues, the proposed amendment that NACA has submitted in
25 its written comments states as follows: "Unless otherwise

1 authorized by the court or stipulated by the parties and the
2 deponent, no side may examine or cross-examine an individual
3 for more than one day of seven hours. Breaks taken during the
4 deposition do not count against this limitation. For the
5 purposes of this limitation, each person designated under
6 Rule 30(b)(6) is a separate individual witness."

7 I think that with those clarifying amendments some of
8 the fires can be put out before they are even started. And my
9 time is up. I thank the committee for its attention.

10 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Langone.
11 Mr. Condron.

12 MR. CONDRON: Do we save the best for last?

13 THE HONORABLE JUDGE NIEMEYER: You are not quite the
14 last.

15 MR. CONDRON: I am not quite the last but I am getting
16 close.

17 My name is Kevin Condron. Thank you very much for the
18 opportunity to talk to you about this today.

19 I'm a vice president of Peterson Worldwide. We are an
20 international consulting firm that deals in discovery and
21 discovery services, litigation support services. I previously
22 was assistant --

23 THE HONORABLE JUDGE NIEMEYER: You are probably the
24 person causing all the problems.

25 (Laughter.)

1 MR. CONDRON: We are trying to take the cost out.

2 I was previously assistant general counsel for Sears
3 in charge of litigation for them as well as in charge of
4 litigation for Navistar, formerly International Harvester. So
5 as others have said, I am a real-life lawyer who actually went
6 down, and I attended NTSB hearings and also NTSB crash sites.
7 And let me assure you, I take exception to Mr. Clifford's
8 statement. At the NTSB crashes that I've been at, the
9 investigations are generally more lawyers around there than
10 there are even victims, and especially plaintiffs' lawyers.

11 I am here to talk about this problem of discovery in a
12 kind of a broad context of what the cost is to the business
13 people today in America. It's a business problem, I think,
14 more so than a legal problem. It's a cost problem more so than
15 a legal problem. And what you are addressing here today, I
16 think, you should be applauded for the efforts that everybody
17 is making to take the cost out of the system.

18 It may not be necessarily in Peterson Worldwide's
19 long-term best interest to take cost out of the system, but we
20 think it is certainly in the best interest of America business,
21 small, medium and large.

22 As a former trial lawyer here in Chicago as well as
23 federal court, I have handled many cases, tried many cases,
24 small, medium and large. I have managed many cases both at
25 Navistar and Sears that were from small cases to the complex

1 commercial cases to intellectual property type cases. And I
2 can assure you that discovery abuses run rampant in many of
3 those cases.

4 When I would sit down and speak with some of the
5 clients internally, whether they are executive managers or
6 middle-level managers, I try and explain the discovery process
7 to them and how it started. And law school students are taught
8 that the purpose of the discovery process is to prevent trial
9 by ambush and to enhance the resolution of the disputes that we
10 have between us. And everybody is supposed to sit back and say
11 there is going to be no surprises. You will know what I am
12 going to say and I am going to know what you are going to say.
13 And, therefore, why litigate?

14 The purpose and the objective of this was to resolve
15 disputes quickly and cheaply and economically. And the theory
16 worked early on. And unfortunately litigation grew a little
17 more voluminous here and grew more complex, and so we began an
18 awful lot of discovery of documents and things that created an
19 awful lot of expense in the process. And I guess I personally
20 manage matters where the cost of the document production far
21 exceeds the reasonable settlement value of any of the
22 underlying claims.

23 It's a common experience in most major corporations
24 today. It's difficult to explain to executive management. The
25 expenses involved in some of these disputes are so excessive

1 that even the most seasoned of the litigation managers, risk
2 managers and others, who are monitoring these claims assess the
3 discovery expenses in the claim before establishing the
4 reserves and determining the trial and settlement strategies in
5 the case.

6 Now, that may be a somewhat new statement to you that
7 you may not have heard in Baltimore and San Francisco, but
8 having lived it for over 20 years, I can assure you it's a
9 fact. Key data components in establishing the claim accruals
10 for risk managers across America include far more data than is
11 necessary and logical in the entire litigation process. We
12 take into account in many instances venue, jurisdiction, the
13 lawyers' or the judges' propensity for liberalism in the
14 discovery process.

15 And I can assure you that in management of litigation
16 over the last 15 years, there are large inventories that I have
17 had, thousands of cases, where I have measured the matters.
18 And 70 percent of those expenses and thousands of cases where I
19 measured over extensive periods were directly attributable to
20 the discovery process. That means an awful lot of money in a
21 bus or truck that Navistar is building today is directly cost --
22 directly the cost of a truck now. So you are looking at a
23 substantial amount.

24 PROFESSOR MARCUS: Mr. Condron?

25 MR. CONDRON: Per product liability claim.

1 PROFESSOR MARCUS: I thought I heard you say that you
2 sometimes key these calculations to venue matters.

3 MR. CONDRON: Yes.

4 PROFESSOR MARCUS: Do you find that the costs vary
5 according to the discovery rules that exist in different
6 places?

7 MR. CONDRON: Yes, they do.

8 PROFESSOR MARCUS: Can you tell us about that?

9 MR. CONDRON: Yes. For example, in certain
10 jurisdictions -- and of course I'll get to why it's important
11 to have federal reform because I think it will impact
12 dramatically on how the states do it. And most of the
13 companies' large litigation inventories are at the state level,
14 not at the federal level, even though they are very complex
15 cases at the federal level. The major impact that litigation
16 expenses are having, discovery expenses are having, are at the
17 state level. But the federal reform will impact that.

18 But venue in Texas and Alabama over most, I would say,
19 the last seven years have been particularly high. It's been --

20 THE HONORABLE JUDGE CARROLL: Thank you for that
21 compliment.

22 MR. CONDRON: It's been particularly difficult for
23 folks to resolve disputes down there, and those are
24 particularly large verdict areas. I know that everyone is
25 familiar with the punitive damage issues that have occurred in

1 Alabama over the last several years, and I know there are
2 efforts being made to do something about that.

3 But just particularly discovery has been, in certain
4 venues, Texas and Alabama, really been a problem.

5 PROFESSOR ROWE: Have you handled cases, significant
6 number of cases, in states that to your knowledge have claim or
7 defense scope definitions of their discovery as opposed to
8 subject matter scope definitions?

9 MR. CONDRON: I would say there is no real distinction
10 there in terms of the federal -- these are state court cases
11 that I am really looking at, not the federal court cases.
12 There is no real subject matter issue.

13 PROFESSOR ROWE: The committee has made a proposal to
14 make the first instance scope definition that of information
15 relevant to claims or defenses.

16 MR. CONDRON: Right. And I think that's a laudable
17 approach and I think that will have a dramatic impact on it.

18 PROFESSOR ROWE: What I was trying to find out whether
19 we have experience from state levels where -- are there some
20 states that, to your knowledge, already define scope in terms
21 of claim or defense, as opposed to following the present
22 federal rule and defining scope as relevant to the subject
23 matter?

24 MR. CONWAY: I would say some of the southeastern
25 states other than Alabama have done so, and they have been

1 pretty successful.

2 PROFESSOR ROWE: And I was wondering if you could
3 speak to --

4 MR. CONDRON: I haven't really studied.

5 PROFESSOR ROWE: Have you had enough experience with
6 states where --

7 MR. CONDRON: I would be fibbing. I would be
8 exaggerating my statement if I said so.

9 So again, these expenses when you are examining them
10 from a purely business perspective, are pretty startling,
11 especially to executive management. I loathe the subjective
12 anecdotal evidence because they generally are just a little bit
13 overwhelming. But let me just talk a little bit about one
14 matter that I had.

15 It was a case in district court. It was in Missouri.
16 I personally sat for two weeks and produced 500,000 documents.
17 10,000 of the documents were copied, through two lengthy jury
18 trials. 12 of those documents were attempted to be put into
19 evidence, none were ever entered into evidence. It's just one
20 case, but I can go on and on about it. It's just an
21 extraordinary expense and people can never really fully
22 understand the expense at a business level.

23 I'd like to just comment quickly on some of the
24 amendments. Production of documents and things, the cost
25 shifting proposal may be the most meritorious of the proposals

1 that I have heard. Total cost determination in document
2 production, though, may not be as easily quantifiable because
3 of the numerous collateral expenses incurred in extremely
4 technical litigation, such as security cases and such as
5 intellectual property matters. If discovery is available from
6 other sources or is merely cumulative, you know, I wonder why
7 do we need to grant it.

8 I concur with Mr. Oldham's earlier statement about
9 national uniformity would be effective in conjunction with
10 changes in the initial disclosure requirements. I think this
11 will help lower the expenses permitting companies to plan for
12 dealing with discovery demands. I support the narrowing of the
13 initial disclosure, requiring parties to disclose the
14 information that supports their position. I think that will
15 help again reduce the expense involved.

16 I think the discovery scope, I just want to talk a
17 little bit about that. While generating countless reports,
18 enumerating discovery expenses, and I did this manually if you
19 can believe this, it had long been my hope that the standard of
20 Rule 26 for discovery relevant, calculating to lead to relevant
21 material, would be narrowed. I strongly support the proposed
22 amendment. The concept of discovery only to data relevant to
23 claims and defenses is long overdue, even though a party may
24 still obtain them relevant to the subject matter upon
25 application and approval by the court.

1 We need to really scrutinize this, what is really
2 required to litigate the matter. I really think it needs to be
3 planned. I think people need to start using discovery again as
4 a tool as intended, not as a weapon to obtain a damning
5 document and force negotiated settlement.

6 Quickly on the depositions, I love the idea of a seven
7 hour -- the onetime seven-hour rule. Except in extremely
8 technical cases, I think it could be worked out.

9 In conclusion, I just want the committee not to lose
10 sight of the fact that most of the companies are not sued in
11 the federal courts. Most litigation is in the local court
12 system. I want to emphasize again that their costs are
13 extraordinarily high. I think whatever changes we can make
14 here are going to have a dramatic impact on the states. They
15 look to you for guidance. I think it will be very helpful.

16 I thank you again for taking the time to listen to me.

17 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr. Condron.
18 Mr. Barnhard.

19 MR. BARNHARD: Good afternoon, Judge Niemeyer,
20 panelists.

21 My name is Dean Barnhard. I am a partner resident in
22 the Indianapolis office of Barnes & Thornburg. My bone fides,
23 for most of my career I was an intellectual property litigator,
24 patents, trademarks and copyrights. Although I am still
25 permitted to represent the estates of James Dean, Babe Ruth,

1 Humphrey Bogard, Marilyn Monroe, my practice now is dedicated
2 exclusively to serving now agrosiences and the defense of
3 pesticide and herbicide cases around the country.

4 It is a national practice. I had the honor of
5 receiving justice from the hands of Judge Rosenthal this
6 summer. And just two weeks ago I had the honor of receiving
7 justice from one of your colleagues, Chief Judge Wilkinson.
8 And at any point in time I have not less than two or three
9 cases pending in district courts within your circuit, Judge
10 Niemeyer. So in that regard, I do know whereof I speak when it
11 comes to practicing in the federal courts because that's the
12 place where I love to be the most.

13 I confess that I don't just love the law. I am
14 impassioned by it. And some day when I grow up, maybe I can be
15 a federal judge too. And it is because of this passion for the
16 law that I wanted to --

17 THE HONORABLE JUDGE NIEMEYER: You have to give up
18 everything to do that.

19 (Laughter.)

20 MR. BARNHARD: That's true. One of my buddies in
21 Indianapolis, who is a state court judge, he and I had to cease
22 being golfing partners when he ascended to the federal bench.
23 And so I understand some of the sacrifices.

24 But that aside, the point that I wanted to make, we
25 have heard all the war stories. We've heard what I believe to

1 be far too partisan signs from both the plaintiffs' bar and the
2 defendants' bar. And since I have the opportunity to bat
3 cleanup, I would like to return to the symmetry and the
4 architecture and the philosophy of what the federal rules
5 embody to me and why this architecture and symmetry is going to
6 be greatly enhanced by what the committee is doing today with
7 the revisions to these rules.

8 One of the things that I have seen and I have observed
9 but have not heard during this process is how each of these
10 rules interplay so well with that which is already in place and
11 embodied by the rules. If not expressly stated and certainly
12 taught by, starting at the beginning, with Rule 11, which
13 embodies much of what case law preceded it, before people file
14 lawsuits, they're supposed to have a reason why. They're
15 supposed to have some claims based on facts, which are
16 supported by substantive law. Rule 11 reduces that to a rule.
17 It's unfortunate that it has to be so but there it is.

18 So since we know that Rule 11 embodies the philosophy
19 that you must have something to sue over in the first place, it
20 makes perfect sense that when the time comes to make an initial
21 disclosure, it's fair to lay the evidence out.

22 Rule 11 also tells us that when you deny the
23 allegations in a complaint and then when you assert affirmative
24 defenses to it, you had better have reasons grounded in the
25 evidence and you had better have reasons grounded in the law.

1 And they ought to be good ones. That being so, perfectly fair
2 to have the defendants disclose what they have. Everybody's
3 cards are out on the table at the initial disclosure layer.

4 But where else does this philosophy then flow? It
5 flows perfectly through what I have heard called the narrowing
6 of discovery, and I think it is not narrowing at all. I think
7 it is the structure of discovery. Since we know that there
8 must be a claim well grounded in fact and law before that claim
9 is brought, it makes perfect sense to confine -- or confine is
10 not the right word -- to direct discovery to those claims. It
11 makes perfect sense. It's taught through Rule 11 and it flows
12 through Rule 26.

13 Now, why is this important to us as lawyers? Because
14 your time is precious. How infrequently do we have the
15 opportunity to appear before our colleagues on the bench? Too
16 infrequently. Does the bar wish to waste your time, the
17 precious time that we have available, to come before you to
18 have you calling balls and strikes over whether this discovery
19 is ever so burdensome and costly to me and the scope of this
20 discovery is undefinable? That's not your jobs.

21 The passion that brought you to the bench is the same
22 passion that brings me here today, and that is the intellectual
23 rigor of that which we do. The job that you do best is calling
24 balls and strikes on whether these claims are meritorious in
25 theory and/or supportable in fact. That's why discovery

1 related to claims and discovery related to defenses under the
2 attorney-managed phase of discovery is perfect, because it
3 enables the judiciary to do that which it does best.

4 And now where next does the logic flow? From Rule 26
5 on to Rule 16, and this is the point that I want to make most
6 emphatically to the panel: The Rule 16 requirements require
7 both the bench and bar to collectively put their heads together
8 and figure out what this case, whatever it is, is about and
9 where it's headed. This takes place after the exchange of the
10 initial disclosure. It takes place after the filing of the
11 Rule 26 report.

12 This is where the rubber ought the meet the road.
13 This gives the opportunity to both the bench and the bar to
14 figure out of this myriad number of claims -- and as I said in
15 my written statement, I have never seen a complaint that did
16 not have one or more claims or theories immediately susceptible
17 to motion practice.

18 What I should have said in my statement but did not is
19 I have never seen an answer that simply didn't have a laundry
20 list of affirmative defenses, many of which have absolutely no
21 value whatsoever to the merits of the case or simply don't fly
22 under the substantive state law.

23 The initial disclosure requirement, the Rule 26(f)
24 report, and then the Rule 16 initial conference give everybody
25 an opportunity to clear away the clutter from the complaint, to

1 clear away the clutter, for that matter, from the answer, to
2 get down to the core issues that are going to drive the
3 resolution of this particular dispute.

4 What does that do for us as a whole? It saves the
5 very precious and very scarce judicial resources that are
6 parsed out to us on a fairly parsimonious basis. It saves our
7 clients an enormous amount of money, both for the plaintiffs
8 and for the defense. Most importantly, it serves a social
9 value because the cost of litigation to society as a whole is
10 not confined to those of us who participate in this forum, but
11 it affects all of society.

12 So the idea of bringing all of these rules to bear so
13 that we can focus our intellectual capabilities and marshal our
14 facts and marshal our law at the earliest possible opportunity
15 to bring structure to a case is advanced and enhanced by these
16 revisions. And I applaud them very, very much. If you can't
17 tell, I am very excited about them.

18 Now, the only other point that I wanted to make was
19 with respect to the comment this morning from the first witness
20 that is it not true that these revisions to these rules will
21 provoke early motion practice. Well, I certainly hope it does.
22 I certainly hope so. This is not something to be afraid of.
23 This is something to be embraced because every time we narrow
24 an issue down, either taking out a factually or legally
25 unsupportable claim or throwing out some affirmative defense

1 that simply does not fly under state substantive law, we
2 eliminate an area in which expensive discovery must be taken,
3 and we eliminate having to call judges in to call balls and
4 strikes on little internecine tribal warfares between the
5 plaintiffs' and defendants' bar.

6 We preserve the opportunity to do that which you do
7 best. And that to me is the beauty. I mean, the step forward
8 that these rules do take is to put the bench back to the job
9 that the bench does best and what we depend on the bench to do
10 best for us, instead of, as I said, counting beans on costs and
11 burden and counting beans on whatever the scope of discovery
12 might possibly be.

13 PROFESSOR ROWE: Would you have the court-managed
14 stage of possibly expanding discovery to matters relevant to
15 the subject matter, would you have that eliminated from this
16 proposal?

17 MR. BARNHARD: Absolutely not.

18 PROFESSOR ROWE: From everything you were saying about
19 sort of unity, it was seeming to me that that didn't fit with
20 what you are saying.

21 MR. BARNHARD: It fits perfectly because it provides
22 the safety valve. And that's the beauty of these rules is with
23 every -- the plaintiffs' bar seems to be arguing that we are
24 attempting to tilt the playing field. The defense bar has been
25 arguing that the playing field has been tilted all along.

1 What I am saying is that the playing field has been
2 tilted neither way. It has simply been muddy. These revisions
3 to these rules put the stripes back on the playing field, and
4 that's the beauty of it, because for every rule there is a
5 built-in way to avoid its automatic operation by going to the
6 court and seeking one of the written exceptions to the
7 operation of the rule.

8 So I believe absolutely discovery should be upon good
9 cause expanded from that which applies only to the claim or
10 defenses, because as a defense lawyer that helps me. Issues
11 may arise, I may perceive something in the case. It's not
12 limited just to the plaintiffs. But I want to see something
13 that at the initial stage seems collateral.

14 But as discovery progresses, it may become quite
15 important. At that point, just like the plaintiffs' bar can, I
16 can as a defense lawyer come to his or her honor and say,
17 please, may I have more upon showing of good cause? That's the
18 beauty of the way these rules are drafted. It gives everybody
19 the opportunity, upon cause shown, to do precisely that.

20 So it preserves everyone's rights. It merely brings
21 structure. And that's why this morning when Judge Niemeyer
22 used the word architecture, I lit up like a little firefly back
23 there because that's what I believe best describes what is
24 happening. We are bringing structure to this architecture. So
25 anyway, the moment I heard that word, I was very excited.

1 If I could have one more point and then I will thank
2 you very much and leave. Daubert. There is no way that we can
3 do our jobs as attorneys in building records sufficient for you
4 to do your jobs as judges on Daubert motions if we are confined
5 to seven hours in a deposition.

6 Now, understanding in those districts that have fully
7 embraced expert reports under 26(a)(2), we've got a big leg up
8 on what the expert's opinion is. But understand, that expert
9 is putting forth his or her best case in that expert report.
10 And for everybody who sat on the Daubert hearing, you know that
11 the issue is not so much what the expert does know and has
12 considered. The real issue is what does the expert not know,
13 what has the expert not considered.

14 To do that, to build a record upon which you can rule
15 intelligently and fairly, we have to debunk the expert. That's
16 where we do our work so you can do your job. We can't do that
17 reliably and consistently under presumptive seven-hour
18 limitation. And with respect to requiring the deponent's
19 consent to a continuance, these people don't want to be deposed
20 because if we knock them out on Daubert, they don't make any
21 money. This is bad business for them. They will not consent.

22 Thank you.

23 THE HONORABLE JUDGE NIEMEYER: Thank you, Mr.
24 Barnhard.

25 Is there anyone in the room whose name I haven't

1 called who is registered to testify?

2 (No response.)

3 THE HONORABLE JUDGE NIEMEYER: We have heard 36
4 witnesses today, and I want to say that we are very grateful to
5 have that testimony and have the views. We will take them into
6 consideration in our April meeting. We will come to any
7 adjustments or final conclusions at that meeting and present
8 our final work to the standing committee in June.

9 I want to thank you all again, and I will declare this
10 hearing closed.

11 (Which were all the proceedings had at the hearing of the
12 within cause on the day and date hereof.)

13 CERTIFICATE

14 I HEREBY CERTIFY that the foregoing is a true,
15 correct and complete transcript of the proceedings had at the
16 hearing of the aforementioned cause on the day and date hereof.

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Contract Court Reporter

2-4-98

Date