TRANSCRIPT OF PROCEEDINGS

In the Matter of:)
)
PUBLIC HEARING ON PROPOSED)
AMENDMENTS TO THE FEDERAL)
RULES OF CIVIL PROCEDURE)
JUDICIAL CONFERENCE ADVISORY)
COMMITTEE ON CIVIL RULES)
)

Pages: 1 through 314

Place: Washington, D.C.

Date: November 7, 2013

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005-4018
(202) 628-4888
contracts@hrccourtreporters.com

BEFORE THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

In the Matter of:	)
	)
PUBLIC HEARING ON PROPOSED	)
AMENDMENTS TO THE FEDERAL	)
RULES OF CIVIL PROCEDURE	)
JUDICIAL CONFERENCE ADVISORY	)
COMMITTEE ON CIVIL RULES	)
	)

Thursday,
November 7, 2013

The parties met, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE DAVID G. CAMPBELL, CHAIR

APPEARANCES:

Committee Members and Reporters:

HON. PAUL S. DIAMOND
DEAN ROBERT H. KLONOFF
LAURA A. BRIGGS, Esquire
HON. ARTHUR I. HARRIS
HON. GENE E.K. PRATTER
PETER D. KEISLER, Esquire
HON. JOHN G. KOELTL
PROF. DANIEL R. COQUILLETTE
HON. JEFFERY S. SUTTON
PROF. EDWARD H. COOPER
PROF. RICHARD L. MARCUS
HON. PAUL H. GRIMM
HON. SCOTT M. MATHESON, JR.
HON. STUART F. DELEREY
ELIZABETH CABRASER, Esquire
HON. SOLOMON OLIVER, JR.
HON. DAVID E. NAHMIAS
HON. ROBERT MICHAEL DOW, JR.
JOHN M. BARKETT, Esquire
PARKER C. FOLSE, Esquire

Speakers:

JACK B. McCOWAN, JR., Gordon & Rees LLP
JEANA M. LITTRELL, FedEx Express
JOHN C.S. PIERCE, Butler Pappas Weihmuller Katz Craig LLP
ALTOM M. MAGLIO, Maglio Christopher & Toale
DAVID R. COHEN, Reed Smith LLP
CORY L. ANDREWS, Washington Legal Foundation
MARY MASSARON ROSS, Plunkett & Cooney
PAUL D. CARRINGTON, Duke University School of Law
JONATHAN M. REDGRAVE, Redgrave LLP
PAUL J. STANCIL, University of Illinois at Urbana-Champaign
THOMAS Y. ALLMAN
DANIEL C. HEDLUND, Committee to Support Antitrust Laws
ANNA BENVENUTTI HOFFMAN, Neufeld Scheck & Brustin, LLP
PETER E. STRAND, Shook, Hardy & Bacon LLP
DAN TROY, GlaxoSmithKline
BURTON LeBLANC, American Association for Justice
WAYNE B. MASON, Sedgwick LLP
DARPANA M. SHETH, Institute for Justice
ROBERT L. LEVY, Exxon Mobil Corporation
MICHELLE D. SCHWARTZ, Alliance for Justice
ANDREA VAUGHN, Public Justice Center, Inc.
BARRY H. DYLLER, Dyller Law Firm
ALEXANDER R. DAHL, Brownstein Hyatt Farber Schreck
LILY CLAFFEE, U.S. Chamber of Commerce
JOHN F. KARL, JR., McDonald & Karl
STEPHEN Z. CHERTKOF, Heller, Huron, Chertkof & Salzman, PLLC
JENNIFER I. KLAR, Relman, Dane, & Colfax PLLC
NICHOLAS WOODFIELD, The Employment Law Group
ROBERT C. SELDON, Seldon Bofinger & Associates, P.C.
MARC E. WILLIAMS, Lawyers for Civil Justice
JOHN P. RELMAN, Relman, Dane, & Colfax PLLC
MALINI MOORTHY, Pfizer, Inc.
JONATHAN SMITH, NAACP Legal Defense and Education Fund, Inc.
WENDY R. FLEISHMAN, Lieff Cabraser Heimann & Bernstein
PATRICK M. REGAN, Regan Zambri Long & Bertram
MICHAEL C. RAKOWER, New York State Bar Association
WADE HENDERSON, The Leadership Conference on Civil and Human Rights

Speakers: (Cont'd.)

JANE DOLKART, Lawyers' Committee for Civil Rights Under Law
FRANK L. STEEVES, Emerson
JOSEPH M. SELLERS, Cohen Milstein

P R O C E E D I N G S

(9:00 a.m.)

JUDGE CAMPBELL: Good morning. We appreciate everybody being with us this morning. We're going to try to start in one minute so that we can stay on schedule through the day.

Welcome to all the committee members who we've not had an opportunity to greet, and thank you for everybody else who is here. We very much appreciate your being with us this morning. We appreciate your input and your interest in the committee's work.

I think I speak on behalf of the committee when I say that we genuinely need your input, and we value what you are going to be sharing with us. This is very much an effort on the part of the committee to be educated, and you are the experts who can help educate us on the things that we are considering.

We want you to know that we are reading the written submissions that have been coming in. It's a big job. There are lots of them. We will continue to do that. So, if you have additional thoughts you want to put in writing and submit them, we will read them all and we will consider them carefully.

I think it goes without saying that on the

proposals that have been issued there have been no final decisions made. This is very much a work in process, and the public comment process is perhaps the most critical part of it.

So we are very interested in the input we are going to receive today and appreciate your willingness to be here. Unfortunately, we've got so much interest that we are going to have to limit the time of everybody who speaks today. We have 41 individuals slated to speak today. I think we could have had more if we had allowed room, but we just didn't have room.

If we're going to finish by 5:30 this evening and we stay on schedule, that means we can hear comments of five minutes from you and then have five minutes for questions from the committee afterward. And so we're going to run on that schedule. We know you cannot say everything you would like to in five minutes, but again, to the extent you can't say it here, if you submit it in writing, we will absolutely read it and consider it carefully.

We have lights that are going to help keep us on time. There's a light on the podium. There's one in front of me. And I'm told that at four minutes the yellow light will come on and at five minutes the

red light will come on, and then it will be my job to keep the committee questions to five minutes so we can get to the next speaker on time. And along those lines, for committee members, obviously I think we need to resist the urge to talk too much and try to put our questions as pointedly and as briefly as we can.

So, with that introduction, we are going to get started. The first speaker I have listed is Jack McCowan. And, sir, if you could, and all the speakers, just introduce yourself and your affiliation if you have one, and we will get going.

MR. McCOWAN: Thank you very much. Good morning, ladies and gentlemen of the committee. It's a real pleasure to be here, an honor to be here to offer a few thoughts on the rule changes that you're proposing.

My name is Jack McCowan. I'm from San Francisco. I'm with the law firm of Gordon & Rees. A little background so you know where I'm coming from. I'm a defense lawyer that's been practicing for about 38 years, and I have limited my practice to the defense of civil cases.

I am a member of the board of directors of the DRI, an association of defense lawyers that

numbers over 22,000 folks here in the United States and abroad. I'm a faculty member, an adjunct faculty member at the University of California Hastings College of Law in San Francisco where I have the privilege of coteaching with a plaintiff's lawyer a personal injury litigation class.

My practice over the last 25 years has been primarily devoted to the defense of manufacturers of medical devices, pharmaceuticals, and other products. My practice is both in state and in federal courts. I've tried medical device cases in state and in federal courts. In California, for instance, our rule on the scope of discovery is almost identical to Rule 26.

I have been retained by manufacturers over the years of medical devices and pharmaceuticals in multi-plaintiff litigation in courts and also in coordinated cases in California. And one of the things that I did early on in my career in product device cases is I had the honor of being trial counsel in California for over 35 different cases and consulted on the job on that basis.

JUDGE CAMPBELL: Mr. McCowan, can I interrupt you just briefly? Can folks in the back hear what he is saying? Yeah. I'm not sure that mike

is as sensitive as we need it. Why don't we see if we can make an adjustment so everybody can hear.

(Pause.)

MR. McCOWAN: I would like to address -- that sounds better. I would like to address today just the proposed changes to Rule 26. That would be my focus. And first let me say that I support the committee's goals of advancing early and effective judicial case management, proportional discovery, and attorney cooperation.

If these goals are achieved, I believe progress will be made in reducing the high cost of discovery for all parties in litigation without adversely affecting the rights of plaintiffs or defendants to have their cases tried before a jury.

I don't think it can be questioned that the cost of discovery even for companies with significant means drives the settlement of claims that would otherwise be tried before a jury or a judge. I have been involved in scores of multi-plaintiff personal injury cases in which my clients have opted to settle cases that should have been tried in my judgment primarily because of the sheer volume of the cases and the costs of preparing those cases for trial.

In the majority of the mediations in which I

participated over the years, I often hear the mediator say isn't it more expensive to prepare this case to try and to try than the settlement offer that's now on the table. There's no question that we hear that all the time, but in my judgment, the driving of the costs of the litigation should not be the reason the case is settled.

If the proposed changes to Rule 26 that incorporate the concept of proportionality of discovery and eliminate the phrase "appears reasonably calculated to lead to the discovery of admissible evidence" are adopted, I believe a great deal of money and time will be saved and will inure to the benefit of both plaintiffs and defendants.

I've been involved in many product liability cases involving medical device, pharmaceutical, and automotive products where plaintiff's counsel have successfully argued that discovery of information on products totally unrelated to the product involved in the case must be produced because the documents are reasonably calculated to lead to the discovery of admissible evidence.

The phrase is too broad to define. Because of the overbreadth of this phrase, companies and their attorneys spend untold hours and money searching for

documents and other products that are almost never placed on an exhibit list at trial. In most cases, motions in limine are successful in preventing these documents from being used at trial, yet the damage in my opinion has already been done in lost productivity of the company, costs associated with the outside vendors who process the documents, and higher fees paid to defense lawyers to try to keep these documents from being disclosed or out of evidence.

Despite the fact that proportionality of discovery is a concept that is already within the rules, the courts in my opinion are still using orders or issuing orders that are way too broad. One example is an order issued by a magistrate judge just last month in a case in Florida called McLane v. Ethicon Endo-Surgery. It's a case pending in the Middle District of Florida.

The case involves an alleged defective staple that failed to secure an incision in the plaintiff's colon. Plaintiff in its eighth request for production sought adverse event reports and other documents not only for the product that Plaintiff received but for every predicate product or device on which the FDA relied to clear that product for marketing as a substantially equivalent product to

predicate devices.

Substantial equivalence under the FDA rules is a term of art that's used in clearing new products for the market under section 510(k) of the 1976 Medical Device Amendments. It does not mean that the predicate product is identical to the product being proposed. The proposed device can be substantially equivalent for FDA purposes even if its technology is substantially different than the technology of the predicate devices upon which the FDA decides whether to put the product on the market.

In order for FDA to grant 510(k) approval, it demands only comparability of performance, not design, with the predicate device. But it does not require that they have the same type of technology. Defendant in that case presented facts in its opposition about the major ways in which the technological characteristics of the device in question that was implanted in the plaintiff differed from the two predicate devices which plaintiffs sought discovery. These facts included the ability to bend, the method of closing the wound, reloadability, staple configuration, tissue cutting, trigger and handle design, and staple formation.

Despite these facts, the court apparently

ignored this testimony given in affidavits, and the court granted plaintiff's motion, and defendant was ordered to produce the documents related to the predicate products.

It's clear from the ruling that the court relied solely on a case that referred to the "reasonably calculated" language in Rule 26(b)(1). There was no discussion of the evidence that was offered by the defendant about why the predicate products were not similar to the product in question in the case. The result was the court-ordered discovery concerning other dissimilar products and adverse events.

In my judgment, if the "reasonably calculated" language were not in the rule, the defendant in that case would have had a better chance of preventing this overreaching discovery. Had the court limited the discovery to design and manufacturing and adverse events and documents generated by the company for the product that was in the lawsuit, the plaintiff would have had sufficient evidence to try to prove his case.

If rulings like this one, which came out in Florida but is not an isolated incident, are allowed to stand, they could potentially expand discovery to

predicate devices and their adverse event reports in every case in which a product in question is approved for marketing under 510(k), and that includes approximately 99 percent of all medical devices on the market today.

In this case, the predicate devices were manufactured by the defendant, Ethicon, but that's not always the case. A manufacturer in offering a product to the FDA for approval can rely on predicate devices by other companies. So, with rulings like the one in McLane, there is good reason to believe that manufacturers of predicate devices not involved in the lawsuit could be asked to produce documents on their products just because a manufacturer of a later approved product referenced their product.

JUDGE CAMPBELL: All right, Mr. McCowan, we have just under a minute left if we're going to have any questions. Did you have any final wrap-up points you wanted to make?

MR. McCOWAN: The only thing I wanted to say, Your Honor, is I believe that this rule if it is adopted, if we change the proportionality of discovery, move it into the rule, and if we remove the language of the "reasonably calculated to lead to the discovery of admissible evidence," we will go a long

way in reducing the costs of discovery for all parties, which will inure to the benefits of plaintiffs and defendants.

JUDGE CAMPBELL: All right. Thank you, Mr. McCowan. We've used just about all of the time, so we won't ask questions of you, but we appreciate your comments.

MR. McCOWAN: Thank you very much.

JUDGE CAMPBELL: Ms. Littrell?

MS. LITTRELL: Thank you. My name is Gina Littrell. I am the vice president of employment litigation for FedEx Express, the world's largest express transportation company. We appreciate the committee's work in bringing forward these proposals for comment and testimony, and thank you for the opportunity to appear this morning.

At FedEx Express, we rely almost exclusively on in-house attorneys and legal professionals to litigate cases in state and federal courts in the United States involving business transactions, employment discrimination, and allegations of wage and hour violations.

With regard to proposed amendments characterized as case management proposals, we are particularly supportive of proposed Rule 26(d)(2) to

allow for the early exchange of discovery requests. We believe cases will get to resolution more efficiently and with less ancillary litigation, and for these reasons, we would not limit the exchange of early discovery to simply requests for production.

With respect to the proposed amendments categorized as proportionality proposals, I'd like to focus on the proposed amendments to 26(b), 26(c), and 34. We support the proposed Rule 26(b)(1) revisions to clarify the appropriate scope of discovery and respectfully disagree with those who have cautioned that the revisions represent a monumental sea change that will impede plaintiffs' ability to obtain vital discovery.

On the contrary, the current version of Rule 26 already places the burden on the requesting party to ensure and certify that requests are proportional. So some are questioning whether the amendment is really needed. It's been suggested we just need to better educate judges on the existing rules. We submit that there is no better education for judges and litigants than moving the proportionately requirement to the most prominent part of the rule, and we believe that doing so will result in fewer motions.

The emphasis on proportionality is particularly necessary now given the emerging trend of discovery on discovery through which requesting parties seek extensive information regarding the thousands of software applications and systems in use, details of preservation capabilities and efforts. And this discovery on discovery campaign particularly is disproportional because it typically precedes any discovery on the actual allegations in the complaint.

In response to the suggestion that the proposed amendments to Rule 26(b) would particularly prejudice plaintiffs in employment discrimination claims, it's important to note that employment discrimination claims governed by federal law cannot be litigated by charging parties until they have first brought their claims to the Equal Employment Opportunity Commission, which has investigative powers, subpoena authority that is far broader than the scope of discovery provided by the Federal Rules of Civil Procedure.

The need for proposed Rule 26(c) amendment to add explicit recognition of the courts' authority to allocate discovery costs was recently demonstrated in a putative commercial class action brought against FedEx by a retail shipper. The amount in controversy

if the class is not certified is about 7- or $8,000. We don't think the class will be properly certified because the issues are individual that would require an inquiry into each shipment to determine if human error caused the alleged overcharge.

But at our own expense, we have produced more than a million pages of ESI from the 20 key custodians plaintiff identified covering a six-year time period. We spent more than $150,000 for contract attorneys to assist with review, plus an equal value of in-house resources.

Plaintiff recently asked the magistrate judge for a preemptive ruling that FedEx would have to bear the costs of production of ESI from any additional custodians. The magistrate judge reserved ruling until an actual motion is filed but said his preliminary inclination would be to require FedEx to bear the costs because that's the general rule. Clearly we think that courts need specific authorization within the rules to shift costs in appropriate circumstances.

We oppose the proposed Rule 34 amendment to require responding parties to state whether any documents are being withheld based on objections. This amendment would definitely encourage ancillary

litigation because although the proposed rule itself would not require the identification of withheld documents, an affirmative statement that documents are being withheld will undoubtedly be followed by a request to identify each and every document withheld and ancillary litigation over the sufficiency of the corporation's disclosure.

Again, especially in light of the emerging trend of discovery on discovery efforts, we urge the committee to reconsider the proposed Rule 34 amendment.

FedEx Express is a member of the Lawyers for Civil Justice. We support the positions taken with regard to proposed Rule 37(e) and LCJ's public comment. We also urge the committee to adopt the recommendation of the Duke Law Center for Judicial Studies requiring a showing of *some* degree of prejudice before curative measures may be ordered for the loss of ESI.

With regard to the concerns expressed that courts will interpret willful to include intentional acts, including an auto-delete function, please consider that if meeting our preservation obligations requires discontinuance of auto delete for all systems and users, not just those subject to a litigation

hold, the stated purpose of the rules to ensure the just, speedy, and inexpensive determination of every action will be frustrated, if not defeated, because we're already pushing the limits of the industry leading technology for finding responsive ESI, and multiplying the quantity of data for each custodian would cripple the search.

I see that I am out of my allotted time, so I will thank the committee again and take any questions.

JUDGE CAMPBELL: Thanks, Ms. Littrell.

Are there questions? Rick.

PROF. MARCUS: Ms. Littrell, one of the things that some have said about the 26(b)(1) change is that it would somehow affect the burden of showing whether discovery is or is not proportional. Do you think that's true, and would you be expecting to take that position if the rule change were made?

MS. LITTRELL: Professor Marcus, that burden is already in Rule 26. Rule 26(g) requires a certification of each requesting party that their request is proportional to what's at stake in the case. And that isn't just limited to the amount in controversy but whatever is at stake in the case. So the rules already require that the proposed change

will not give responding parties a new argument.

JUDGE CAMPBELL: I have a question, Ms. Littrell. You expressed concern that if a party producing documents is required to say whether or not they're withholding anything you'll get a follow-on request saying what are you withholding. What prevents parties from doing that now? And do you see parties asking that question?

MS. LITTRELL: We don't. I was surprised, Your Honor, to see this proposed amendment. This has not been an issue in our practice. We properly pose objections. Typically we get, as an example, tell us every or produce every policy and procedure at FedEx. Well, with 100,000 employees in hundreds of locations, it's impossible and just not relevant to produce every policy and procedure.

So we typically respond and say your request is overly broad. Here are the policies that relate to the specific claims. Your client was terminated for a violation of our acceptable conduct policy. Here is the acceptable conduct policy. It seems obvious that there are other policies, and sometimes we have negotiations with requesting parties. But I have not seen that this issue of we can't tell what you're not giving us is a problem. I was surprised by the

amendment but concerned about how it would be used in practice.

JUDGE CAMPBELL: All right. We have about a minute left. Any other questions for Ms. Littrell?

MR. BARKETT: I think the problem --

JUDGE CAMPBELL: Push the button, John, would you? Push it, and it should be on.

MR. BARKETT: There it goes. The problem in Rule 34 that the committee encountered was the situation where boilerplate objections are being made routinely in response after response after response after response, and it's just impossible to know, so I make an objection that privileged, work product, overbroad, unduly burdensome, subject to these objections we're producing. Is that what your folks do when they make responses? Do you follow that format?

MS. LITTRELL: Yes. And we shouldn't.

(Laughter.)

MS. LITTRELL: You know, I just have to be honest. I think that if we'll allow this early exchange of discovery requests, then when the parties get together for the 26(f) conference, they can work through these things. And generally speaking, yes, we do the boilerplate objections, and then the requesting

party calls. We work out a compromise. And this is not really a problem, but to move it further into the beginning of the case I think will solve a lot of this.

JUDGE CAMPBELL: All right. Thank you, Ms. Littrell. We've run out of time. We very much appreciate your comments.

Mr. Pierce?

MR. PIERCE: Thank you very much. Good morning. My name is John Pierce. I'm an attorney in Mobile, Alabama, practicing with the firm of Butler Pappas. I am here on behalf of myself, my firm, and my clients. I'm also here on behalf of DRI and its 23,000 members. I'm the chair of DRI's Trial Tactics Committee, and what we do as a committee is we seek to teach best practices in an age when more and more cases are not being tried. And the trend is not to try cases, and for those of us like me that enjoy trying cases and believe that you get your best outcomes with jury trials, that's a bad thing.

The Trial Tactics Committee and DRI are committed to preserving the right to a civil trial by jury. That's one of our key missions. And one of the things that the amendments that this group has put together will do is that it puts the focus back on the

merits of the case and not on money. Too often cases are settled because discovery is expensive and litigation is expensive, and we need a way to bring the focus back to the merits and not money.

Just by way of background, I'm a bit of a generalist in my practice. I try cases in state and federal court, in Alabama, the Florida panhandle, and in southern Mississippi. I try cases on behalf of some larger companies, but most of my work is for small companies, subchapter Ss, mom-and-pop drugstores, compounding pharmacies, transportation companies, companies that build things, construction companies, clients like that that one of the key drivers in litigation involving clients like that is cost.

And cost cuts both ways. And it's not just money, but it's time and opportunity costs and resources. Preservation and production of discovery material is one of the key elements of those costs. And so I and the constituents I represent are in favor of the limitations of the number of depositions, the limitations on the discovery tools like requests for production, requests for interrogatories, requests for admission, in order to make lawyers sit and think about their cases at the very outset.

I'll tell you I'm also a big fan of the concept of early case management, of getting in before the judge early on in a case, early Rule 16 issuance of scheduling orders, and the idea that you have to go to the court with a conflict before you file a discovery motion.

There's been some mention in some of the papers that have been filed with the committee that defendants love discovery disputes and they love to throw a bunch of paper out. I'll tell you my clients do not like discovery disputes. They do not like paying for discovery disputes. And so if we can get the judge on the phone kind of like you do -- in 22 years of practice, I've only done this a few times, but in a deposition sometimes you have to get the judge on the phone. That resolves the issue. There's no briefing. That is a wonderful tool that this committee has recommended, to have early scheduling, early scheduling conferences and informal conferences.

And in the early scheduling conferences, you get around a lot of this problem that's been raised by some of the opponents to these amendments about we're not going to get enough discovery, we can't fully develop the facts of our case. There's a relief valve built in that allows you to raise that with the judge

early on so you're thinking about your case.

With regard to proportionality and cost allocation, certainly the constituency that I represent is in favor of the amendments to Rule 26 and Rule 37. There are others that will speak about that in greater detail, but it brings more fairness. It limits what both sides get to do, not just one. It doesn't favor big defendants.

A lot of times references are made to David versus Goliath. And I watched the hearings in front of the Senate Judiciary Committee on Tuesday. A lot of times I'm David. I have a very well-organized bar against me, and so, you know, I'm the David that is getting crippled by discovery costs. Reducing the amount of information that is exchanged through discovery reduces the cost, but I don't think it reduces the quality of the trial.

Needles in haystacks. How much are we willing to spend to find needles in haystacks, these peripheral, marginal facts that really don't bear on the substance of a case? I take issue with some of the overtones in some of the documents that have been submitted that seem to question judges in their exercise of discretion. I've tried cases in federal courts for 22 years. I find that we have a federal

judiciary that is highly dedicated to the job at hand. It is engaged and involved. And so to give them an opportunity to be involved earlier I think is a good thing.

My time is about up. I will tell you this. There's going to be spillover into the state courts from what happens here, and what's happening here is a good thing. You are not closing the door to litigation. By reducing costs, you're opening the door for people like the constituency that I represent.

JUDGE CAMPBELL: All right. Thank you, Mr. Pierce. Are there questions from members of the committee?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much for your comments.

Mr. Maglio?

MR. MAGLIO: Good morning. My name is Altom Maglio, and I'm a small-firm attorney from Florida, and I represent patients in medical product liability suits, and I'm here today on my own behalf.

First I'd like to thank the committee for the imminent changes to Rule 45. I believe these changes will simplify discovery to the benefit of all,

and these changes are clearly a step in the right direction. Unfortunately, some of the changes being contemplated today are not. These changes I strongly believe will have drastic, unintended, and very negative consequences.

My clients are typically injured by a failed medical device. They face mounting medical bills, are out of work, and often in constant pain. They go to a lawyer typically because their doctor told them to. The manufacturer of the product is almost always an enormous multinational corporation. David versus Goliath was just mentioned, and this is your typical or your textbook David versus Goliath situation.

Some manufacturers do take responsibility for injuries caused by their product. Unfortunately, these days that response is more the exception than the rule. The typical multinational response is a scorched-earth defense. Deny everything. Discovery is essential in these cases. Proof that the product works or doesn't work often can only come from the manufacturer. The proof is often the amount and type of other product failures.

This information is almost never publicly available. Only the manufacturer has it. If the product failure shows that a product is defective,

then my job is to turn to what the company knew and when it knew it. This is fought, as you can well imagine, even harder.

And let's talk about the business of law and contingency fee practice specifically. I get paid a percentage of what my client receives, if anything. When I take a deposition, I don't get paid by the hour. In fact, I pay the expenses of the deposition out of my own pocket. I have zero incentive to take unnecessary depositions. Likewise, once I get the information I need in deposition, I have no incentive to take an extra minute of deposition, much less fill up seven hours. If the proposed rule changes are intended to stop contingency fee attorneys from conducting unnecessary discovery, don't bother. Economics already does.

The proposed rule changes send the message to magistrates and judges that they have been allowing too much discovery. However, real discovery is absolutely necessary for my clients to prove their cases. Real discovery is necessary for justice to be done. The proposed rule changes sends a message to judges and magistrates that they erred when they allowed real discovery. Getting back to the David versus Goliath analogy, they take the rock for David's

slingshot away and replace it with a pebble.

Equally problematic to the administration of justice is the limiting of the scope of discovery by the five-part proportionality test. There will be immense unintended consequences if this change is made. Almost every discovery request will require a hearing on proportionality. Judicial dockets will be clogged with these proportionality hearings. Far from making the administration of justice more efficient and less expensive, goals I greatly applaud, they will have the exact opposite effect.

The proportionality change is unnecessary. Defendants are not shy about making proportionality objections. Almost every discovery request, well, many discovery requests raise an overly burdensome objection often as a default response. If unresolved, the defendant then has to explain to the magistrate or judge why the discovery is overly burdensome and convince the court.

This rule change turns that on its head. The injured patient, my client, now has to show why producing the requested information is not overly burdensome or expensive to the defendant. Almost certainly the only way to be able to show this will be by conducting discovery on discovery.

Finally, moving the proportionality analysis to the fore creates a perverse incentive for a defendant to make any potentially incriminating information as burdensome and as expensive as possible to locate and collect. Then the defendant may not have to produce it in litigation. They get to keep their skeletons hidden, and this is certainly not going to make justice more efficient or less expensive.

Please carefully consider these proposed changes. They are not minor. They are not modest. They are drastic, and they will not help the cause of justice. Thank you.

JUDGE CAMPBELL: Thank you, Mr. Maglio.

Are there questions from the committee? Judge Koeltl?

JUDGE KOELTL: Do you find yourself usually having to take more than 10 depositions in a case?

MR. MAGLIO: Unfortunately, Your Honor, in a hard-fought case, I would say that the first five depositions are typically of the witnesses put -- and answers to interrogatories by a defendant described as those with the most knowledge about the case. That invariably turns out not to be the case. They are not at all knowledgeable about anything other than

typically marketing, and it takes those five depositions to even begin to figure out who you're supposed to depose and who actually has knowledge.

And quite frankly, oftentimes 10 are insufficient. But on the flip side of it, Your Honor, I mean, these depositions don't always take seven hours. Oftentimes they're fairly quick once you realize you've got the wrong guy.

JUDGE KOELTL: But when you need to take more than 10 depositions, do the parties usually agree or does the judge grant you leave to take more than 10 depositions?

MR. MAGLIO: Well, it's certainly seen by the judiciary, by the magistrates and judges, as a yardstick as kind of what's supposed to be done in a typical case. And I have the burden to explain to them that this is not a typical case, that this is much more complex than your usual case and thus more discovery than typically allowed is necessary.

JUDGE KOELTL: But you do get it. The judges typically give it, right?

MR. MAGLIO: But it's a fight. It's a fight. And I in my practice have been successful in getting it when necessary. But quite frankly, with this rule change, I fear that that will not be the

case.

JUDGE CAMPBELL: Other questions? Professor?

PROF. MARCUS: I'm interested in your expanding a bit on the 26(b)(1) proposed change. I'd like you to explain why that change produces the shift in burden regarding burden that you say it will produce and where that comes from in the proposal that's out for comment.

MR. MAGLIO: Well, that comes from shifting it from the limitations on discovery to the scope of discovery and from a lay attorney perspective and envisioning how courts, magistrates and judges, line magistrates and judges will look at this. It certainly seems to shift the burden from the responding party to the discovery request to the party that's making the discovery request. The party that's making the request now has the burden of showing that it is within the scope of permissible discovery.

JUDGE CAMPBELL: Other questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much, Mr. Maglio.

Mr. Cohen?

MR. COHEN: Good morning. My name is David

Cohen, and I'm with the law firm Reed Smith, and I head the records and e-discovery practice group at Reed Smith. I'm here today. I have not checked my views with my clients or my law firm, so I have to say they're my own views, but they're my views based on 30 years of experience, primarily representing companies, from small to large companies, mostly on the defense side but periodically on the plaintiff's side.

But I have a real view of discovery based on 30 years of experience and focusing on e-discovery. It originally wasn't my intention to focus on discovery. I hoped to try cases. But when I got to my law firm and started working on big cases, I quickly learned that very few cases actually go to trial.

At the time -- I graduated from Harvard Law School 30 years ago -- I think the statistics were about 10 percent of federal cases went to trial. I saw that drop to less than 5 percent. And just before coming here, I went on the federal court website to see what the percentage is now of the federal civil cases that actually go to trial. The latest statistics for 2011 are posted: 1.1 percent of cases reach trial, in 2010 1.1 percent, 2009, 1.2 percent. So about 1 percent of cases are making it all the way

to trial. And from my observation of hundreds of cases over my career, maybe thousands of cases, the main reason is the expense, and the main driver of that expense is the cost of discovery.

We need to do something about the cost of discovery. Our clients are settling cases all the time because the discovery costs are out of proportion. It's not about the merits anymore. It's about how much it costs to try cases. And parties are fleeing our courts and they're going to alternative dispute resolution and other mechanisms to escape this.

So I'm speaking out today in favor of the amendments to Rule 26(b)(1), and I'll also say a quick word about Rule 37(e). I believe those amendments are very positive as well. And I just want to give you a couple of personal insights into what's going on with discovery right now.

My practice group at Reed Smith, which I started there about three years ago, now employs 65 e-discovery attorneys. And we call them e-discovery attorneys, but what they're job is is to review documents every minute, every hour, every day, eight hours a day, five days a week, 50 [sic] days a year. We have 65 attorneys. That's all they do pretty much

is review documents, and that is because of this.

Now that wouldn't be so bad if the documents they were reviewing were actually going to lead to resolving disputes. But my experience is this matches what I've seen in statistics that have been gathered by big companies. Of the documents we typically produce in litigation, less than .1 percent are actually used as exhibits in depositions or trials. I pulled that statistic from an LCJ survey I saw in 2010, but that matches my subjective judgment of what I see in litigation.

Specifically, in most of our cases these days, we start with more than a million pages of documents, and only a small proportion of those are used as deposition or trial exhibits. And if you look at the broader picture of the expenses that our clients are facing to preserve documents and then provide documents to us that we have to review, I saw a statistic Microsoft calculated that 1 out of 340,000 is the proportion of documents that are actually used in a case versus the number that they preserve.

Companies today are spending millions of dollars, U.S. companies are spending millions of dollars, to preserve documents that are never going to be used in litigation, and it's putting our companies

in a competitive disadvantage compared to other companies around the world. And we have a global marketplace. We need our companies to be in a position to compete.

Just one other comment on 26. A couple years ago I convinced my firm to invest in predictive coding technology, otherwise known as technology-assisted review, with the idea that this would help cut down the costs, cut down how much review is needed. But having made that investment, we're finding that we frequently can't use it because we can't get the other side to agree. In many cases I can't even convince case teams to try, or they know it's impractical because they're facing cases in 25 different jurisdictions on behalf of the client and they know they'd have to get all 25 judges or opposing counsel, in some cases multiple opposing counsel, to agree to be able to use this technology.

Plaintiffs have very little incentive to agree to that technology if it's going to reduce the burden on the defendant because they know that this is great leverage for them that the defendants have this burden, and that leads to settlements.

What we need to do right now, the focus of the rules, 26(b)(1), the focus is on what may lead to

relevant evidence or what may be relevant. That is too narrow a standard. We have to look at the other side of the equation too. We have to level the playing field by not only looking at the relevance but also the costs. And that's what the amendment to 26(b)(1) does.

Yeah, the rules are already there in 26(g), but all of us practicing know that most courts ignore it. Moving it to 26(b)(1) is going to get folks' attention, and people are going to start controlling discovery, making sure it's reasonable, making sure that parties get what they need but that costs are also considered.

And then just very briefly on Rule 37(e), I think that rule is absolutely necessary because it has gotten to where in major litigation sanctions motions are being used as a tactic. There's all kinds of satellite litigation, and the stakes are so high that parties are afraid to make reasonable judgments. Where do I cut off the preservation? Is it enough to preserve for 100 witnesses, or do I have to preserve for 1,000 because some court is going to second-guess me later and I'm going to be labeled as a spoliator of evidence.

The thing about Rule 37(e), which the

committee wisely has done, is has left in remedial measures so that parties can still get additional discovery if they need it, even attorney's fees, the things that we used to call sanctions but we're no longer placing that bad label on it when you don't have bad conduct to go with it.

And my only other comment on 37(e) is that I caution the committee to be careful about the existing language in 37(e)(2)(A) which requires in order for there to be sanctions for the failure to preserve or produce to be willful or in bad faith. Some courts have interpreted willful very differently than most of us think of willful.

If you just as part of ordinary document maintenance don't turn off auto delete, that could be intentionally deleting things, and courts in the Second Circuit, the recent case of Sekisui and the Residential Funding line of cases, even if you weren't doing that because of litigation, even if you weren't trying to hide evidence, even if you weren't aware of the litigation, that's willful just because it was a willful decision to follow your document retention policy and eliminate obsolete data.

So I think that rule ought to be changed to say the failure has to be willful and in bad faith, or

there ought to be a definition of willful that actually means intentionally hiding evidence. Thank you very much.

JUDGE CAMPBELL: All right. Thank you.

Questions? Judge Grimm?

JUDGE GRIMM: I think you just may have answered the question that I had.

JUDGE CAMPBELL: Could you use the mike, Judge Grimm, just so folks in the back can hear.

JUDGE GRIMM: Thanks. I think you may have answered the question that I wanted to ask you most, which was if the formula continues to be willful or bad faith what the definition would be. And you are saying it would be a definition that requires some connection between the shortcoming on the part of the party that should have preserved and an awareness that that would have caused information that might be relevant to be destroyed. An intentionality is what you're saying.

MR. COHEN: Exactly. And that is how some courts interpret it now. But what you have is split between the circuits. You never know where your case is going to go to trial sometimes. And so we need that to be uniform, and I think a definition of willful or simply adding the word "and" will help

solve that problem.

JUDGE GRIMM: Another question just to follow up on that real quickly. Have you found that when you and your firm did use the technology-assisted review that it did drive down the costs of reviewing, particularly with ESI?

MR. COHEN: Yes. When we can use it, it does drive down costs, but that's I would say in 20 percent or fewer of our cases so far, and the reason we haven't even tried in some other cases is because of the fear that just having to convince the other side, fight about it, et cetera, would cost more than the savings. And we've seen that in cases like the Clean Products case in Illinois where they spent so much time fighting about it they eventually abandoned trying to even use it. So there's a lot of fear of actually driving up the cost for motions practice because there's no balance now between cost and benefit in discovery the way it's actually applied.

JUDGE GRIMM: Thank you very much.

JUDGE CAMPBELL: We've got about 30 seconds. Judge Oliver, did you have a question?

JUDGE OLIVER: Yes.

JUDGE CAMPBELL: Push the button if you would.

JUDGE OLIVER: I don't think you spoke about this, but I was interested in your opinion. I know some cases are probably simple, but I'm sure that you also do some that are somewhat more complex and more involved. What is your view about the five deposition limit or proposed limit? Do you think that's actually enough depositions, that's all you need in most of your cases?

MR. COHEN: In most of the cases that my firm handles, they tend to be bigger cases. There tend to be more depositions. Even with the 10-deposition limit, very often there's more. So I think judges are used to applying discretion.

The thing I like about having some limits is it gets people thinking about the depositions. And while there are some contingent attorneys who do have motivation to only take necessary depositions, we also face all kinds of commercial cases where they're not contingent fee cases. And believe me, I've seen a lot. I've seen multiple-day depositions, and I think most depositions that take seven hours can be done in six and most cases that have 20 depositions can use far fewer.

So I like the idea of that change to start the conversation and get people thinking, but I think

most judges when shown good cause are going to grant the extra depositions. And frankly, the parties usually agree to that when they know that there's good reason for more depositions in big cases.

JUDGE CAMPBELL: All right. Thanks very much, Mr. Cohen.

Mr. Andrews?

MR. ANDREWS: Thank you very much, and good morning. It's a pleasure to be here, and I'd like to commend the work that you've done. It's tiring work I'm sure, and it shows in the product, in the proposal that you put forward, and I think I speak on behalf of everyone on this side of the room in just saying thank you for those efforts.

I'm here today on behalf of the Washington Legal Foundation. WLF is now in its 36th year as a public interest law and policy center. We advocate in favor of free enterprise, limited accountable government, and individual rights. WLF has a longstanding interest in the work of this committee and in its central role in shaping federal practice and procedure, and I'd like to use my time today to discuss sort of the macro view, the big picture.

WLF did submit formal comments a month ago today actually on the specific proposals, and today

what I'd like to do is leave you with the main point, and that main point is that the status quo is completely unacceptable.

Everyone agrees that discovery-related litigation costs are a competitive drag on the American economy. The exponential growth in discovery-related litigation, it doesn't merely deplete the coffers of Fortune-500 companies. Massive litigation costs can decimate small and medium-sized businesses, many of whom can't afford to hire someone to get on a plane and come up here and testify to you. And all of these costs, large and small, are passed along to every American every day in the form of higher priced goods and services.

In fact, it's interesting to note, but there's a story on the AP wire today that says despite relatively stable inflation over the last several years the cost of goods and services continues to rise.

Now it would be bad enough if that was the end of the story, but it isn't, and the reason it isn't is because we are now competing in a global market. Global businesses have many choices in deciding where they'd like to locate their research and development facilities, their factories, their

global headquarters. Survey after survey shows that litigation costs here are higher than anywhere else. And the costs of litigation, driven primarily by discovery costs, is well recognized as a disadvantage to bringing business investment here in the United States, and in an increasingly global competitive market, this is something that our nation cannot afford.

The excessive costs of the U.S. legal system don't simply deter foreign investment in America, but they also disadvantage American companies who are seeking to compete overseas. Because American companies tend to locate their operations here and disproportionately conduct their business here, they are uniquely vulnerable to the high costs of American-based litigation.

America's global competitors almost always enjoy lower costs in their home country's legal system, and as a result, when an American company competes elsewhere, that company is at a peculiar disadvantage.

Now, given all the talk of David and Goliath, I think it's also important to remember that the proposed reforms you're considering today are about issues of fundamental fairness. And if it's

fundamental fairness that we're after, so-called deep-pocketed litigants should not be denied the benefit of otherwise sensible discovery limits. The fact that an injustice is visited on litigants with a high net worth is no more reason to ignore it than if an injustice is visited on low net worth litigants. After all, justice means justice for all, not merely for some.

So no litigant should be essentially forced to settle an unfounded substantive claim simply because the discovery costs of defending the action on the merits are too high and far too lopsided to permit a just resolution of the dispute.

In conclusion, I think this is a time of great promise for the committee and for American justice. You can accomplish much needed change in the way that federal litigation is conducted and ultimately in the way state litigation is conducted and also, more importantly perhaps, in the way that American citizens and the world come to view the administration of justice.

Burdensome litigation costs are an unnecessary drain on American businesses who are already deeply impacted by economic hardships. Today's overly broad discovery regime imposes a heavy

burden with very little corresponding benefit. Without any sacrifice to the pursuit of justice, the modest revisions to the rules you propose will go a long way towards reducing overall costs and improving federal litigation practice. These are modest revisions. They're modest, they're incremental, they're common sense. They're not radical. They're not draconian.

And with that, I yield the balance of my time.

JUDGE CAMPBELL: Thank you, Mr. Andrews.

Questions from the committee? John?

MR. BARKETT: Is this still on? Yes. When I was in law school, I had a civil procedure professor named James William Moore who said to us that there was no such thing as a debtor who isn't one day also a creditor. We were discussing the Sniadach case in the Supreme Court at the time. And I was just interested in your remarks about litigation. I've seen antitrust cases and patent cases where World War III would be an apt description to describe two very large companies on both sides taking advantage of these rules in incurring the costs of litigation that you are now describing.

So there are different obviously categories

of cases out there, but do you acknowledge that in fact part of the reason why costs are so great can be attributed in fact to people that just want to win in big stakes litigation involving very large companies?

MR. ANDREWS: Sure, absolutely. There's no discounting the role of psychology in litigation. My current practice is primarily appellate, but before that I was a complex commercial litigator in your neck of the woods at White & Case in Miami, and before that I saw federal law practice from the other side as a law clerk for two years with District Judge Steven Merryday. And routinely, as most district judges do at least in the Middle District, he would order the parties to mediation. And one of our mediators has on his office a map of Napoleon's invasion of Russia, and it shows month, the numbers of troops, and how they're completely decimated all the way through to the end.

And he shows that to the parties who come to try to mediate these settlements to try to get them to understand that sometimes these suits are not really about the merits as much as they are about winning. So I think I certainly appreciate your point.

JUDGE CAMPBELL: Other questions? Judge Pratter?

JUDGE PRATTER: Mr. Andrews, you wrote a

very lengthy letter, and among the suggestions, while you applauded the limits that are proposed, you said that you actually would suggest further limits. of what variety and of what quantity?

MR. ANDREWS: Oh. Well, certainly I wasn't suggesting further limits on the numbers of discovery devices. One of the concerns that were expressed in our comments was the attempt to sort of change the culture and change the habits of practice with the scope of discovery.

I know the committee already feels that it made clear that the scope of discovery isn't items reasonably calculated to lead to the discovery of relevant evidence, but that didn't catch on. And so one suggestion that we made and I think that some others have made is that you might consider adding a materiality element as well so that it would be relevant and material. That way it will sort of signal the change in paradigm that I think is necessary to get day-to-day litigants and some judges to get away from that language that's very unhelpful.

JUDGE PRATTER: So you're not really urging numerical, further numerical adjusting?

MR. ANDREWS: Oh, absolutely not. No, ma'am.

JUDGE PRATTER: Okay.

MR. ANDREWS: No, ma'am.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Andrews.

Ms. Ross?

MS. ROSS: Good morning. Thank you for allowing me to appear. I'm here today in my capacity as immediate past president of DRI, and DRI is an organization, as somebody already said, of 22,000 lawyers who defend businesses and individuals in civil litigation. Part of our mission is to work to assure a fair and balanced civil justice system. That's one of the key goals that our organization was created for some 50 years ago, and it continues to be a key part of what we try to accomplish.

And our members have a strong desire to preserve merits-based jury system as a way of resolving disputes. They believe very strongly that our system of justice has been a wonderful system of justice. It has allowed for people to rely upon contracts, for people with injuries to pursue their injuries and get legal remedies that are available, and for those who are charged with violations to defend themselves when the claims are not merit-based.

What we see happening, and this has become

really apparent to me over the last year as I've traveled around the United States and also in Europe speaking with our members and speaking also with the over 50 state and local defense organizations that are affiliated with DRI, is a huge concern about the state of the civil justice system and the fact that our clients are in many instances fleeing the system for private arbitrations or are settling cases rather than pursuing them on the merits because of a concern about cost.

And so I applaud the committee for really wrestling with these issues and putting out proposals that we think will improve the situation and will help to make sure that litigation is not about discovery, it's not about setting up your opponent for some claim of discovery abuse. It's about finding an efficient way the key information that will allow the case to be resolved on the merits. That should be the goal, and we think these rules are moving in the right direction.

I want to also address concerns that I know some people have raised in the papers, and this is based a little bit on part of my practice that has been a significant part in some years at least, and that is the whole area of civil rights. I know there

has been expressed a concern that perhaps changing these is going to impact civil rights claims.

I speak with respect to this as the author of an American Bar Association multi-author -- the editor of a multi-author treatise on 42 U.S.C. § 1983 called *Sword and Shield* and as someone who has been involved in representing both municipal governments as well as individuals suing governments in the area of 42 U.S.C. § 1983 in civil rights claims for virtually my whole career, and let me just say a word about the kinds of clients.

Some of my municipal clients are very tiny townships. I think probably the smallest and with least resources municipal client I ever represented was a very small rural township where the township clerk had the city records in a room in his barn because they didn't have any buildings. They don't have a lot of resources in that circumstance.

And at the same time, I have represented major metropolitan areas. I also represented the property owners suing Wayne County, a fairly large and well-heeled county at one time, not so much now, in bringing their claim that the Michigan constitution did not permit taking of private property for private use, sort of the Kelo case at the U.S. Supreme Court.

Our case was Wayne County v. Hathcock. I'm lucky to say we won, unlike the property owners in the U.S. Supreme Court.

But the point of making these comments about my experience is to say in the area of government civil rights kinds of litigation, I do not see these as being a problem whether I would be representing the individual or the government. And I think it's important to keep in mind in the area of civil rights how much government information is freely and widely available.

First of all, the FOIA statutes that most states have and the U.S. Government has make tons and tons of information readily available. Secondly, governments operate in the public eye. Their meetings are public. Their decision-making process is public. Their minutes are public. All of that is public. And even in some of the areas of individual claims, such as the many, many claims that arise in local lockups or jails or involving police, today so many of those claims the governments are using videos, video monitors, and the jail lockup's video monitors on the police cars, and that plus the testimony of a fairly limited number of people is enough to prove or disprove those claims.

So I think these rules would be helpful both to those bringing suits and to those defending suits because governments are struggling, as are individuals, with the economics, and what we want in those very important cases is the ability to get the key information, have a merits-based resolution of the dispute, and not have people having to settle their claim in a somewhat unsatisfactory way because the costs are too high to proceed.

I'm happy to answer any questions.

JUDGE CAMPBELL: All right. Thanks, Ms. Ross.

Dean Klonoff?

DEAN KLONOFF: In the 1983 cases that you've handled --

JUDGE CAMPBELL: I'm not sure your mike is on, Bob.

DEAN KLONOFF: In the 1983 cases that you've handled, roughly what percentage were done with five or fewer depositions?

MS. ROSS: You know, I'm not going to be able to be entirely accurate about the number of depositions. My work on them has been more at the appellate level than at the trial level, so I'm aware of the number of depositions obviously. I think many

of them are not huge number deposition cases, but I don't want to give you a special number because I didn't go back and look and I don't want to be inaccurate.

JUDGE CAMPBELL: Judge Diamond?

JUDGE DIAMOND: Has the DRI with its many members considered reducing litigation costs by reducing the fees they charge, whether it's reducing their hourly rates or figuring a different way to get paid besides hourly?

MS. ROSS: I would say that certainly DRI as an organization is not in the business of aligning its members' rates. I think that would have some legal consequences that we try very hard to stay away from. But I can tell you that we have many discussions about the business of legal practice, and it is uniformly agreed that our members are experiencing serious pressure on their rates. Many of the clients that our members work for are extracting significant rate reductions. Many of our members are now working very often on alternative fee arrangements. They could be capped fees. They could be a lower hourly rate with a success bonus. They could be a single lump-sum amount for a certain number of cases to be handled over the course of a year. All of those changes are happening

in the litigation industry in defense firms all across this country and are causing a reduction in the legal spend. I think that's a fair statement.

JUDGE CAMPBELL: Other questions? Judge Oliver.

JUDGE OLIVER: Just very briefly just following up on Dean Klonoff's question. I don't mean to push you too far, but my question to you is if you're dealing with a 1983 case, let's say excessive force or something like that, and you have to deal both with liability issues generally as well as with policy and custom kinds of issues, do you think five depositions would likely be enough?

MS. ROSS: I think very often five or 10 would be enough, but again, my practice is more appellate. I would say this. The policies, you know, that's paper discovery. Often in policymaker cases the information is going to be available. And then it's targeted individuals that you can figure out from the structure of the government which is fully available.

Let me add this point about a distinction in the government arena versus the private corporation. When you're looking at the government, the government structure, who is in command formally, who are the

people, including their job descriptions and what they're doing, that information is available through FOIA. And so a lot of that preliminary work at figuring out who the key players are can be done through these other mechanisms so that then the actual discovery can and should be very targeted.

JUDGE CAMPBELL: All right. Thank you very much, Ms. Ross.

Professor Carrington?

PROF. CARRINGTON: Thank you very much. I guess I should identify myself. I am a retired professor. I spent eight years as the reporter for this committee back in ancient times, and it was a wonderful adventure. I was appointed by Warren Burger to that role and continued with a number of different federal judges, all of whom were very dedicated to the work of the committee, and I thoroughly enjoyed it.

But there was an adversary process at work. One of the things that happened in the first couple of years that I was a reporter was there appeared on the scene something called the Competitiveness Commission, which was led by Vice President Quayle on the appointment of President Bush, and I attended a couple of their sessions, and one of the things that I was asked informally on such events was couldn't we

just get rid of Rules 26 through 37. Wouldn't that make the whole system a whole lot better if we just got rid of discovery, because it costs a whole lot of money, and it makes American business less profitable, and consequently we can't compete as well in the international global market. And we were hearing a little about this sort of thing just a few minutes ago, an echo of that same notion.

It was ultimately resolved in a way. There were a lot of minor changes made in the rules, some of which I served as draftsman for. And one of them did have to do with the idea that an attorney had a duty to make a disclosure. If you already had the document and you knew perfectly well the other side needed it, you ought to turn it over.

That was proposed by one of the members of the committee, and we put it in the rules, and it did go to the Supreme Court. Everybody said it was okay. It went through and was presented to Congress. And sometime after that the president of the American Bar Association exploded at the idea of our trespass on the adversary tradition, and he actually went to the House of Representatives and got them to vote 365 to nothing that the rule that I had drafted for the committee and was going through the process to that

point should not become the law of the United States.

But they didn't get to the Senate in time and so the rule did become the law. And I hold the distinction of having written a law that became the law of the United States, notwithstanding the fact that the House of Representatives voted 365 to nothing that it should not become law.

So I am a veteran of that kind of political process. I have written a short statement that I didn't get in the mail, but maybe I can just pass it around. It was something I did prepare for this presentation, and I thought maybe for the few minutes I'm here today I would like simply to emphasize the historical mission of this committee and of this function, what are the purposes of the rules, and to remind you that in the 19th century the United States and its legal system was in pretty deep trouble.

Things were kind of falling apart because of diverse conflicts that were arising in the national economy, that we had railroads and we had factories, but nobody was taking care of much of anything, and a lot of harm was being done to a lot of people, a lot of businesses, and as a result, there was a good deal of conflict, which led to the comment -- produced the comment by Roscoe Pound about the necessity of somehow

or other getting to solve the conflict problems. And he was the author of the purposes of the rules, which was to convince everybody that their rights would be enforced, and everybody's rights are going to be enforced. And that really was the message of Roscoe Pound's statement. The American Bar Association bought into it, and that's what produced the Federal Rules, that enabling act, and where we got the rules in 1938.

And that is the principle expressed in Rule 1, and I beg you to keep that very much on your minds, that our aim is to convince everybody that their rights will be enforced, whatever those rights, substantive rights may turn out to be. And to some extent, the efforts to economize on the process of course do have the potential to jeopardize somebody's interests. And I think you have to be very careful about what you're doing with the discovery process in that regard. And it may well be that the ABA will be back again if you are trying to make lawyers betray their clients in some way or do something that is seen not to be in the interest of their clients.

That was the problem we got into with the rule that I wrote, and I think there's still some little echoes in these present rules that do invite

concern, particularly the amendment to Rule 1, which didn't appeal to me at all anyway, but particularly I think it kind of suggests that lawyers are supposed to be not too vigorous on behalf of their clients if it would somehow be a pain to the other side.

The cost of discovery is in many minds an inflated item. The Federal Judicial Center doesn't find the cost of discovery to be out of control in most cases. And the ones where we really can say obviously a lot of money is being wasted on discovery tend to be those big cases in which big enterprises are already on both sides of the case, and that sometimes does lead to them getting out of hand.

I have no doubt that one of the consequences of the discovery rules -- and not of the discovery rules but the Federal Rules and other -- the discovery process particularly is the elevation in hourly billing by American law firms. That idea really didn't catch on until about 1950, somewhere along in there, and the price just kept going up and up and up. And it is pretty amazing to think about somebody charging $10,000 for half an afternoon of deposition.

But a lot of that kind of expenditure goes on, and I do think that has been a problem. We get some reassurance from the current literature

indicating that the value and the price of legal services is going down. The market has affected that, and it's harder to charge $1,000 a minute for your time than it used to be. Clients are more mistrustful, more likely to control the expenditure of time by their lawyers.

So the proportionality question is less of a problem than it is sometimes presented to be. And I urge you to be cautious about trying to save on discovery expenses at the cost of making individual rights harder to enforce. And there are a lot of detailed circumstances in which there's a risk of that happening.

The kinds of cases that are most likely most vulnerable to invocation of the idea of constraining disproportionality are going to be those cases in which an individual has a claim or a small business has a claim against a big enterprise and is trying to figure out what was going on out there, who was doing what to whom, and who is responsible for this. And that does run up the costs, no question.

So that is a caution that I wanted to express. The other items, well, I guess I have pretty much said what I have put out at little further length in that two-page statement, but --

JUDGE CAMPBELL: Professor, we will read this with care, but if I can ask you a question on something you just said?

PROF. CARRINGTON: Sure.

JUDGE CAMPBELL: One of the interesting dynamics in this process is that concern about access to justice is pushing on both sides of this. Those who are seeking to reduce the cost of litigation are doing so in part because so many people are priced out of federal court. They can't get in. They can't get a lawyer to take their case because it just costs too much to litigate. And part of the thought is if we can somehow try to reduce the cost, we will enable more people to come into federal court. And of course, the opposite side is saying you make these changes, you're going to preclude more people from federal court because they can't prove their case.

Do you have a thought on that tension and how we ought to be trying to balance those arguments?

PROF. CARRINGTON: Well, my sense is that the individual plaintiffs are not the ones who are complaining very much about the cost of presenting their cases or defending themselves and that it tends to be a problem primarily, not exclusively but primarily of big enterprises who are engaged in

litigation of one kind or another and who necessarily have more individual officers and employees who are engaged in the controversy, and the price tends to get high.

And that tends to be -- I mean, the Federal Judicial Center's data tends to point in that direction. It's the disputes between big enterprises that really run off the charts for cost. And I'm not convinced that in an ordinary civil rights case that there's really a serious problem about excessive costs. There are undoubtedly some episodic cases, some odd ones here and there in which you encounter some extraordinary waste of time, but I'm not persuaded that the real purpose here is to save costs.

I think there is an underlying purpose that was expressed to me by the Quayle Commission, which was to make American business more competitive by protecting it from liability. And I think it's not always candidly presented that way, but I think that's a lot of what we're talking about.

JUDGE CAMPBELL: All right. John?

MR. BARKETT: Professor, I'm interested in your reaction to this question. When Edson Sunderland was put on the advisory committee, he was put on there in large part to draft the discovery rules, and he did

that, draft the summary judgment rule, the pretrial conference rule, and I've wondered a lot if those rules -- and if Professor Sunderland were writing those rules today on a clean slate in an era where we have social medial and social media discovery on the plaintiff's side, which is becoming a very significant issue both in terms of preservation and spoliation, and an era where you've heard already about the amount of electronic discovery where we're not dealing with a few pieces of paper, where under Rule 34 originally there was a good-cause requirement when the rules were first adopted before you could even get documents.

Now we're in an era where judges have been basically taken out of the discovery process and we're dealing with large volumes of data that you need a vendor to help you with in many cases, including a lot of small cases.

How do you think the rules would have been written if the rules committee members were dealing in an environment that we're dealing with today where there are terabytes and even larger amounts of information on the corporate side. We've heard about the preservation costs. And even little people walk around with eight and 16 and 32 gigabyte devices in their pockets representing hundreds of thousands of

files. I'm curious as to how you think Professor Sunderland would have dealt with something like that and how it might guide us based on your historical perspective.

PROF. CARRINGTON: Well, Edson Sunderland was a fine scholar and a good voice for the cause. I don't have a direct answer to your question. I mean, I think it's -- well, I'm not sure exactly what the question is. Edson Sunderland, yeah. Go ahead.

MR. BARKETT: Well, I'm interested in your reaction. I appreciate very much what you said, that you don't think the costs are really that great.

PROF. CARRINGTON: Yeah.

MR. BARKETT: I don't know when the last time was that you actually worked on a document production involving electronically stored information, whether on the plaintiff's side or the defense side, whether it's a small case or a large case. But I do recognize that these costs can get expensive.

PROF. CARRINGTON: Well, I'm sure they can in extraordinary cases.

MR. BARKETT: Well, I beg to differ with you there. It doesn't have to necessarily be that extraordinary. But that's my point is how familiar

are you of what goes on day to day in both state courts and federal courts.

PROF. CARRINGTON: I'm not pretending to be engaged in daily litigation.

JUDGE CAMPBELL: Could we have you just back at the mike, Professor? We're sort of losing you.

PROF. CARRINGTON: Sure. I'm a senior citizen. I'm a little over the hill for all of this, and I grant you that I'm not into all of the technology. But I am aware of the fact that the same engineering that produces the technology also produces ways of tracing and tracking and getting information out of a huge pile of documents. And it also enables us, for example, if you don't want to read all the documents, you can hire somebody in Asia somewhere who can read English who can do this for a very small fee.

MR. BARKETT: But there's a cost associated with every one of those steps.

PROF. CARRINGTON: Oh, to be sure, there's a cost. Litigation is not free, and I didn't mean to suggest that it is. But the important step, more important step here in my view is to make sure that we are making a pretty full effort to enforce the rights of individual litigants.

One of the -- maybe if I can just take a

moment. There's a wonderful book out recently that inspires me to think about the kind of issues that this group puts together, and maybe some of you have -- maybe all of you have read it, *Why Nations Fail*. It's written by economists, and it's got endorsements by a whole series of Nobel Prize-winning economists. And the point of the book is that if you want a country to work, you have to make sure you run a system that is inclusive, that gives ordinary citizens a sense that it's their country, it's their place, and they have a stake in it.

And if you don't do that, then you're going to have some serious problems. And they go all over the world with examples of countries that have fallen apart, others that have come together, a striking contrast of Botswana as a country that works and it's prosperous, although they don't have any natural resources and they don't -- it's just amazing right there in the middle of South Africa is a prospering little country. Why? Because everybody in Botswana thinks of themselves as having a dog in the fight, as having a stake in the enterprise. And somehow they got that way.

The contrast between North and South Korea is another one that they dwell on at some length and

very persuasively, that the poorest people in Asia are in North Korea, and it's because the government is so full of itself and the people who are prospering control everything, and they control it to make sure that they continue to prosper and prosper more if possible, never mind what happens to ordinary folks.

And they go all over the world taking examples of this. And the change that occurred in England in 1688 was a change of that kind in which suddenly, suddenly all the citizens, all the subjects of the king felt that they had some role, some participation, some sense of mutual commitment that made it into a more prosperous nation than it had been before.

So I do think it is very important to pursue that objective, and the Federal Rules of Civil Procedure were designed to do precisely that. That doesn't answer all the questions. I don't pretend to say exactly what ought to be done. And as I say, I wrote one rule myself that the American Bar Association thought was terrible, and maybe it is. I'm not sure.

I would certainly not want to go very far down the road of burdening plaintiffs' lawyers with duties that will diminish their ability to bring their

cases, and the amendment to Rule 1 troubled me on that ground. I didn't particularly like the idea of making the plaintiff's lawyer responsible for the outcome as under Rule 1. I mean, Rule 1 is a very good rule, and we want to make it as efficient as possible, but trying to impose an independent duty on the part of a lawyer representing the plaintiffs to try to save costs and prevent this from being too vigorous a dispute is I think subject to the same kind of complaint that was brought to the House of Representatives in my time.

JUDGE CAMPBELL: All right. Well, thank you very much, Professor Carrington.

PROF. CARRINGTON: Okay. Thank you, thank you.

JUDGE CAMPBELL: We are going to take a 15-minute break. We will resume promptly at 10:43.

(Whereupon, a brief recess was taken.)

JUDGE CAMPBELL: Folks, let's get started if we can, please. It's 10:43.

(Pause.)

JUDGE CAMPBELL: Okay. We are going to continue with Mr. Redgrave.

MALE VOICE: Would you like me to shut the doors?

JUDGE CAMPBELL: Actually, in fairness to you, I'm going to go out and call folks in.

MALE VOICE: I'll get it.

JUDGE CAMPBELL: Okay.

MALE VOICE: We'll fight for the honor.

(Pause.)

JUDGE CAMPBELL: All right. Mr. Redgrave.

MR. REDGRAVE: Thank you, Your Honor, and it's a pleasure to be here. I appreciate the opportunity to address the committee. My name is Jonathan Redgrave. I'm a partner in Redgrave LLP. I'm here in the Washington, D.C. office. The views I'm expressing are mine and mine alone. I've had the privilege of litigating cases over the last 20-some odd years, a wide variety. I've certainly been involved in the big ticket litigation, but I've also done things from wrongful repossessions to small business-to-business disputes, to lawsuits involving employment rights, a wide variety of cases I've seen in my time.

And I've also been involved in the Sedona Conference Working Group on Electronic Document Retention and Production for years. I was the first chair for the first five years, and I'm currently a chair emeritus of that group.

I want to commend the Advisory Committee and especially the discovery subcommittee for its work on these proposed rules. I think it's a tremendous undertaking, and it has considered and addressed views and concerns from all angles.

While I'll be submitting written comments by the deadline probably in January, I want to provide specific testimony today on three subjects, the first being why I believe the committee should move forward with these rules; secondly, my particular views on the proportionality provisions of Rule 26; and then some views on Rule 37.

With respect to the imperative to act, I do not believe that we can wait forever for the ever-elusive empirical data to develop. I've heard that and seen that in many of the comments. But we all know the famous quote attributed to Benjamin Disraeli. There are three kinds of lies: lies, damn lies, and statistics. Perhaps a fourth is the absence of statistics.

The absence of empirical data, especially in this age of electronic information that is continually developing at warp speed, is not a stop sign. In fact, there are many well-experienced voices in this room and amongst the judges around the country as well

as practitioners and clients who have lived the past and the present and can help and understand what lies ahead and what needs to be done.

Indeed, I believe that the comments that arose at the Duke conference more than three years ago and in many of the written comments that have been submitted from disparate groups reflect a consensus that the civil rules governing discovery need further amendments.

I also commend the steady and deliberate pace that has been pursued by the committee and the discovery subcommittee. Anyone who thinks that this process is rushed has missed the first six-plus years of this movie.

Finally, I also believe that all parties, all parties in federal civil litigation, individuals, small businesses, state, local, and federal government agencies, as well as large businesses, will benefit from the proposed rules changes that adjust procedures to better honor Rule 1.

With respect to the 26(b)(1) amendments, in short, I support the proposed changes. This is not a radical change. This is a change that gives meaningful life to the promise of proportionality envisioned by the 1983 amendments.

In 1984, Professor Arthur Miller, obviously known as a contributing architect to the 1983 amendments, said, "Redundancy and disproportionality most people would agree should be excised." Now, although Professor Miller may not have viewed these proposed changes in 2013 as favorably, the sentiment he expressed at the time in 1983 is absolutely true today and perhaps in my opinion more compelling than ever in light of the exponential growth of data that everyone has. It's not just large businesses.

Mr. Barkett noted earlier in his questioning about the vast growth of information in social media and in the cloud. This impacts everyone, individuals, and we're just beginning to see the tip of that iceberg and what that means and why proportionality is critical for all litigants.

I've been doing a lot of work on this in trying to write a law review article on the failed promise of proportionality, and I think there are three reasons why it has failed to meet the promise in 1983. First, partisan courts quite frankly ignore the proportionality factors altogether. Haphazard arguments are made regarding burdens and needs, and there's no meaningful body of stare decisis.

Second, when parties have argued

proportionality, they've missed the point of proportional discovery, the focus on the discovery device and whether it's worth the candle and instead just cite to a factor, it's a big case, or cite to a factor by itself without really tying it with a discovery device.

And third, I think the absence of a consistent mandated approach to proportionality causes the parties to seek and courts to default to a view that I'm not going to get reversed if I give too much discovery.

So why do the proposed rule changes help? First, I believe it reinforces the need to consider proportionality factors when addressing discovery in every case. It can no longer be ignored by parties or courts. The proposed deletion of existing language is likewise necessary to achieve this end.

Importantly, proportionality is employed in the amended rule, as I read it and understand it, it's still party and position neutral. Proportionality helps those seeking discovery as much as those seeking to limit discovery. What the rule does is require lawyers to do their jobs better.

What are the claims or defenses? How does a particular discovery request seeking relevant

information move the ball forward? Is it worth that candle? And asking and answering these questions does not equate to a roadblock at all. They're fundamental questions that with appropriate answers can justify extensive discovery in those cases where it's needed, and that goes for whether it's in the context of a massive intellectual property rights dispute, an employment law fight, or even a civil rights context.

Proportionality is inherently and remains in this proposed rule infinitely elastic upon proper justification, and this rule doesn't inherently harm anyone or change the burdens.

With respect to Rule 37, I know I only have a few seconds possibly to address this. I believe that Rule 37(e) in its current formation has failed to live up to the promise. I think what the discovery subcommittee has done in formulating a new 37(e) is commendable, but I think there are still some issues with the drafting.

I suggested a year and a half ago a simpler formulation of the rule, and I may with all due respect submit something in my January written comments. But I think in terms of putting forth some ideas besides just less language, I think that the curative measures right now is untethered to any idea

of culpability as well as prejudice. I think John Rabiej has submitted a comment in this regard. I think that it is worthy of consideration by the discovery subcommittee and this committee.

In terms of the bad faith or willful that's currently in (b)(1), I believe we should focus on one of those terms and define it, and I would pick bad faith. I think having the alternative terms leads to a sense of confusion, and I think that will lead to more disputes.

In terms of (b)(2)'s language, and I know several people are opposed to that in its entirety. I think the real harm here is in any meaningful opportunity to present or defend against the claims. That kind of concept, any meaningful opportunity, is far distant from what we at Sedona when we wrote the Sedona Principles talked about in terms of the materiality of loss. In other words, it mattered to the outcome for any sort of sanction. And I think when we're talking about these even larger sanctions, tying it back to materiality, you can say do they have an opportunity to present or defend a case or a claim. That's not really the issue. Did it make any difference? Was it going to make a difference to the outcome? And that's a more important test and a

narrow one I admit, but I think it's the right one.

In terms of the 37(e)(2) factors, I do not believe they should be in the rule. I think that you've got five different factors that are purporting to define four different things that are not necessary to an understanding or an implementation of the rule. If I were in the committee, I would suggest putting them in the committee notes. And then I think finally the notion of the sanctions that are going to be opposed being the least severe available to do the job, that I believe should actually be elevated into the text of the rule itself.

Those are my comments, and I'd be happy to take any questions.

JUDGE CAMPBELL: Thank you.

Questions? Parker.

MR. FOLSE: I wanted to give you a chance to --

JUDGE CAMPBELL: Could you push the button, please, Parker?

MR. FOLSE: Thank you. I wanted to give you a chance to comment on two thoughts I had as I listened. You said that the proposed language in Rule 26(b)(1) is party and position neutral. Would you agree that in a case in which there is an imbalance in

the possession of information where one party has information that the other side needs to prove its case, but the reverse is not true, that the rule favors parties that are in possession of information that they don't want to disclose by giving them additional tools to resist discovery requests? So that's the first point.

And the second is you said that the language as phrased is infinitely elastic in that it still allows courts to provide and tailor discovery depending on the needs of the case. And I wondered if it is in fact infinitely elastic, then why do you believe the change in the language is going to work any kind of a change in the landscape of discovery and the costs of litigation?

MR. REDGRAVE: I'm happy to address both. With respect to the first one, I don't believe this is providing additional tools in a disparate situation of the one side having a lot of information and the other side not. I say that because the formulation in 1983 of proportionality, and I can go back to some of the original concepts here, but there are a lot of students of the rules on the committee.

That last sentence on 26(b)(1) right now says the courts shall consider the 26(b), (c) or the

renumbered factors over time with respect to proportionality considerations has already been in there. But what we've seen, and this is my caselaw research, is people haven't effectively used those.

So it's not a matter of additional tools now being given to let's say large corporations to beat down plaintiffs who want information. It's saying everyone needs to come to that consistent with the Rule 26(g) obligation to say, hey, what is this case really about? What do I need?

So, in the instance here with respect to a true uniform application of proportionality, I think representing an individual, you can justify why I need whatever number of depositions or why we need discovery from X number of custodians or why we need information from certain databases. And it's getting more complex. It's not just turning over documents. But the idea of proportionality, as I said, helps both the requesting and the responding party in discovery.

That's why I say it's neutral. And I think what you're seeing in terms of, you know, a lot of arguments that it's going to be unfair. It is not some new roadblock because it currently exists as a tool. It's just not being uniformly applied and there's not a body of consistent practice about how to

do this. And quite frankly, I think that development of this under this new rule will help those requesting parties better translate what they need for their claims to articulate why the discovery they seek from a large entity is proportional to give them the right of access to justice.

And I will say one of the important things from the last speaker was we do need a rule set that everyone believes gives them a fair shake in court, that they're not going to be overly burdened, but they're not going to be cut off from their rights. And I think this rule set does that balance.

Now the second question you asked with respect to the infinite elasticity, I think there is an element --

JUDGE CAMPBELL: If you could cover this in about 30 seconds, we would appreciate it.

MR. REDGRAVE: I'll cover it in 20 seconds.

JUDGE CAMPBELL: Okay.

MR. REDGRAVE: The infinite elasticity point is focused purely on the fact that the rule doesn't cut off anyone from the ability to argue and show their need in a particular case. It doesn't give a company a blanket power to say we're not doing it. That concept as prescribed in this rule just says

everyone has to come to the table understanding you've got to deal with it both from a requesting and a responding side, deal with it responsibly, consistent with your duties, and if you can justify it based on that discussion, go to the judge, you can get enormous amounts of discovery if it's right for that case, whether it's civil rights, intellectual property, whatever it is.

JUDGE CAMPBELL: All right. Thank you. Peter Keisler has a brief question.

MR. KEISLER: Just one question. Could you elaborate, Jonathan, on why with respect to Rule 37, why materiality you think would be a narrower standard than irreparably deprive a party of any meaningful opportunity to present or defend against claims in the action? My instinct would be the opposite.

MR. REDGRAVE: In terms of -- well, there's a couple things here. Materiality as we use it in the Sedona world applied to all. There had to be some showing that for sanctions there is a breach of the duty to be fair. There's culpability and then there was material prejudice. So there is an element applying to all sanctions no matter what.

With respect to the specific term that you used there, the irreparable deprivation, that is

pretty tight. But the of any opportunity to present, that becomes very loose as opposed to saying it was any -- not any opportunity to present. But irreparably deprived, or I would say actually had a material -- it was reasonably probable to have a material impact on the outcome. In other words, it really did change the outcome rather than your ability just to argue.

Does that make sense? I'm really saying it's that ability to argue that's -- anyone can say I could have argued, I should have argued and maybe that would make a difference to what I could have argued. I'm saying no, it should make a difference to what the outcome would have been.

MR. KEISLER: Although by definition here you're dealing here with something that people couldn't obtain and was lost or destroyed. So, you know, there could be an issue with applying that kind of standard to something where the content is not fully or even perhaps at all understood.

MR. REDGRAVE: That is absolutely right. There is a close alignment between those two standards and the reality that you're arguing about things that no one knows exactly what they were. I agree, that is a problem.

JUDGE CAMPBELL: All right. Thank you very much.

Professor Stancil?

PROF. STANCIL: Thank you. My name is Paul Stancil. I'm a professor of law at the University of Illinois. Before that, I practiced law for 10 years as a litigator at both large and small firms. My comments are informed by both perspectives. I should also note at the outset two things. One, I need to make sure I'm first because it makes me sound more intelligent next time instead of repeating what others have said; and second, that it's more difficult than I expected to come up and be critical of people and work that I deeply admire, but I'm going to go ahead and forge on with that as well.

So, on the flight from Chicago to Washington yesterday, I had the pleasure of sitting next to a young legal aid attorney and she was on her way to a conference here. We'll call her Angela. Angela represents homeowners who are facing mortgage foreclosure actions from their lenders.

As we talked, I realized I had to scrap my planned remarks in favor of a couple of stories she told me that I think highlight my concerns about the proposed amendments much better than the abstract

academic account that I was going to offer.

I'm going to start with something maybe a little different than you're used to, a proposal to allow Rule 34 early request for production. As you might expect, Angela mentioned that her clients enjoy few advantages relative to their opponents. Mortgage lenders typically have a few more dollars in the bank even today than the homeowners who can't make their payments. But one thing the homeowners can do and their lawyers can do, they can turn the pressure up and impose costs by handling discovery requests just like we handle voting in Illinois: do it early and often.

(Laughter.)

PROF. STANCIL: She acknowledged that they often file requests at the earliest possible moment both because that puts the screws to their opponents and because they know their opponents can't do the same to them.

I'm concerned about the proposal to allow early submission of Rule 34 requests primarily because it will effectively move the most expensive part of many cases, document discovery, forward. One can characterize the period in between filing and the first Rule 26(f) conference as the calm before the

storm, but it doesn't necessarily follow that we want the storm to arrive any earlier. It depends on whether we can use that calm to the net benefit of the society and the system. In my experience, the no-discovery period is enormously valuable, not least because it allows adversaries to assess the strength of their claims and defenses without being distracted by the breeze generated as the discovery meter spins out of control.

If the proposed rule change is adopted, the realities of complex litigation dictate that for some cases the meter will start running more or less upon delivery no matter when the rules declare service to have taken place. Depending on the cases, it's likely to have one of two undesired effects. For cases involving potentially valid claims or defenses, it might stiffen the spine of the responding party, making them less willing to compromise despite their legal vulnerability.

For frivolous claims or defenses, something that seems to be a matter of significant concern, moving document discovery up makes filing suit and/or asserting the defense more attractive because the immediacy of cost imposition makes it more threatening to the adversary.

Second, I want to talk like many others about proportionality. Because I know very little about foreclosure litigation and defenses available to the homeowner, I asked Angela what percentage of her clients have valid legal defenses to lenders' claims. She indicated it was surprisingly high. In her experience, upwards of 80 percent of homeowners facing foreclosure have some good faith legal defense to the claim.

This does not mean, by the way, she's correct. This is just her perception, which is an important point. But she also noted that only a fraction of these defenses are obvious from the homeowner's own records and recollections. The remainder must be uncovered on discovery.

Finally, she noted that her biggest challenge in some ways was not the banks against whom she litigates but rather the judges in front of whom she appears. Liberal or conservative, the judges Angela sees have a decidedly low opinion of her clients. They of course couldn't even manage to make their mortgage payments. And they tend to believe that very few will have any sort of defense to a foreclosure action in the end.

While I applaud the Advisory Committee's

attempt to address discovery cost concerns with the proportionality rule, I'm skeptical that any proportionality rule is going to get around two core problems that are inherent in the situation.

First, although it may be possible for many judges to perform reasonable proportionality analyses with respect to say the amount in controversy, those sorts of factors, it's unlikely in the extreme that those judges will be able to make any meaningful assessment of the likely value of the proposed discovery. Worse, any judge who thinks they can do so will almost certainly be influenced by his or her own priors regarding the type of claim at issue, and there is substantial reason to believe that those priors are unreliable even for the most committed and well-meaning jurists.

Still worse, there is a serious correlation problem. The very cases in which the temptation will be strongest to reduce allowable discovery on proportionality grounds are those in which we should have the least confidence in judges' ability to assess certain of those relevant factors. They're typically the cases that involve significant informational asymmetry problems for the parties seeking discovery. In other words, they're the cases in which the

proponent of discovery is least likely to be able to demonstrate ex-ante, as the previous speaker suggested, that the likely benefit of the discovery outweighs the burden or cost.

So in the absence of reliable data -- and I'll admit right off the bat that's a very confounding problem, how do you get reliable data on this -- but in the absence of reliable data, rather than judicial impressions regarding the likelihood that such discovery will bear fruit, it seems to me inappropriate to authorize the judge to invoke her own priors regarding the likely value of discovery. But that is exactly what the proportionality rule contemplates. And making it mandatory or sort of bringing more focus to it the way that these changes do I think is problematic.

I've written elsewhere about the risk of systemic bias by even the most well-meaning of judges, and this is certainly not my attempt to suggest that judges are anything other than people who do their very best day in, day out. But I believe this is a particularly salient problem, these biases, with the proportionality proposal as currently drafted. And I think I'm under five minutes for the first time in my life.

JUDGE CAMPBELL: Congratulations. All right. Questions?

PROF. STANCIL: Yes, sir?

MR. FOLSE: What is your view -- there have been some arguments made by prior speakers today that this really isn't a dramatic or a drastic change because the language still already exists in Rule 26(g). You obviously have some concerns about the appearance of many of the same words in the proposed rule change to 26(b)(1). What is your view with respect to whether or not moving the language into 26(b)(1) is or isn't a significant change?

PROF. STANCIL: So, when deciding whether to spend limited research funds on a ticket to Washington, it was my thought that maybe this ends up not being such a big deal that it counts along the side of not coming. In other words, I think that there are a number of cases in the rules where it turns out to be very difficult to move judges to change behavior, and so I don't see -- you know, it is possible that at the end of the day this is not much of a difference functionally.

At the same time, I think you are very deliberately in a very high profile way making this issue of proportionality much more salient to judges

and to litigants to some degree. And so I hate to sort of dodge the question because I don't know what's going to happen. The one thing that I've learned -- and I hope you know any comment I give is that you need to be modest about this sort of stuff and see how it works out. I think, you know, Twombly and Iqbal taught us some lessons along those lines as well. The sky it turns out maybe wasn't falling quite like some people predicted.

MR. FOLSE: I probably should have asked the question a little more carefully --

PROF. STANCIL: Yeah. I apologize.

MR. FOLSE: -- because it's not just the movement of the language, it's the movement and replacement of other language that is in 26(b)(1). But you may have answered the question already.

PROF. STANCIL: Yeah. I think I'm probably still going to stick with the answer.

MR. FOLSE: Right.

JUDGE CAMPBELL: All right. Judge Koeltl.

JUDGE KOELTL: You had mentioned that the legal aid lawyer liked to serve Rule 34 requests and a lot of them as early as possible. What would the change be under the proposed rule? Under the proposed rule, yes, the document requests could be served

before the Rule 26(f) conference, but the requests only -- the time to respond to the request is measured from the 26(f) conference, and under the proposal, that same legal aid lawyer can have the 26(f) conference and serve, if it's that same diligent lawyer who wants to serve as much as possible as early as possible, you go to the 26(f) conference, you serve your 34 request and it's the same time to answer.

PROF. STANCIL: So I'll answer this more from the perspective of --

JUDGE KOELTL: Could I just add one other thing?

PROF. STANCIL: Yes, sir. I'm sorry.

JUDGE KOELTL: The comments that we've gotten from plaintiffs' lawyers almost uniformly applaud this rule because --

PROF. STANCIL: As I would expect.

JUDGE KOELTL: -- they want to move forward and they want to get their discovery requests out and they think it would be useful to do it. And some defendants say, well, we'd like to see what's going to be involved.

PROF. STANCIL: So a couple of responses. I'll speak at least to some degree as a former associate at a big law firm doing electronic discovery

work in the earlier days of electronic discovery. With respect to what that timing gives you, yes, obviously it's not deemed served until the Rule 26(f) conference takes place. This is going to start that clock running. But I will also tell you that in the words of my 14-year-old daughter, my typical response when I saw a discovery request whenever it came across my desk was OMG. How in the world am I going to respond to this in the time I have? And if we thought the case was something that was likely to survive a motion to dismiss, something pretty much the norm in pre-Twombly or Iqbal era, we started work immediately on that, and that starts the clock running for the client, and it had some effect on the client's mentality as well.

With respect to the plaintiffs' lawyers, yeah. I don't want it to come across that I am a pro-plaintiff witness. I think probably my proportionality comments are on balance more pro-plaintiff than pro-defendant because I think it's more likely the dynamic I'm concerned with is going to affect plaintiffs there. But I actually think the opposite is true with respect to the Rule 34 request. I think moving that forward is likely to advantage plaintiffs over defendants disproportionately, and I

think it's that -- so I don't want to suggest that there is any ideological valence to the sum of my comments. It's really two different things.

JUDGE CAMPBELL: All right. Thank you, Professor Stancil. We appreciate your comments.

Mr. Allman?

MR. ALLMAN: Good morning. My name is Tom Allman. I am I guess the third professor to talk to you today. I'm an adjunct professor at the University of Cincinnati College of Law. Prior to that I was general counsel of a very large chemical company for a decade that spanned the trend from documents to e-discovery. And during that decade, I formed some fairly strong views about the role of preservation and was one of the folks that advocated that you should adopt what became Rule 37(e).

I also served along with John Barkett on the e-discovery panel at the Duke conference where we advocated both a preservation rule and a rule dealing with spoliation. You have before you now Rule 37(e), and I'm here to endorse it, and I'm also here to plead somewhat of an evolution of my thinking.

I originally proposed to you folks that you should take the existing Rule 37(e) and tweak it. And I and others, among them the Sedona conference, have

suggested ways in which that could be done. You have chosen not to do so, and I have come to the conclusion that that is *the* correct decision, and I strongly support the enactment of Rule 37(e) with a certain amount of tweaks in that one as well, and the reason I do it is because of the role of inherent power.

In my view, the occupation of the field of spoliation sanctions by the current draft of Rule 37(e) is such that it effectively cabins the sanctioning power of the judges and will discourage the unnecessary and overuse of inherent power to avoid the restrictions that you have placed into the rule. And if I could cite you to a case that really in my view just captures this very well, and that's The United States v. ALEO, which is 681 F.3d 290. And at page 310, Judge Sutton said, "A judge may not use inherent power to end-run a cabined power." And I take that as a very strong support for what your efforts are.

Let me tell you why I think what you're doing is the correct thing. In my view, the lack of uniformity among the Circuits on the issue of spoliation is an affront to the entire judicial system and it's having unnecessary consequences to both individuals and entities, and I believe that the goal

of alleviating that confusion is worth the candle. To me, that's what you're trying to do, and that's worth it.

I believe that it will incentivize reasonable and proportional preservation conduct, not deincentivize it. I think it will help do it, and it will do it because it will allow people to have certainty in their preservation planning, especially in their primary conduct. It's often forgotten that so much of what happens in the preservation world at least happens before there is litigation. And it is that area of primary conduct that has always concerned me from day one and is the reason why I support the bill.

However, I must caution you that some of the factors and some of the wording in the committee note about the factors is roughly reminiscent of some of the unfortunate language in the 2006 committee notes that led into a per se world where the mere failure to institute a litigation hold, the mere failure to adopt a preservation standard that some federal judge felt should be applied universally to all cases was held to justify sanctions.

I think you need to address in the committee note that risk in ways that it will not have

unintended consequences. I concede that close to what I'm saying is a possibility that you might want to consider dropping the factors out of the rules into the notes. And there is even a possibility of eliminating those factors for the reasons that one of the witnesses just suggested, that they're trying to do too much in those factors in a very complex and difficult field that is best left to folks like the Sedona conference. And I confess that I'm also a chair emeritus of the Sedona conference and so I'm somewhat biased. But I think we do a better job at Sedona of articulating the considerations of how to manage a litigation hold than you can in a rule that is fixed in time and only changed every 10 years.

Another quick comment about what you're up to. I take it that you are rejecting the Second Circuit decision in Residential Funding. John Barkett made that point at the November 2010 conference, rules committee conference. I sat behind him at the time he made it. It's an extraordinarily important point. But you need to think through the implications of that decision. It doesn't just mean that gross negligence does not justify sanctions. It also means that presumption shifting is not justified by gross negligence.

The discovery subcommittee felt that gross negligence was not equivalent to willful conduct, that they were quite different things. But some of these recent decisions do not agree, and so you're going to have to address that problem, perhaps by defining willfulness to include that extra element of willful intent to prevent the use of adverse information. Perhaps that's the way to do it. Or perhaps you're going to have to drop willfulness, or even as some have today suggested, link willfulness by the word "and" to bad faith.

Finally, dealing with Silvestri. I recognize your concerns about Silvestri, but I do not believe that Silvestri belongs in the Federal Rules. I believe that the best way of handling it is to introduce the key (e)(1) rule by the phrase "absent exceptional circumstances," much as we've done in current Rule 37(e), with success I might add, and I see no reason to believe that you cannot do that and then in the committee note explain the extraordinary circumstances that lead to the Silvestri exception, and it would not then be an exception. It would simply be a recognized principle of law which would exist outside the federal rule.

And in response to your penultimate

question, if you don't do that, what, I would suggest too you might want to take a look at Rule 34(a), which distinguishes between documents and ESI and tangible things, and you might want to confine the rule just to documents and ESI. Not just ESI. I totally agree you cannot draw a line between documents and ESI, but you could draw it between documents and ESI and tangible things.

I don't recommend it. I don't like it. But if you're not willing to take away some of the temptation to equate (b)(2) with (b)(1) and make it sound as though if you don't like the fact that you can't find culpability, all you have to do is say the damage is irreparable and you can avoid the rule. I don't like that temptation, and I don't think it's fair to the judges to give that to them. Thank you.

JUDGE CAMPBELL: All right. Thank you. We have about two minutes for questions.

Judge Grimm?

JUDGE GRIMM: A quick question. Tom, with the issue of whether we keep the factors or don't keep the factors --

MR. ALLMAN: Yeah.

JUDGE GRIMM: -- if the goal is uniformity to try to have a standard that is not going to change

dramatically from one jurisdiction to another, and maybe the factors as listed are not the best factors, but --

JUDGE CAMPBELL: Could you turn on that mike? Folks can't hear you in the back.

JUDGE GRIMM: Sorry. But my question is that if the goal is to try to have a uniform standard that will be applied in the same fashion in all jurisdictions as much as possible, if the choice is having factors and having no factors, is there not a greater risk of having less uniformity if there's no guidance whatsoever as to how you might try to apply those factors to achieve the goals that you're advancing in the rule itself? And if we got the wrong factors, are there other factors that should be in there?

MR. ALLMAN: I would like to be able to say to you I know what the factors are and here is what they should be. I'm not in a position to say that. I think it's an extraordinarily difficult thing. I call it rulemaking by committee note really is what it's about. I just think the risk of not -- reasonability and proportionality clearly are related to and important to this process, but when you throw in those other factors -- I'm just not happy with your factors.

(Laughter.)

JUDGE GRIMM: We'll factor that in.

MR. ALLMAN: Okay.

(Laughter.)

JUDGE CAMPBELL: Judge Koeltl?

JUDGE KOELTL: If you dropped (b)(2) and added "absent extraordinary circumstances," wouldn't that be far more expansive than (b)(2) is now and lead to the problem that it's really undefined so that you're really back in the situation that sanctions could be imposed under the standards that some have said are too broad?

MR. ALLMAN: Yes, I agree it's a risk. I do think a really carefully written committee note -- here I am advocating a good committee note, but I think a carefully written committee note that explains and especially touches on the point I tried to make kind of subtly in my paper, that using the irreparable prejudice standard as an excuse to enter a default judgment and allowing a party to go immediately to the damages suffered is equivalent to creating a spoliation tort.

I think what you need to do is carefully define in the committee note that the purpose of the Silvestri exception is to permit parties who would be

unfairly asked to defend a case to have that avoidance, and I think you could do that in a committee note. So it's a risk, but I think based on the fact we've had -- you know, since 2006, we've had a rule that says that, and I've never seen any case that has questioned or tried to use that as a hole through which to drive a truck. I just haven't seen it.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Allman.

Mr. Hedlund?

MR. HEDLUND: Good morning, Mr. Chairman and members of the committee. First I wanted to thank you for all your efforts on this committee and all the hard work that you put forth, and thank you for giving me a chance to speak today about these important proposed changes.

My name is Dan Hedlund. I am a member of the law firm of Gustafson Gluek in Minneapolis where I practice antitrust and consumer protection law. I am also vice president of the Committee to Support the Antitrust Laws, or COSAL, of which I am here on behalf of today.

I realize the time is limited given the number of speakers that are appearing, so I refer the

committee to our written comments submitted in March for a more complete recitation of our views on the proposed rules. Those comments contain the input of COSAL members from around the country, members with many years of prosecuting complex litigation cases on behalf of small businesses and consumers.

Today I am here to testify regarding the proposed changes to Rules 26(b)(1), 30, and 33. These changes are potentially unfair to parties bearing the burden of proof in complex civil litigation in particular and could result in increasing the costs, inefficiencies, and burden of litigation for all parties. These proposed changes raise serious concerns because they could substantially curtail the ability of litigants to gather evidence from defendants and third parties. This is a problem for the following reasons.

First, plaintiffs in antitrust cases are faced with substantial information asymmetry. Defendants and third parties have the bulk of relevant information regarding the market, the product, and the alleged conduct, while plaintiffs tend to be on the outside looking in at the outset of a case. Price-fixing conspiracies by their very nature are secretive and hidden ventures, and oftentimes they can only be

proved by stringing together numerous pieces of circumstantial evidence known as plus factors.

The evidence vital to plaintiffs' claims is regularly in the sole possession of the defendants or sometimes disbursed among a variety of far-flung third parties. To effectively enforce the antitrust laws and obtain recoveries for the businesses and consumers that have been harmed, private litigation is the only way to do that because although the Department of Justice issues a lot of fines, as everyone here is aware, that money does not go through to the people who have been harmed by the illegal behavior.

So, in order to effectively enforce the antitrust laws, the discovery rules must provide fair access to defendants' and third parties' information and documents.

Second, many recent court opinions have been increasing the evidentiary burdens on plaintiffs. For example, the requirements to prove class certification have been expanding pursuant to recent cases, including the Dukes case and Hydrogen Peroxide. This has led to a period where we are required to gather substantial amounts of data and to comprehend and understand a great deal of documentary and testimonial evidence.

Third, the Class Action Fairness Act has brought many state law class actions into federal courts. These cases typically assert the laws of multiple states, further adding to the complexity of the discovery process.

Specifically with regard to the rules, I'll start with the proposed changes to 26(b)(1). Decades of law students have learned the simple rule that discovery is limited to that which appears reasonably calculated to lead to the discovery of admissible evidence. The new rule proposes to eliminate this currently familiar language without replacing it with an equivalent.

This is troublesome for several reasons. First, we do believe that it is the case that the burden as it stands now is presently on the party withholding the information to establish that the withheld information is beyond the scope or too burdensome to produce.

In contrast, we believe that the proposed rule imposes a multifactor proportionality determination that will place a heavy burden on the party seeking information to satisfy the requisite proportionality. As we read it, the proposed proportionality inquiry is open to interpretation and

will subject potentially every discovery request to scrutiny, and we believe that will lead to inefficiencies in the discovery process.

Third, the proportionality concept is unworkable at the outset of a complex case characterized by asymmetric information. Where one party has all the information, discovery will necessarily appear disproportional until the evidence is discovered and used to prove the claims.

As currently written, Rule 26(b)(1) generally treats litigants equally without regard to the amount of potentially relevant information they may have. In contrast, the proposed rule appears to offer protection to larger parties who have a monopoly on information by allowing them to use that disproportionate burden to avoid document production through the use of the proportionality argument.

With regard to Rule 30 and the two proposed changes, first to change the presumptive limit from 10 depositions to five and to reduce the number of hours from seven to six. With regard to antitrust cases, which are oftentimes or almost always MDL cases, dozens of depositions are often required to gather evidence from far-flung witnesses and to preserve testimony of witnesses that will not be available at

trial.

In addition, experts play a very large role in the cases that we work on. One side may even have more than five expert witnesses. Due to the unique nature, expert witnesses should be, it's our position, excluded from the proposed limit.

Third, reducing the presumptive limit to five depositions significantly alters the bargaining position of the parties. The net effect we believe will be to drag down the number of allotted depositions below a level necessary to prosecute a complex case, which can prevent parties from obtaining all the information that they need to litigate. Five instead of 10 becomes the new baseline for negotiating purposes.

With regard to the proposed six-hour limit, antitrust cases involve large amount of documents and data and a large amount of time during the depositions is spent going through those documents and authenticating them. Another issue that arises is that oftentimes seven hours needs to be split between multiple parties. We've been in cases where we've shared time on behalf of the class with the Department of Justice and with opt-out cases. We've also had cases where states attorneys general are involved, and

so once the limit is cut to six there's fewer pieces of pie to go around between the various parties taking depositions.

At the very least, COSAL suggests that the proposed presumptive limit should be modified by committee comments to exempt expert and third-party depositions from the proposed limits. In addition, we suggest that the proposed rule could include a clarification that the presumptive limit on depositions is per party and not per side.

Finally, with regard to the interrogatories, we believe that the proposed shift from 25 to 15 is similarly problematic for the same reasons that I've stated with regard to depositions. And in our proposal, we actually put forth a suggestion with respect to contention interrogatories, proposing that they not be required to be answered until the close of discovery.

To conclude, as a lawyer who works on contingent cases, we at COSAL are familiar with the expenses of discovery because we bear it until the end of a case, and sometimes, if the case isn't successful, we bear it forever. We believe these proposals to restrict discovery are unnecessary and should not be adopted, but in the alternative, any new

restrictions should include commentary and the Advisory Committee notes observing that courts should be expected to substantially vary the rules and especially the presumptive limits and caps in complex and large cases, consistent with the interests of justice.

JUDGE CAMPBELL: All right. Thank you, Mr. Hedlund. We've got about a minute of time. General?

GENERAL DELEREY: Thank you. Given that your subject is antitrust cases, I wanted to ask you about your experience. I'm not an antitrust practitioner, but I sort of assume that the arrival of an antitrust case would bring with it an assumption by everybody, including the court, that it's going to be complicated and will require more than whatever the defaults are. And so I was curious about your experience under the current rules in terms of getting the needed discovery given the complexities of the case.

You mentioned frequent cases with dozens of depositions. Do you see an issue now with getting the discovery that you need in these which almost by definition would be viewed as complicated?

MR. HEDLUND: Thank you. Yes. I mean, I think generally the experience has been that, you

know, for example, we're not limited to 10 just due to, you know, the complexity of the case and in particular the number of parties that are involved. But our concern is that if the numbers shrink that, you know, when we start negotiating -- for example, we're negotiating with some defendants now, and their proposal is that, you know, we should have three depositions of each defendant family, which equals more than 10 for the case. But it seems to me that it becomes -- when the number is diminished, it becomes sort of a new guideline or a framework to work within, and the assumption of the courts will be, well, then, you know, for example, if they were going to give say 60 depositions in a case, now they can say, well, that's six times the number of depositions that are allowed under the rules. But now if you did 60 depositions in a case and it's five, then it's 12 times. I think it's a harder argument for us to make.

Plus, I do think that with respect to cases that are not like the cases that I prosecute but with respect to smaller plaintiffs and cases, you know, we're used in our practice to going to the court and talking to the defendants about expanding the number of depositions. But I do think there's probably litigants out there who don't have that sort of level

of knowledge with respect to going about that practice and I think they can be negatively impacted by this as well.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Hedlund.

MR. HEDLUND: Thank you.

JUDGE CAMPBELL: Ms. Hoffman?

MS. HOFFMAN: Hello. My name is Anna Benvenutti Hoffman, and I'm a partner at Neufeld Scheck & Brustin, a small civil rights law firm --

JUDGE CAMPBELL: Ma'am, could you pull that mike down just a bit?

MS. HOFFMAN: Sorry.

JUDGE CAMPBELL: Thanks so much.

MS. HOFFMAN: A small civil rights law firm that handles serious police misconduct and other civil rights cases around the country. Obtaining enough discovery, particularly document and deposition discovery, is absolutely critical to the success of our civil rights suits, but we already have a strong incentive to keep the costs of discovery down as much as possible. As lawyers representing disadvantaged clients, we advance discovery costs out of pocket, carrying them for the multiyear life of the case against the risk that they will never be repaid if we

lose.

Although we object to the proposed new limits on depositions, interrogatories, and requests to admit, I will focus today on the proposed limits to depositions and the new spoliation rules.

In our serious civil rights cases, we always need to take more than five depositions and routinely more than 10, including at least seven hours with lead deponent. It is one thing to give judges discretion to limit discovery, but by creating presumptive limits that we can never meet, our ability to prove civil rights violations is left to the essentially unreviewable mercy of the district judges to grant us an extension in every single case.

For example, we represented Eddie Joe Lloyd, who was exonerated by DNA testing after serving 17 years in prison for a 1984 rape and murder he did not commit. While he was involuntarily committed to a psychiatric hospital, Mr. Lloyd was interrogated by Detroit police officers who deceived him into confessing by telling him he could help smoke out the real killer. The detectives then fed nonpublic facts about the crime to the innocent Mr. Lloyd to make this confession falsely appear reliable and then misrepresented that this nonpublic information had

originated with Mr. Lloyd.

As with most of our cases, the defendants did not admit the misconduct. We had to prove our case through circumstantial evidence. This mostly comes from witnesses who generally will not talk to us outside of a deposition, defendants, other police employees, prosecutors, and witnesses who testified against our clients at their criminal trials.

As most of these witnesses are hostile to us, the depositions are slow-going, with even basic facts conceded only begrudgingly. In Mr. Lloyd's civil rights suit, we took 18 depositions spanning 24 days. Discovery established that several details included in Mr. Lloyd's confession were things that the detectives believed to be true when they interrogated Mr. Lloyd but that were later proven false. The only possible source of these details was the detectives.

Discovery also revealed at least two other instances of coerced or fabricated confessions taken by the Detroit Police Department around the same time. At the end of discovery, Detroit not only agreed to provide substantial compensation for Mr. Lloyd but also to begin videotaping interrogations in homicide and other serious felony cases to prevent similar

tragedies.

As another example, we represented Michael Greene, another DNA exoneree who spent 13 years wrongly imprisoned for rape. Mr. Greene's conviction was based on deeply flawed forensic evidence. Mr. Greene should have been excluded as a suspect at the time of his initial prosecution. Instead, a Cleveland criminalist falsely claimed that hair comparison and blood type evidence were highly incriminating.

To prove our civil rights case, however, we had to establish the criminalist knew these findings were false at the time he reported them. Only after we took 15 depositions over 17 days did Cleveland agree to a settlement. It would compensate Mr. Greene and perform an audit of its forensic laboratory. This audit in turn led to the exoneration of two more men. The criminalist, who had remained on the job after Mr. Greene's exoneration and the prosecution of the real perpetrator, was fired several months after the settlement.

Both of these cases show how critical adequate discovery is to the essential objective of § 1983, ensuring that victims of unconstitutional misconduct may recover damages or secure injunctive relief. We firmly believe that had we been limited to

five depositions of six hours each we would not have succeeded in getting the agreement to videotape interrogations in Detroit or the audit in the Cleveland crime lab.

The proposed changes to Rule 37 are also of concern. We routinely face serious difficulties obtaining the underlying files from our client's criminal prosecutions even when according to policy and law they should have been preserved. These files, the contemporaneous records of the investigation, often contain critical evidence. The new rules encourage stonewalling and the destruction of this evidence.

An adverse inference is not a very powerful sanction. It merely permits the jury to find that evidence the defendant should have kept but cannot produce may have been helpful to plaintiff. But it does provide some incentive for defendants to look for and produce files. With the change, that would be gone as it would be essentially impossible to meet the threshold required for sanctions.

Even if files have been willfully destroyed, it may be difficult to prove that. Typically all anyone will say is the files have disappeared or cannot be located. On top of that, we would also have

to prove the loss caused substantial prejudice, which is particularly difficult when you don't have the files.

We urge you to reject this change entirely. At the very least it should be limited to electronically stored evidence. The committee's aim to make civil litigation more accessible for average citizens is laudable, but limiting discovery in civil rights cases will have the opposite effect. It can effectively shut the courthouse doors to victims of serious police misconduct.

JUDGE CAMPBELL: All right. Thank you, Ms. Hoffman.

Questions? Judge Koeltl.

JUDGE KOELTL: Did you reach agreements with the defendants to take that number of depositions in the Lloyd and Greene cases, or did the judges give you the authority to do it?

MS. HOFFMAN: To be honest, I don't remember in those cases whether that was by agreement or --

JUDGE KOELTL: But plainly there would have had to have been either agreement or a decision by the court to go beyond the 10 deposition limit, and the rules say that the court must do that if the discovery is consistent with the rules. Why do you think that

judges would be more reluctant to give you the same number of depositions when the presumptive limit is five rather than 10? The judge is still looking at the same case. The judge is still going to have to make the determination that this is the number of depositions that is the reasonable number in this case. The judge is going to have to say in fact I must do this if the amount of depositions is consistent with the purposes of the rules.

MS. HOFFMAN: Well, I think there are two issues. First is by changing the rule from 10 depositions to five depositions, you'd be sending a strong signal that you think there's too much discovery. I mean, that's what you've been talking about. You think there's too much discovery in civil cases. So I think conscientious judges will take that signal and say, well, we've been allowing too many depositions. We should cut down. And I think that as the gentleman who spoke before me mentioned, when you have a lower limit of five and you're arguing for above that instead of arguing for, you know, slightly over the limit of 10, we're now arguing for triple the limit of five.

The other issue is, to be honest, I mean, we've faced some judges who are -- not most, but some

judges who are very hostile to our clients, and I think that if we have to get either agreement from the defendants or permission from the court to take any more than five depositions, we run the risk of just simply not being able to prove our claims at all, and it would be a very difficult thing to get reversed or to get review of in any way.

JUDGE CAMPBELL: Other questions? Dean Klonoff?

DEAN KLONOFF: Do you see serious prejudice by the reduction from seven hours to six?

MS. HOFFMAN: I mean, I see prejudice. It's hard to say one hour is serious prejudice. I do think that with lead defendants in our cases we often have to take more than seven hours. And frankly, a lot of that is because of the obstruction by both the defendants and the defense lawyers. They say they don't remember anything, they won't admit anything. There's lots of speaking objections, all kinds of things which are not permitted by the rules but which everyone does and you don't want to run to the court every single time someone's violating the deposition rules.

And as long as you are permitted enough time in depositions to get what you need anyway, you don't

have to bother anybody with it. You can just kind of ignore it and go ahead. But the shorter you make the depositions, the easier it is to just frustrate the ability to get the necessary discovery at all.

JUDGE CAMPBELL: Judge Diamond?

JUDGE DIAMOND: You kept saying your firm represents plaintiffs in serious civil rights cases. Do you have any sense of how many depositions are usually needed in less serious civil rights cases?

MS. HOFFMAN: I mean, I don't want to say any civil rights cases are not serious, but I --

JUDGE DIAMOND: Your word.

MS. HOFFMAN: I understand. Our cases are all cases with very high damages, often people who are in prison for many years, you know, death cases, that kind of thing. My understanding is from plaintiffs who are representing, you know, people who are held for 24 hours or something that routinely they don't take as much discovery because it's not in anyone's interest for them to take as much discovery. So I think it's a self-limiting --

JUDGE DIAMOND: It's the less exceptional cases that we see perhaps more frequently. A five-deposition limit might be perfectly okay.

MS. HOFFMAN: But I think that they're

already -- I don't think there's a problem now. I don't think they're routinely taking more.

JUDGE DIAMOND: But the five-deposition limit would be okay.

MS. HOFFMAN: For those cases, they might take less than five depositions, yes.

JUDGE CAMPBELL: All right. Thank you very much, Ms. Hoffman.

Mr. Strand?

MR. STRAND: Good morning. Thank you all very much for having me here today. Thank you all very much for the very hard work that you've done in working on the rules over the past several years. I'm here today on behalf of the Defense Research Institute. I am currently chair of the DRI Intellectual Property Litigation Committee, and I am immediate past chair of the DRI Commercial Litigation Committee.

When I'm not doing DRI work, I am a partner at Shook, Hardy & Bacon in their Washington, D.C. office. Over the past 30 years I have been trying commercial and intellectual property cases, generally very complex, and I have been living with and under the very federal rules we're here talking about today. So I do not come to you as a scholar. I come to you

as someone who has worked with the rules and oftentimes with judges across the table.

I'm here today to urge the committee to adopt the rules in the form that they're advanced with the modifications suggested by the Lawyers for Civil Justice in their written submission. I won't go over all of that and don't have the time. There are two things I'd like to talk to, Rule 26(b)(1) and Rule 37(e). We've also submitted written submissions from the chairman of our firm and you have those before you.

If I can only leave you with one word today, this is the word I'd leave you with: focus, focus. Rule 1 of the Federal Rules of Civil Procedure, and I believe it's Rule 1 for a purpose, talks about the just, speedy, and inexpensive resolution of claims. Just, speedy, and inexpensive. And just is first. Why? Because an inexpensive resolution without justice is no good. A speedy resolution without justice is no good. So it's about justice.

Now, when I started litigating, the purpose of litigating was the trial, and the purpose of anyone in our firm that had any clout was as a trial lawyer because you walked in to a judge, you walked in front of a jury, you declared ready and you tried the

lawsuit. Today we have lost focus. Our system is a system of trial by litigation and trial by discovery, not trial by jury. We have lost focus.

The rules that you all have considered are attempting -- they're not the total solution. They're not a panacea. They're attempting to shift that focus back to the just, speedy, and inexpensive resolution of claims. Here's what I mean.

I do a lot of patent work. I try not to do a troll litigation. I hate troll litigation, because what happens? You get a troll that comes in. They file a lawsuit. They've never practiced. They're out buying foreign lawyers. Every document they have is privileged. They come in to your client. They say we want all documents for all time over everything you've ever done related to all of your products. It will cost $100 million to produce -- or it will cost $10 million to produce 100 million documents. And the first thing your client says is how fast can we settle this.

That's not just, speedy, and inexpensive. That is litigation for litigation's sake. It is not litigation for the purpose of the Federal Rules. That's the most egregious example that's being considered by our friends across the way here with

legislative changes. Your rules will assist in fixing that.

What do I mean? 26(b)(1). I've been a plaintiff, I've been a defendant. I have argued as a plaintiff that I am reasonably calculating to lead to the discovery of relevant information as I seek everything in the entire world. I'm not proud of that, but you do that when you zealously represent your client.

By eliminating that reasonably calculated language, you are focusing the issue on what is the claim about. First day of law school we all learn there are certain elements in the cause of action. Today we don't talk about elements. We talk about the litigation.

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

Focus: speedy, just, and inexpensive

resolution. 37(e), same type of thing. Let's focus there on when there is really something that has gone wrong. I would agree with LCJ that the willful and bad faith, not or, would make a huge difference there. Folks don't destroy documents. Many of you are judges. There is no way in the world if a client's destroyed documents that's a good thing. You know you're going to die sooner or later, so just get it over with. I don't think Rule 37(e)'s change -- I think it benefits. I don't think it hurts things.

I'm slightly over my time.

JUDGE CAMPBELL: All right. Thanks, Mr. Strand.

MR. STRAND: So if you have any questions.

JUDGE CAMPBELL: Questions?

(No response.)

MR. STRAND: Thank you all very much.

JUDGE CAMPBELL: All right. Thank you.

Mr. Troy?

MR. TROY: Thank you. I'm Dan Troy. I'm a senior vice president and the U.S.-based worldwide general counsel for GlaxoSmithKline, a London-headquartered research-based global health organization of 100,000 people, 17,000 in the U.S. committed to helping people do more, feel better, and

live longer. I'm keenly aware that I'm what stands between you and lunch. I'm always short. I'll try to be brief.

(Laughter.)

MR. TROY: In my position, I see firsthand almost every day how the U.S. legal system harms the U.S. competitiveness in the global marketplace. Within the last 10 years, as a percentage of GSK's global relative revenues, our annual U.S. external litigation case costs have been as much as 50 times higher than our non-U.S. costs. More than 45 percent, almost half, of GSK's U.S. employees are subject to at least one preservation notice. By contrast, in the rest of the world, it's just about one in eight.

Foreign-headquartered, worldwide, global multinationals like GSK, we have many choices about where to invest, where to expand, where to establish our new operations. As a 2008 U.S. Commerce Department report recommended, and I quote, "If high U.S. legal costs are not commensurate with high benefits, policymakers will need to find ways to reduce uncertainty and to bring U.S. legal costs more in line with those of other advanced economies."

I'm here to tell you the costs at least from where we sit are not commensurate with the said

benefits. To take but two examples, I was in Germany two weeks ago, in the U.K. last week. We can get way more cost-effective justice in the United Kingdom and in Germany. And as a patriotic American, it pains me to say that, but it is true.

When we make contracts with our peers these days, we opt out of the U.S. courts. That is not the way it was perhaps 30 or 40 years ago, but that is the way we as multinationals have to play things.

Indeed, a 2011 Harvard Business School survey of nearly 10,000 alumni identified cost and delay of the U.S. legal system as an important impediment to business investment in America. The U.K., for example, their current economic development efforts highlight their legal system and its emphasis on proportionality and cost containment. And I really think it behooves us to look to places like the U.K. and Germany to see how you can have an effective court system which does not function the way ours does.

So I'm going to talk about two rules quickly, and I very much endorse the previous comments and LCJ's comments. The current overly broad scope of discovery allowed under current Rule 26(b)(1) creates an overwhelming burden for corporate litigants and provides little evidentiary benefit to any party at

trial.

Fortune 200 companies reported that in 2008 there were an average of 1,000 pages produced in discovery in major cases for every one page used at trial, 1/10th of 1 percent. Our experience is similar. I will submit these comments for the record. But in one federal multidistrict product litigation that settled recently before trial in 2011, we produced 1.2 million documents, yet plaintiffs included only 646 GSK documents on their exhibits list, less than 5/100ths of 1 percent of the production.

So we strongly support the proposed changes to 26(b)(1), with the addition of a materiality requirement which we think is necessary to ensure that the proposal isn't undermined by historically broad views of discovery and relevance that have unfortunately made ineffective the previous scope of discovery reforms.

Turning briefly to Rule 37(e), preservation, like many corporate defendants, we are forced to take an extremely conservative approach to the preservation, collection, review, and production of documents. In one example, we have preserved 57.6 percent of our company email. That's 203 terabytes of

information. That's 20 times that of the printed collection of the Library of Congress.

Just to take another example, the amount of material collected to respond to specific requests in litigation has increased, this is from 2010, 2.86 terabytes, to 2012, 9.03 terabytes. That's 316 percent in two years.

So we believe that the proposed Rule 37(e) is an incredibly important step towards establishing a national preservation standard desperately needed to allow corporate defendants to reduce costly overpreservation so we can spend the money on more socially valuable activities like R&D.

We do ask that the proposed rule be further reviewed to make clear that sanctions are available only if the actor had a culpable state of mind and acted with both willfulness and bad faith, though willfulness has been interpreted inconsistently.

To pick up and in conclusion, the favorite words you'll hear from me, what someone said before is not right. We don't want to be protected from liability where it is warranted. We do want to be protected from what some courts have accurately called legalized blackmail. We believe that taken together, the proposed changes, especially as we suggest with

the amendments, would go a long way towards making the U.S. legal system more fair, efficient, cost-effective, and, yes, competitive.

Thank you for the opportunity to testify. I'm happy to take any questions.

JUDGE CAMPBELL: All right. Thank you.

Judge Grimm?

JUDGE GRIMM: A question when we're trying to address some of the notions of the economic consequences of our system versus another system, and you expressed some confidence in the one in the U.K., and also you say that you don't want to avoid liability where liability is proper. In the U.K., they require disclosures, to include disclosures of information which is harmful to the party by their civil rules.

I've had some time and contact with the judges in the U.K. and how they do that, and that's ingrained in their system. It would certainly help reduce the amount of document production, discovery requests and other things that have to be -- that happen under our system if there was a requirement that both plaintiff and defendant produce as a mandatory disclosure information that was, in the case of a medical device that allegedly caused some sort of

an injury, the information they had that shows that it was in fact harmful or that they had knowledge of it.

Should we be considering measures like this when we look at other countries like the U.K.?

MR. TROY: I'm not a U.K. lawyer. I'm not an expert in their system. I can't practice law in the U.K. That said, I think that if you take a look at the requirements or the proposals for the American College of Trial Lawyers, both plaintiffs and defendants, the best lawyers believe that they actually can get to the resolution of a litigation much quicker, much speedier, and by and large they believe that those kinds of -- I'm not endorsing one or the other specific thing -- focused information exchange can lead to better justice and better resolution. And that's why even plaintiffs' lawyers like Steve Sussman have endorsed a much more focused approach to discovery that's much more like the U.K. than you have here in the U.S. unfortunately.

JUDGE GRIMM: You can't get much more focused than giving up the stuff you know you have which is harmful to your case, right?

JUDGE CAMPBELL: Judge Matheson.

JUDGE MATHESON: We've heard now several times this morning the suggestion about adding

materiality, and I'd be interested in what your definition of materiality would be and how it should be applied.

MR. TROY: That is a good question. I'm not sure I've given that enough thought. I'd like to respond to that in written comments. I mean, as lawyers, I want to say we know it when we see it. Materially means materiality does have a sense of there's something that's important as opposed to being trivial, whereas I think it's fair to say the interpretation and application of 26(b)(1) has been anything that could potentially be relevant as opposed to things that are again more focused and material.

JUDGE CAMPBELL: Elizabeth?

MS. CABRASER: Yes, thanks. I'm just curious if you know what percentage of the business records of Glaxo that it keeps in the normal course are now kept solely as ESI.

MR. TROY: Great question. I do not know that offhand.

MS. CABRASER: Okay. Thanks.

MR. TROY: A lot of it.

JUDGE CAMPBELL: We've got several other hands that have come up. I think the next one up was Judge Koeltl's.

JUDGE KOELTL: It's not clear to me how adding material to Rule 26(b)(1) would actually work since it's the standard for discovery, and you're going to be sending people out into the field or outsourcing it to contract people abroad to go over documents. You tell them that these are the documents which are relevant to a claim or defense, and then they're going to have to sift through the documents also to determine whether they're not only relevant to a claim or defense but also material. Wouldn't that just sort of increase all of the costs of review, discovery, sifting? How would it work?

MR. TROY: I'm not sure that it would. And we don't offshore our review, by the way. We tend to do it here in the U.S. And even if there's an initial cut made by contract lawyers, the people who are working on the litigation do take a second cut at things.

So I think it absolutely could work, and it would just again shrink down the massive amounts of information that each side is really sort of dumping on the other, which again, if you go back to the American College of Trial Lawyers, the plaintiffs' lawyers who at least participated in that, they don't want that much information dumped on them either. It

gets to the needle in the haystack problem that was identified before.

JUDGE CAMPBELL: Judge Pratter.

JUDGE PRATTER: To understand rather than to presume the context in which your comments have been made, could you say just very briefly what it means to say you get better justice in the U.K. or Germany than here? I mean, what justice is this?

MR. TROY: What I mean is that if we have a contract dispute and we can choose a forum in which to litigate, we tend to put in an ADR clause. Why? Because we think that the courts are too expensive, the courts are too burdensome, the courts take too long. But if we can't agree to an ADR clause, we will often litigate in the U.K. because again the process is not as burdensome, it's not as costly, it's not as random.

I mean, I can't tell you that in this individual case versus that individual case, but in general, the U.S. litigation system does not have a very good reputation abroad. Go and talk to the Europeans even as they adopt things like modified class action kinds of measures. The first thing they say is, well, we don't want to be like America. We don't want to be like America. Well, why is that?

It's because our system is the ridicule of the world.

JUDGE PRATTER: And excuse me for following up.

MR. TROY: Please.

JUDGE PRATTER: But I'm just saying maybe we could just listen in on what they're saying, but maybe I won't.

(Laughter.)

MR. TROY: That hasn't helped us either.

(Laughter.)

JUDGE PRATTER: But what I'm hearing is that you're talking more about cost and process, not result. Or is that how you quantify the result?

MR. TROY: Well, I guess two things. First of all, I'm much more willing and able to try cases in other places because it's not a process of extortion. I can actually get to a result much more easily, quickly, and less expensively, okay? And I think that this goes way beyond where this committee's discussions are, but often in certain kinds of complex cases, I'm a lot better off in front of a judge than I am in front of a judge and a jury.

JUDGE PRATTER: Okay. Thanks.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Troy.

We appreciate everybody's comments this morning. We will take a one-hour break and resume at 1:00.

(Whereupon, at 12:01 p.m., the hearing in the above-entitled matter was recessed, to reconvene at 1:00 p.m. this same day, Thursday, November 7, 2013.)

//

//

//

//

//

//

//

//

//

//

//

//

//

//

A F T E R N O O N S E S S I O N

(1:00 p.m.)

JUDGE CAMPBELL: All right. We're ready to start with the afternoon session. Thank you all for being here, and I think our first speaker is Mr. LeBlanc.

MR. LeBLANC: Thank you. Good afternoon. Thank you for the opportunity to testify before this committee today. My name is Burton LeBlanc. I'm a shareholder with the law firm of Baron & Budd. And I appear before you today in my capacity as president of the American Association for Justice.

I'd like to say at the outset AAJ believes that we do have the greatest legal system in the world, and the fact that we're going through this process today serves as a shining example. AAJ, with members in the United States, Canada, and abroad, is the world's largest trial bar. Our members have practical experience with discovery tactics undertaken by defendants, who often have far greater resources than the plaintiffs AAJ members represent.

In other words, they can afford to battle over every dispute and spend excessively on document review while complaining about the expense. AAJ is extremely concerned with the impact the proposed rules

will have on the administration of justice. The rules will increase the burden and expense for plaintiffs and give defendants more tools to avoid discovery -- more tools to producing relevant discovery that plaintiffs need to meet their burden of proof. Ultimately these proposed rules will make it far more difficult for consumers and small business owners to hold wrongdoers accountable.

Now AAJ has a number of concerns about the proposed rules. I'll be submitting extensive comments to this committee detailing all of those concerns. But today I want to focus on the harm the new proportionality standard of 26(b) will create.

The proposed changes to Rule 26(b) shifts the discovery process from a focus on relevancy to an economic calculation. In doing so, relevancy will give way to proportionality and defendants will benefit from step-by-step instructions on how to avoid producing critical, relevant information that plaintiffs need to prove their case. Each of the five factors would benefit defendants at the expense of plaintiffs, ultimately raising more questions than they will answer while creating collateral litigation in each and every case, in our view drastically increasing the workload of the federal judiciary.

The factor that will have the greatest impact on the fair administration of justice is the specific consideration of burden or expense. Discovery is more than a cost-benefit analysis. It is necessary in the search for the truth, and it is the method by which injured individuals are able to obtain information from alleged wrongdoers.

Defendants already argue in almost every case that discovery is simply too burdensome and expensive to produce, including that as one of the specific factors at the outset, but when we codify this practice, you give the argument credibility even when there is no basis for the claim. This factor upends incentives for defendants to preserve documents in an easily accessible format and encourages them to ensure that discovery will be too expensive or difficult to retrieve.

Justice would not be served in numerous cases litigated by our members if the burden or expense factor is codified. For example, in a complicated qui tam case that resulted in a very large verdict, plaintiffs alleged that a nursing home defrauded the federal government and the State of Illinois by billing Medicare and Medicaid for services that were so deficient as to be essentially worthless.

Discovery in the case involved 25 fact depositions, five expert depositions, and the review of approximately 350 patient files and company records, all of which were necessary because plaintiffs were required to prove that proper care was not documented or provided. Discovery also included the late production of 50 boxes of inappropriately withheld but relevant documents.

There is no doubt that defendants had a significant burden and expense to produce medical records for the residents in this case that lasted over six years. Plaintiffs would never have been able to prove their case if the defendants had been able to hide behind the burden of cost of producing relevant documents, and significant funds would not have been returned to the federal government and U.S. taxpayers.

I'd like to briefly address AAJ's objection to the proposed changes to the new limits on depositions, interrogatories, and requests for admissions. We believe these proposed limits will place limitations on important discovery tools that will make it far more difficult for parties to get the information that they need to support their case and will eviscerate tools the parties currently use to resolve simple issues of fact.

The problem that the new limits will create are enhanced by the fact that the proposed rules require that these exceptions now be granted only to the extent consistent with the new proportionality test.

While AAJ supports the proposed changes to Rule 34(b) relating to requests for production, the totality of the other proposed changes is overwhelmingly unbalanced against the interests of plaintiffs, and in our view, the changes are not necessary. Thank you for your time today.

JUDGE CAMPBELL: Thank you, Mr. LeBlanc. A question. You focused on the burden or expense factor that would be part of 26(b)(1), and as you know, that's in the rule now. It's in Rule 26(b)(2). It's also in Rule 26(g). So it can't be the presence of that language in the rule that's the problem. It's the relocating of it that it sounds like you're objecting to. Could you address what you think the relocating of it does given the fact that 26(b)(1) now says all discovery is subject to that factor which is in 26(b)(2)(C)?

MR. LeBLANC: We believe that the relocating will heighten the burden or expense factor. It will make it more complicated and challenging for the

plaintiff to deal with that particular burden of proof early on in the litigation right up front.

JUDGE CAMPBELL: How will it do that? I mean, in every Rule 16 conference I hold, I ask myself the question and also the parties the question of proportionality, and we have that discussion right at the beginning of the case to ensure that the discovery is proportional to what is needed in the case. And in most cases, that's what they're proposing, but in some they're proposing out-of-proportion discovery.

MR. LeBLANC: Right.

JUDGE CAMPBELL: Is AAJ opposed to that discussion occurring at the Rule 16 conference, or do you see other problems arising from the presence of the language in 26(b)(1)?

MR. LeBLANC: We believe that it will emphasize the proportionality aspect as opposed to the relevancy aspect of seeking the information sought. So, yes, we have a problem with the location. Placing the proportionality test and codifying it up at the beginning as opposed to the end after determining what is relevant is a problem for us. We don't oppose discussing it in a rule conference, though.

JUDGE CAMPBELL: Other questions?

PROF. MARCUS: A similar kind of question.

You didn't mention the proposed permission to serve Rule 34 requests earlier than presently allowed. Does AAJ have a view on that?

MR. LeBLANC: We don't oppose the changes to Rule 34, so we support the proposals as written. I was running short on time, so I focused on the proportionality and even had more to say on that but for time. But no, we do not have opposition to requests for production.

JUDGE CAMPBELL: If I can ask you one other question. I don't know your particular practice, but I know your firm is often engaged in large-scale litigation.

MR. LeBLANC: Yes.

JUDGE CAMPBELL: Do you find that you encounter difficulty getting more than 10 depositions in most cases? And if the answer to that is no, is there a reason you think you would encounter difficulty getting more than five?

MR. LeBLANC: Let me answer it this way. In my case, I handle toxic tort and environmental cases, and at the outset of the type of litigation that I handle, we did encounter problems getting the depositions that we needed to prove our case. As this area of the law has matured and developed, we now

generally enter into consent arrangements with the defendants concerning depositions.

Our concern with limiting the depositions to five is the same that we heard earlier from the antitrust bar. It will become the new normal, and it will be much more difficult to get 15 or 25 depositions, 25 being the norm in the type of cases we handle.

JUDGE CAMPBELL: We have another minute. Any other questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much, Mr. LeBlanc.

MR. LeBLANC: Thank you for your time.

JUDGE CAMPBELL: Mr. Mason?

MR. MASON: Thank you, Mr. Chair. My name is Wayne Mason, and I hope to bring you maybe a little different perspective. I have a national trial practice where I travel around the country and try cases both in federal as well as state court, primarily on the defense side, although I do do some plaintiffs' work.

I want to talk with you about Rule 26, which seems to be a popular subject today, and give you my perspective perhaps of where the rubber meets the road

out on the road so to speak. My experience is and my recommendation to you is if you did one thing and made one change through all of this, that it would be to remove the language as you have proposed with respect to reasonably calculated to lead to admissible evidence.

I heard in the Dallas mini-conference, I believe it was the chair who mentioned the experience of having lawyers come in and believing that that phrase meant you could pretty much have anything you wanted. And I would tell you that when he said that that it resonated with me and my experience not only in the federal system but in the state system and in arbitrations.

And we can't ignore the fact that that is the reality of this. In arbitrations where they're going to apply the federal rules, we have the same reference to it. So I applaud the fact that you have included that in and recommend that that remain in.

This issue of discovery in Rule 26 has become an issue of leverage. We used to in the trial bar talk about resolving a case because the person on the other side was a great trial lawyer and you may get your bell rung. Now it's just about how much discovery that they can push the button on and how

much media attention and destructive that the other side can be.

It's an unfortunate situation. So, when I talk about change and changing this, one might say, well, wait a minute, this has been in the rule forever. Why are you saying that this is such a powerful thing? E-discovery has changed the world, and it has highlighted and it has created an opportunity for parties, and not just defendants, plaintiffs, commercial plaintiffs in cases that know they can do it, to push the button and use the leverage there do it.

And the importance of focusing on narrowing that is really an important thing that I think that you have to consider. The practical realities then of all of this massive documents, which is not limited to just multinational corporations, but because everyone has an iPhone and everyone has a smartphone and an iPad, the amount of information available from smaller companies is now disproportionate to what it used to be, and it does matter in litigation in cases.

Here is how it matters too. It's not just about we'll send it to India and save money, and defense lawyers, you charge too much money. The reality is these documents have to be reviewed and

they have to be reviewed typically for attorney-client privilege, work product, and things like that, and it's an enormous expense.

What I'm suggesting to you is that justice is not being denied. But my personal view of what I see is the fact that when I have to produce 2 million documents and the reality is two dozen of them wind up in trial of any significance, that there's so much waste in the system of stuff that is being requested under the auspices of reasonably calculated to lead to discovery that it's a real problem.

The proportionality, those five factors, I don't see how that increases the burden and expense to plaintiffs. I just don't see it. And I would say to you that in a civil rights context I think there is clearly protection. And if Ms. Hoffman were to suggest to anyone as she did in giving her anecdote today, I think she'd get more discovery. I'm not here to talk about limits because I'm not exercised about whatever you decide on that to be honest with you.

The pretrial process it's been said this week is littered with stop signs, and I would suggest to you that that's an improper metaphor to suggest that there is not justice in the implication of that. To just carry out the metaphor, a stop sign does not

say do not enter. You cannot enter, which would preclude justice.

To the extent that a stop sign is in place in pretrial like we discussed here, it's a moment to pause, like if we were taking our car to a stop, and to reflect, which is a powerful and a good thing typically, and then move forward if appropriate.

That's not to say there aren't dispositive motions and things like that, but to suggest that it is improper is I think really wrong. Any lawyer who has the ability to pass the bar exam in any state in my opinion has the intellectual acumen to focus their requests and to ask good questions. In my experience, the best lawyers take the shortest depositions. They know the questions to ask. And so whatever the number is, the reality is here we're not precluding justice by what you're proposing in terms of relevant evidence.

They can still ask the questions without trouble to sit down, and we can do that, and I should do that, to be reflective, to ask the right questions. And that is not changing here, and it is not favoring one side or the other.

The last thing would be just again I mentioned it briefly, but the reach is really

significant here in state courts dealing with this all the time and in arbitration. And we can't just say, well, we're here about the federal system, we can't talk about that. This matters to justice in the United States, and it's a pervasive problem, and I encourage you to stand firm in your recommendations and to act. Thank you.

JUDGE CAMPBELL: Thank you.

Questions? Judge Pratter?

JUDGE PRATTER: Mr. Mason, did you hear the comment this morning about predictive coding and whether or not that was useful or not? Have you any observations about whether in your practice you've seen any tendency to use predictive coding, or has it been a good idea that is just a good idea?

MR. MASON: Well, it's an evolving idea. So far it's just a good idea. We haven't bought all the software that the other gentleman spoke about, but the reality is we're always looking for ways. I mean, fees are too high. We're to blame. Defense lawyers have some responsibility in this. And the reality, though, is there is enormous pressure to keep costs down and the like.

And so I embrace that kind of technology and the like, but it is only one step and it is not the

answer. My experience is the same as the speaker in terms of multiple cases and things like that. You can't get agreement on it. You can't afford to use it. And so, as a practical matter, it's used very little.

And as I said earlier, the other practical problem is you still have to review a ton of documents under the current system, millions of documents that are unnecessary. They're wasteful. There's no -- there is not -- and I want to emphasize -- a preclusion of an ability to find the smoking gun under your proposals. Or forget the smoking gun. And there is an ability for justice to be served for people to get what they need. They need to focus -- someone used the term focus, focus on the claims.

JUDGE CAMPBELL: Other questions? Let me ask one final one. You talked about producing 2 million documents and 12 became relevant at trial. Why are you persuaded that if you only had to produce 250,000 documents the plaintiff would still get those 12 for trial?

MR. MASON: Because I know what the documents were, and I know what the claims were, and I know exactly that, you know, anybody that is capable of passing a bar examination can ask questions that

would have gotten those documents and not just those. In fairness, there's an appropriate number in excess of that. But every one of those documents without question in my mind were discoverable, would have been had. It's the waste of the other over million and the storage costs that we had of every month having to store all these things and the holds and things that is the real-world problem.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Mason.

Darpana Sheth?

MS. SHETH: Good afternoon. My name is Darpana Sheth, and I'm an attorney with the Institute for Justice, a nonprofit public interest law center dedicated to protecting constitutional rights. Thank you for the opportunity to testify on behalf of IJ at the first public hearing on the proposed amendments to the civil rules.

I applaud the Advisory Committee and the distinguished panel for its extensive work in proposing these reforms. Although IJ welcomes the amendments encouraging early and active judicial case management, we are tremendously concerned about the proposals to narrow discovery and limit the use of discovery devices. These measures will cause serious

problems in constitutional litigation and contrary to their intent will in most cases profoundly increase discovery disputes and therefore litigation costs.

Since 1991, IJ has represented individuals and small businesses in federal courts across the country to challenge unconstitutional conduct by government officials at all levels. IJ litigates to protect free speech, property rights, economic liberty, and educational choice. Perhaps uniquely among the witnesses, IJ represents both plaintiffs and defendants to protect these constitutional rights.

For example, I represented the Monks of St. Joseph Abbey in a constitutional challenge to Louisiana law prohibiting anyone but a licensed funeral director from selling caskets. I also successfully defended a family-run motel against a civil forfeiture action brought by the U.S. Attorney in Massachusetts.

Most IJ cases are moderate in size. Typically they are resolved on summary judgment, but when required trials can last between one and five days. Routinely they require more than five depositions, although rarely more than 10. Invariably these depositions do not last the full seven hours, but more depositions are required because of the

amount of witnesses.

Whether representing plaintiffs or defendants to protect constitutional rights, there is an asymmetry in access to information, with the government in sole possession of most of the facts needed to prove a constitutional violation. Based on this perspective of representing both kinds of litigants in moderate-sized litigation to address constitutional wrongs, I offer testimony opposing the proposals related to discovery.

First, the proposed proportionality requirement threatens the very ability of constitutional plaintiffs to obtain relevant information from the government. As an initial matter, through the use of the conjunctive "and," the amendment requires materials sought to both be relevant to a claim and defense and proportional to five subjective and very fact-dependent criteria.

Many witnesses today have even suggested adding a third requirement of materiality. Thus a government defendant can simply resist requests for information needed to prove a constitutional claim based on its own subjective belief that the request is not proportional to the action. Oftentimes these actions only seek injunctive or declaratory relief.

Moreover, to address Judge Campbell's earlier comment, relocating the proportionality factors shifts the burden under the existing rule from defendants to prove that discovery requests are disproportional to plaintiffs to prove that the discovery requests are in fact proportional. The proposed advisory note makes this burden shifting clear.

Consequently, contrary to its intent, this requirement will increase litigation costs given the uncertainty as to what proportionality means in a particular case and recalcitrant litigants. This shift will inevitably lead to a barrage of motions to compel and a concomitant need for judicial intervention.

Second, the amendments reducing the numerical limits on discovery devices are also counterproductive to the goals espoused by the committee. I will focus my comments on limiting the requests for admission.

Empirically there has been no problem with burdensome or abusive requests for admission. Indeed, to the extent there is a problem, it is that litigants underused this very useful tool that can reduce costs both for parties and the judicial system. Rule 36

requests serve additional vital purposes beyond laying foundation to admit documents into evidence.

First, admissions narrow the issues in the litigation. Second, they facilitate proof with respect to the remaining issues. Both of these purposes expedite litigation by reducing other more burdensome discovery or making a suit amenable to summary judgment or even reducing trial time.

This is particularly true in constitutional cases subject to the rational basis standard of review. For example, in the litigation challenging the casket monopoly in Louisiana, IJ effectively used Rule 36 to obtain admissions to prove material facts about the lack of any health or safety justification for the licensing requirement. As a result, the trial was shortened to three hours rather than the anticipated three days.

IJ is sympathetic to the problems raised by many of the witnesses regarding cost-prohibitive discovery and extortion at settlements, but changing the default rules for *all* civil litigation to address a problem that occurs in only 30 percent of the cases is not the solution. This blunt and heavy-handed approach threatens to close the doors of justice to meritorious cases, and for nonprofits like IJ with

limited budgets, they threaten to severely curtail the vindication of constitutional rights.

Thank you for your time, and I'm available for questions.

JUDGE CAMPBELL: All right. Thank you.

Judge Grimm?

JUDGE GRIMM: Can I just sort of as a practical way of understanding, because the notion of the shift in the location of the existing requirements regarding proportionality, I understood you to say that it shifts the burden to the plaintiff at an earlier point to be able to justify it instead of at some later point when the person who is resisting discovery wants to assert it.

But how in practical terms are you able to meet the requirements that you have under Rule 26(g) that says that your signature on a discovery request certifies, and the third element of that is that it has the same analysis that's required under Rule 26(b)(2)(C), which is it's neither unduly burdensome or expensive given the needs of the case and the importance of the evidence?

So you've got to make that proportionality assessment before you can comply with your obligations under the rule when you initiate it. How if you

already have to do that does moving the language of proportionality into the scope significantly change what you already have to do? I don't understand in a practical matter how does it do that.

MS. SHETH: I think there are two points. One, under current rules, you have the party-controlled discovery where it's relevant to a claim or defense, and then you have court-controlled discovery where it's relevant to the subject matter. And so the current rules contemplate I think more disputes over that larger sphere of information that's simply just relevant to the subject matter. And there I think that's where 26(g) comes into effect where the signing the discovery requests indicates that you are aware of all these factors and you're considering them.

With the proposed revisions, you're inviting more disputes over not just whether it's relevant to the claim or defense but whether it is in fact proportional. And at those disputes, it's going to require judicial intervention, and in that motion to compel, it's going to be plaintiff's burden rather than the defendant's burden to show disproportionality or proportionality.

JUDGE CAMPBELL: Rick?

PROF. MARCUS: Following up I think on what

you just said, and earlier I think you said the committee note shows or says that there's a burden shift. That's what you just said. Can you tell me where it says that?

MS. SHETH: I don't have it in front of me, but I recall that at least the proposed committee note that was in the draft --

PROF. MARCUS: That's what I'm talking about.

MS. SHETH: Right, right. My understanding was that that was the implication of the note. If that's not the case, then, you know, I'm very relieved, but I think a lot of people --

PROF. MARCUS: So, if the committee note didn't say that, you'd be very relieved.

MS. SHETH: I'd be very relieved if there is not in fact a burden shifting. That's correct.

JUDGE CAMPBELL: Any other questions? Go ahead.

JUDGE SUTTON: Yes, just one question. You know, there's a current safeguard in the rules, which is that if your opponent is behaving unreasonably with discovery or the district court judge is being unreasonable, if a Rule 56 summary judgment motion is filed against you, and that's usually the big event in

a 1983 case, you can say under 56(d), you know, I can't respond to this because I haven't gotten enough discovery. There were three decisionmakers, there were four other witnesses. I've only had discovery of five people. I need all seven to be able to respond to the summary judgment motion.

So I'm curious in constitutional litigation is that a waste -- is that really not a safeguard? Or maybe you just haven't come across it.

MS. SHETH: I haven't actually come across it because right now the rules adequately protect rights to discovery, but by severely curtailing that, I don't know how that would.

JUDGE SUTTON: Because what I'm wondering with the current proposals, it's hard to figure exactly where things should be. But you've got safeguard of the person on the other side being reasonable. If that doesn't work, you're hopeful the district court judge is being reasonable. But a concern of an earlier person testifying or commenting was, well, what if you have an unreasonable district court judge. It's very unusual to get review of a limit on depositions or interrogatories, which I think is true.

But I think if you lose a summary judgment

motion having said I can't respond to this, that would strike me as a pretty serious exception, and I do think courts of appeals would step in and say how can they possibly respond to this summary judgment motion if they're not getting the evidence or a deposition of a decision-maker or a witness.

MS. SHETH: Well, in our practice usually, I mean, although you can make a summary judgment motion before the close of discovery, it usually happens after discovery is closed when all the evidence is in. So I'm not sure how the rule would take -- the 56 provision would be implemented after with the proposed rules, but it doesn't seem like it would be an adequate safeguard. Or it would come into play a lot more often, whereas right now the current rules adequately safeguard against it, provide for enough discovery.

JUDGE CAMPBELL: All right. Thank you very much, Ms. Sheth.

Mr. Levy?

MR. LEVY: Good afternoon. My name is Robert Levy, and I am counsel for Civil Justice Reform and Law Technology at Exxon Mobil Corporation, and I also serve as chair of the Federal Rules Committee of Lawyers for Civil Justice. Thank you for the

opportunity to come and speak to you and give a perspective on the proposed amendments. And my goal today is to give you some empirical facts that hopefully will reinforce the reasons why the amendments to these rules are so important and really essential to resolving some of the fundamental challenges that we have in our current litigation system in federal courts.

One initial issue, I know there's been a lot of discussion, and at the Tuesday hearing there was discussion as well, about the FJC study. And while that brought -- the closed case study. That brought some important information to the process. One of the areas that was not addressed in that study were costs and impact of discovery on the parties themselves, which I think is a very important factor, and therefore I'm not sure that we can draw the conclusion from the FJC study that discovery is not a broad issue and it's solely limited to what's been called a narrow band of cases. I think that the issue is much broader and much more severe.

A significant driver for why Exxon Mobil currently has over 5200 individuals on litigation hold for U.S. matters is the lack of standards for preservation obligation. Each time we put someone on

hold it impacts up to 10 different parts of our technology organization, not to mention the impact that it has on the individual involved.

A significant percentage of these holds are put in place long before the litigation actually is formally begun, a lawsuit filed, we file one or the other side files one, and certainly long before we know who the court is or the opposing party. Plus, we have to entertain and address and evaluate preservation issues in all of our e-discovery platforms, of which you can imagine are quite significant in number. And so we are making decisions about what our preservation approach is when we're looking at implementing new technology or updating technology. Even as simple as switching out computers involves preservation issues.

So we are very, very focused on these changes. These holds also impact each individual employee who is on hold. We estimate that it involves at least 10 minutes a day for the individual on hold to address the issues related to the hold and the obligations in the notification, which include some pretty direct and important language to each individual. And they take that very seriously, and so they have to change the way they do their business.

So, if you look at it for the 5200 individuals on hold, and some of those are former employees, but the vast number are current employees, it translates into about 867 hours per day in the company, which on a yearly basis is over 327,000 hours that are impacted just by the fact of people having to address litigation holds.

And this in terms of productivity even for a company of my size is talking about real dollars, in tens of millions of dollars that are impacted simply by dealing with preservation issues. And, you know, it is a significant issue.

So the next issue or question is why do we have this vast overpreservation of information. And as I pointed out before, without the clear standards and consistent standards throughout all of the Circuits, we're forced to overpreserve because we're faced with the risk that in hindsight, looking at the facts of a particular case, we will be held to what is referenced as Monday morning quarterbacking about what we could have done and therefore what we should have done in that context.

Preservation, as I noted, is a big element in our design and approach to our technology systems, and I've described it as throwing sand in the process

of efficiency. These systems are designed to make our people do their jobs more effectively, more efficiently, to give them more information, and yet when we have to deal with all of these issues and hamstring the technology, it slows down the process. We end up sometimes making significant changes in our technology and other times not approaching technology solutions because of these concerns.

We also know that very rarely in actual discovery is this information ever used. In 2012, we collected data on about 3.8 percent of all the custodians that we have on hold in the U.S. So just 3.8 percent, so that's about four out of 100 people. And then we know that even when we collect the information, so we collect it to preserve it or sometimes because we needed it, it's very rarely used in litigation.

So of these individuals, the four out of 100, we processed only 16, a little over 16 percent of that data in terms of matters. So what it's saying is that 16 percent of the 4 percent is for each 100 people, less than one of those individuals ever has their information put into the discovery cycle. And as you know, once it goes into the discovery cycle, the chances of particular information being needed is

also pretty, pretty limited, a relatively small percentage.

These costs are very significant obviously. We spend over 40,000 hours in internal costs just in terms of discovery activities. That's the internal time of our personnel. That's not including the outside review time, the outside counsel costs or the outside costs for our review vendors.

So these are significant costs. Obviously the impact to a smaller company could be devastating, and it's a big impact for us as well. And I don't want to belabor this issue, but we know that the question about costs and the ability to seek and obtain efficient justice can be a gatekeeper for whether people can get relief.

People don't bring lawsuits because they know the costs are going to be so high. And I know that there was a question before about the nonsignificant civil rights cases. I posit that there's probably a number of civil rights cases that are not being brought today because the lawyers can't make an economic case to bring them because of the costs of discovery.

This is an issue that impacts plaintiffs and defendants, and these changes will make a meaningful

difference in our civil litigation system. I want to point out that we endorse obviously the LCJ comments, and I do agree with John Rabiej's comments on the issue of curative measures. I think that's a very important change that should be considered. And I'm happy to answer any other questions.

JUDGE CAMPBELL: Questions? Judge Oliver?

JUDGE OLIVER: I think we would all agree that the plaintiffs didn't cause all these problems with e-discovery and neither did the defendants, but technology, as a result of advances in technology, some of which actually do benefit businesses, that means that we've got a lot more documents, a lot more things to control, and there may actually be a lot more relevant information because people do more recordkeeping.

It's legitimate obviously to think about how can you lay down a rule where you have some certainty or relative certainty and that you don't have to overpreserve. But it's got to be somewhat imprecise necessarily because of the number of documents and things you have to anticipate. Wouldn't it be reasonable to build in some business costs as a result of decisions that are made that may have you getting rid of documents that may be pertinent?

MR. LEVY: Well, when we look at our information systems, we, I think like any company, have to try to figure out the most effective way to manage information, to govern that information, to make our company work more effectively. We do have a tremendous amount of information, and we struggle with how to get rid of what we don't need in terms of the business decision-making and have access to the things that we do need.

We also know that when we try to be the most efficient and effective in making that decision, the exception is the preservation obligation and what happens if we get rid of a lot of things that we know we'll never need, it won't advance our business, but we're going to be questioned later about why we didn't save it because it might be related to some future lawsuit or even an existing lawsuit, and that's a tough standard.

But, yes, business decisions are a factor. We know we benefit from this information, but we need to be able to use it in the most effective way possible. I hope I answered your question on that.

JUDGE CAMPBELL: Parker?

MR. FOLSE: Given that the rule --

JUDGE CAMPBELL: Could you push the button

on that, please?

MR. FOLSE: Okay. Given that the rule doesn't change the obligation to preserve information, how specifically would the proposed amendments in the case of your company reduce the number of individuals who would be on hold or reduce the cost and money incurred internally devoted to preservation? It sounds as if there's been a very conscious, well thought out effort at Exxon Mobil to try to preserve information. Do you as a result of these rule amendments do something less, and if so, what language of the rule allows you to do that?

MR. LEVY: I think the difference is that the decisions that are made, some of them are decisions that are put to me -- my ability to make what I think is the reasoned and appropriate and efficient result that won't cause any loss of information that relates to a lawsuit will be -- I'm not going to say no, let's just keep everything, which sometimes we do now. We have 600 terabytes of data that's only on hold simply for the potential it might be needed in a lawsuit.

I can guarantee you that of that 600 terabytes, maybe 50 gigabytes would ever be used. But I can't feel comfortable getting rid of that knowing

that I don't know what the standard against which I will be judged in that decision, whether it's reasonableness, whether it's negligence, whatever it is. So I have to keep it all.

And that cost, we're spending a significant amount of money right now just dealing with the preservation of that information. It's not free just to sit that stuff down. There are a lot of costs associated with that. Those are the types of examples where we will save money and not lose any information that will be needed in ongoing lawsuits.

MR. FOLSE: Because the standard by which sanctions would be imposed changes?

MR. LEVY: I don't what sanctions -- I don't know what standard against which my decision will be made. So, if it's negligence, I'm not sure what -- you know, how can I decide whether I will meet that in deciding I don't think it's reasonably likely that it's going to be needed, and so I keep it. But if it's a standard based upon what the committee has proposed, I think that I'm justified in making the decision that we don't need to spend the money to keep it because I know it's probably never going to be used. But the probably is the part that I think the difference between some Circuits and other Circuits

could be determinative.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Levy.

Ms. Schwartz?

MS. SCHWARTZ: Judge Campbell, members of the committee, thank you for the opportunity to testify today about proposed amendments to the federal rules. My name is Michelle Schwartz, and I'm the director of justice programs at Alliance for Justice, a national association of more than 100 organizations dedicated to the creation of an equitable, just, and free society. AFJ has submitted comments, as have several of our members.

I speak today to urge you to consider these amendments in the broader context of numerous factors already affecting everyday Americans' access to the courts and to reject those proposals that would further diminish that access.

I want to push back on the suggestion that was made earlier that our justice system is somehow a black mark on our nation's reputation. Quite to the contrary, thanks in no small to the efforts of those on the committee and others in this room, our justice system is the envy of the world. Disputes that in other places might be decided on the streets here are

decided in the courtroom.

The system works because people know that when they enter an American courtroom, they do so on a level playing field. Whatever inequities of status, class, or money exist on the outside do not matter before an impartial judge and jury. This ideal is inscribed on the U.S. Supreme Court: equal justice under law.

The system only works as long as the American people believe they can in fact have their day in court if they are wronged, but that belief is being eroded by a number of factors. First, with one in 10 federal judgeships vacant and courts suffering under the weight of draconian budget cuts, more and more Americans are being forced to wait for justice despite the efforts of federal judges.

Second, consumers, employees, and even small businesses are being blocked from the courthouse because of forced arbitration agreements in the fine print of contracts.

Third, the class action device is facing increasing limitations. That device often is the only path to relief for individuals who have been harmed but whose injuries alone are not worth the cost of litigation. It is also an incredibly important

mechanism for addressing societal wrongs.

And fourth, pleading standards have been increased in recent years such that victims who make it through the courthouse doors frequently cannot make it past the initial pleading stage.

Together these recent developments mean that it's harder for victims to find a lawyer who will take their case, and victims are questioning whether they can really have their fair day in court. As a result, more and more wrongdoing will be pushed underground. That has dire consequences for the victims themselves, but it also harms our society when wrongdoing continues unpunished and the public doesn't learn of threats to their health, safety, and well-being.

Unfortunately, a number of the proposed amendments to the federal rules will only magnify the barriers that already exist for those seeking justice. In particular, we are concerned about the changes to Rules 26(b), 30, 31, 33, and 36. By limiting discovery, these changes would further serve to discourage victims from going to court, discourage lawyers from taking victims' cases, and privilege parties with money and power.

I've heard it suggested that these proposed amendments are minor and would have little effect.

That may be true in cases where the parties have equal power and resources, but where a victim with few resources is coming up against a powerful corporation, the impact will be anything but small.

I began by speaking about an inscription on the U.S. Supreme Court. I would like to end my remarks with an inscription on the Frank R. Lautenberg Federal Courthouse in Newark, New Jersey. I had the great honor of working for Senator Lautenberg, my home state senator, for six years. Although he was not a lawyer himself, Senator Lautenberg had a deep and abiding respect for our justice system, a respect no doubt shaped by his experience fighting in Europe during World War II.

And so, when it came time for Senator Lautenberg to choose an inscription for the courthouse that bears his name, he wrote, "The true measure of democracy is its dispensation of justice." At a time when public confidence in two of our three branches of government is disturbingly low, it has never been more important for Americans to believe in the fair dispensation of justice. Therefore, AFJ urges the committee to reject changes to the federal rules that would undermine those beliefs. Thank you.

JUDGE CAMPBELL: All right. Thank you.

Comments or questions for Ms. Schwartz?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much for your comments.

MR. BARKETT: I have one.

JUDGE CAMPBELL: Yes, please, Justice Nahmias (sic). Could you pull a mike over toward you?

MR. BARKETT: Oh, sorry. No. I have one.

JUDGE CAMPBELL: Oh, it's John. Okay.

MR. BARKETT: Did you have a specific reaction to the scope of discovery in 26(b)(1)? You rolled a number of numbers together, but did you have a particular reaction to the scope changes?

MS. SCHWARTZ: The concern about Rule 26(b) is by moving the proportionality requirement up, by taking out the longstanding language that has existed in that rule, we're very concerned that that will increase litigation around those questions and further burden already overburdened courts, therefore making it even more difficult for people to get justice, delaying trials and so on.

MR. BARKETT: Even though you've heard already the (b)(2)(C) factors have been part of (b)(1) for a long time, reasonably calculated has been subject since 2000 to a good cause standard, and the

26(g) certification language that all lawyers now sign essentially say the same thing.

MS. SCHWARTZ: Well, I think the concern is twofold. One is taking out the reasonably calculated language altogether and --

MR. BARKETT: Well, it's not removed altogether. It's just adjusted to reflect its original intent.

MS. SCHWARTZ: I would submit that the change is going to lead to corollary litigation around that question, and also the concern of moving it up in the rules and making it so that that burden is placed on the proponent of the discovery at the outset as opposed to being a question that may be determined later on.

JUDGE CAMPBELL: Okay. Any other questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much for your comments.

Ms. Vaughn?

MS. VAUGHN: Good afternoon, members of the committee. My name is Andrea Vaughn. I'm a staff attorney with the Public Justice Center. We are a nonprofit social justice law firm in Baltimore, Maryland that works to expand and enforce the rights

of those who have suffered due to poverty or discrimination, and we do this through litigation, legislative advocacy, and community education.

I very much appreciate the opportunity to come here today to provide input on how these proposed changes to the rules will impact our clients' ability to enforce their basic rights under the law. I'll be brief because we've also submitted written comments, and I'll just focus on our three main concerns.

First, the presumptive limit on deposition hours and the reduction of depositions from 10 to five would significantly burden our clients in employment cases. Our workplace justice project litigates many cases on behalf of low-wage workers for nonpayment of wages, and these cases often involve complicated employment relationships.

For example, we litigate a lot of cases around labor broker arrangements or rental worker schemes. These all have multiple employers, which often require several 30(b)(6) depositions of the corporate employers as well as additional depositions of foremen, managers, supervisors, et cetera.

All of these depositions are necessary to take out the facts around control that is required to show joint employment under federal employment laws.

These depositions also take a significant amount of time in order to uncover the necessary and relevant evidence to establish these relationships.

In addition, I'm sure not only in our litigation but in much more litigation than was previously true, many depositions require the use of an interpreter. Using an interpreter in depositions, as you can imagine, often can take more than double the time that is normally needed for a deposition. While in theory a judge could permit a party more time to depose a non-English speaker, the need to argue exceptions each time, which in our cases would be for most depositions that we defend and even some that we conduct, could deter reliance on such witnesses at all.

Reducing the presumptive limits both in number and hours would therefore particularly burden our clients' access to key evidence and would require us to routinely demonstrate why the presumption would not apply. In short, altering limits we don't see as necessary, and we think that it would increase the costs of litigation and impede access to justice for low-wage workers.

Second, in employment and civil rights case, defendants typically are in possession of the facts

that plaintiffs need to support their claims, and the proposed rules we believe would further this imbalance by adding additional limits to plaintiffs' access to information.

For example, in employment discrimination claims, plaintiffs need records of hiring decisions, pay scales, names of coworkers who may have heard improper remarks, names of comparators. All of this evidence is in the hands of the employer, and plaintiffs' only tool to get this evidence is through discovery, especially interrogatories and depositions.

Therefore, decreasing the number of interrogatories and depositions will usually be inadequate to generate the evidence that a plaintiff needs to prevail, and this is especially true in cases where we are arguing a joint employer relationship, as I alluded to earlier.

And finally, as you've heard a lot about already today, we are definitely concerned about the new limitations on discovery based on proportionality. Defining the scope of discovery to include, in our cases, consideration on the amount of controversy at the outset puts low-wage litigants at a distinct disadvantage.

For many low-wage worker plaintiffs,

including our clients, the amount in controversy may be relatively small, especially in comparison to the costs of litigating a case in federal court. Clearly low-wage workers will be at a disadvantage in litigating their wage claims if the scope of permissible discovery shrinks in proportion to the monetary value of their claims.

We also believe that this proposed rule is in direct conflict with the remedial purposes of important employment laws like the Fair Labor Standards Act, which drafters intended to facilitate the enforcement of important rights, especially in the case of low-wage workers.

So not only does this rule adversely impact low-wage workers in employment claims, it will cause more delays and more increased costs while the parties litigate more discovery disputes.

In conclusion, typical civil rights and employment plaintiffs can prevail only through the liberal use of discovery. These proposed rule changes, especially the ones that I've just discussed, will subject litigants, especially low-income litigants, to an unfair and often insurmountable disadvantage.

Thank you. I'm happy to take any questions.

JUDGE CAMPBELL: All right. Thank you.

Questions?

MR. FOLSE: To what extent in the work that you described have you been facing proportionality-related objections based on undue cost or expense already under the existing rules?

MS. VAUGHN: That's a great question. Defendants now often bring up, for example, the amount in controversy. This is a case about a small amount of money. The discovery you are seeking is too much. But typically we are still able to get the information we seek, and if not, then -- or the defendants have to move for a protective order. Our concern is that with this rule, it puts the presumptive responsibility -- or the parties have the ability to resist discovery based on something like amount in controversy, whereas now it would be a question for the court.

JUDGE CAMPBELL: Judge Pratter.

JUDGE PRATTER: Have you run into any circumstances or cases where a judge who's been requested to give you more time on depositions because of a translator or an interpreter has refused that kind of a request?

MS. VAUGHN: We have not had that come up ourselves yet. I think my main concern with the

shortening of the deposition hours, and I heard someone earlier say one hour may not seem like a lot, but the idea is that by just shortening it, you know, going from seven to eight hours may not be seen as a big deal. Maybe going from six to eight or six to nine is seen as a larger jump. So I think the issue is more why are we lowering the bar.

JUDGE PRATTER: Well, if your alternative was to speak to your opponent and say you understand that the plaintiff or the witnesses are not English speakers, we're going to have to bring a translator, do you really think that you're going to run into problems with opposing counsel, who is going to say, you know, five hours are five hours? I mean, really?

MS. VAUGHN: I certainly hope not, of course, because we all understand -- I think it's pretty intuitive that an interpreter is going to take longer. They want to get the information, or we want to get the information. It's in the interests of everybody that the interpreter be allowed to interpret for as long as it takes. And I would say that typically we are able to come to an agreement with defendants on the number of hours when an interpreter is involved.

JUDGE PRATTER: Because obviously with what

we are all -- the underpinning of much of this is that it may be not as simple-minded as can't we all get along, but it really does shock me to think that on basic kinds of propositions do we really have to have rules about them. Maybe that's a rhetorical question.

JUDGE CAMPBELL: Judge Matheson, did you have a question?

JUDGE MATHESON: I had the same question.

JUDGE CAMPBELL: Judge Koeltl?

JUDGE KOELTL: I'm really not sure how your issue with respect to proportionality would work out in practice. You say it's now going to be the responsibility of the plaintiff's lawyer to assure that the requests that the plaintiff's lawyer makes is consistent with the scope of discovery, which includes such things as consideration of burden and expense.

Under 26(g), that's already a responsibility of the plaintiff's lawyer. But the specifics of how a request might be too burdensome, not proportional to the needs of the case is really going to require some input from the defendant, who comes forward and says, look, if we were to comply with this request as you've worded it, we would have to search the files of 500 people.

And so that would usually be something that

would be discussed in the context of attempting to work out what the requests are, what the reasonable proportional responses to the requests would be, and only if the parties disagreed with that would it ever come to the court. It just seems -- and you can respond from your own practice -- that it's unreasonable to think that the change in the rule would somehow require the plaintiffs to be omniscient with respect to what the effect of the request would be on the defendant's recordkeeping and the documents and the custodians. It plainly requires some input from the other side. It requires a discussion as to what a reasonable request is in terms of this case. And you would also expect that in the context of a civil rights case that the interests involved, which are part of the factors to be considered, would be taken into account by the parties and certainly by the judge who if you ever had to bring it before the judge would make that determination.

So I don't understand why putting the factors into the scope of discovery would change the actual practice other than to remind people that all of this is still there, which some people don't appreciate when it's not in the first sentence of the rule.

MS. VAUGHN: Sure. And I can speak again from our own experience. I think largely in most -- I think litigators would agree that discovery is a collaborative process. There's lots of discussion that happens before anything is brought to the judge. In the District of Maryland, for example, it's required that there be very extensive discussion between counsel before --

JUDGE KOELTL: We require a pre -- in the Southern District of New York, we also require a conference. We also require the lawyers to first of all discuss and then to have a conference with the judge before you ever make a discovery motion.

MS. VAUGHN: Right. And in the District of Maryland, you're even required to exchange briefing before it goes before the court. So I don't mean to imply that in every single case it's this contentious battle between the two sides and we're unable to come to an agreement. Our concern about the language, the changes in the language of the rule, is that it puts the -- that it allows defendants to resist discovery from the onset based on the factors instead of requiring them to bring it before the court.

JUDGE KOELTL: But can't they do that now? They file an objection to a request for discovery and

they say burdensome, not proportional, not consistent with 26(b)(2)(C)(iii)?

MS. VAUGHN: Right. And I think what the difference is is that here -- well, in our current practice typically there are objections and occasionally some withholding of information. But for the most part, the rules require that you move for a protective order or that before you can resist the discovery to that level -- and our concern is that by moving the language up, it makes it easier for parties to resist discovery and also potentially increases the risk of abuse, discovery abuse.

JUDGE CAMPBELL: All right. Thank you very much, Ms. Vaughn.

Mr. Dyller?

MR. DYLLER: Thank you. My name is Barry Dyller. I'm a civil rights attorney in a small civil rights litigation law firm. Thank you for hearing from me.

I'm an attorney in the trenches of the federal courts. I represent citizens whose civil rights, their constitutional rights, were violated by government entities or government employees or actors. Most of my clients have little or no money. So I make the decision up front what cases are valid, what

cases are provable, what cases have significant societal issues or personal issues, and I mention this because so much of these proposed rules changes have to do with costs, but I think that it is generally plaintiffs' lawyers who weed out frivolous cases because we're paying for the costs, we're paying for the excessive discovery.

If I take a deposition that's not needed, it costs me hundreds of dollars, so I don't do it. I believe these rules will thwart the goals of reducing costs. I know the proposed rules will prevent valid claims from being brought and prevent valid claims from being proved. And this will permit or encourage bad conduct by government actors, which violates citizens' constitutional rights.

I'd like to talk about two of the proposed amendments, not proportionality because I know that's been discussed extensively. I have not heard anyone speak about Rule 4, service. And the proposed change to Rule 4(m) would reduce the time for service from 120 to 60 days. I think this is unnecessary, first of all, because it's always in plaintiff's interest to get the summons and complaints served as soon as possible.

I also think that the proposed rule change

is a de facto repeal of Rule 4(d), which permits waiver of service by mail, the cheapest, most inexpensive, and easiest mode of service, and the reason it does that is because Rule 4(d), if I file my complaint today and put it in the mail today, the other side has 30 days to not respond. By the time I learn they haven't responded, maybe I have 25 days, and I have to really hustle, and it's not always possible. So I think it doesn't do anything except make it more difficult and expensive.

I would also like to discuss the proposed rules change to the number of depositions. I think a limit of five depositions is a disaster. When one considers the need to depose parties, eyewitnesses, supervisors, people involved in making governmental policy, document custodians, medical providers, countless other types of witnesses, five depositions is nothing or in many cases is nothing.

Not only do we need to be able to survive summary judgment, we need to be able to make a convincing case to a jury. So even if I can survive a summary judgment motion, I need people's testimony and if I can't get it, I can't protect my client's rights.

And that applies equally to defendants because I want defendants to take as many depositions

as they want because if they can't assess my case, they can't assess whether to go to trial or to try to resolve the case. I want all information on the table. And this limit I think is just a disaster.

Now there are abuses, but federal judges are more than capable of stemming those abuses. I think the severe limits in the proposed rules presume that attorneys and judges cannot exercise good judgment, and I just don't think that's so. The proposed rule change reminds me of something that Judge Max Rosen of blessed memory from the Third Circuit wrote in an opinion in a different context, and he wrote that formalism is often the last refuge of scoundrels. History teaches us that the most tyrannical regimes from Pinochet's Chile to Stalin's Soviet Union are theoretically those with the most developed legal procedures. And that's from Beck v. City of Pittsburgh.

The more restrictive our rules, the more we rely on their formalism, the less accountable our government, our government actors, and our corporate and individual citizens need be. The more restrictive our rules, the more at risk the most vulnerable citizens are. The more restrictive our rules, the fewer tools at our disposal to prevent corruption or

other law violations and to pursue remedies where bad acts have already occurred. Thank you.

JUDGE CAMPBELL: Mr. Dyller, it seems to me that a limit of five depositions is a disaster only if you can't get more when you need more, and to say that a presumptive limit is a disaster necessarily implies that judges won't exceed it in cases where it should be exceeded. At the same time, you said that judges are more than capable of preventing abuses. One seems to be a vote against the competency of judges to make the right decision on the number of depositions and the other seems to be a vote in favor of judges being able to control abuses. Could you address that dichotomy?

MR. DYLLER: Sure. When I bring a case, I always think I'm right, and from time to time, the judge tells me I'm not. So, when I say I need more depositions, in my experience, I've never had a problem, but that doesn't mean I won't have a problem. And I also think that if there's a change from 10 to five in the rules, that is a message to judges. You know, we want you to limit this. It's also a message to opposing counsel. Here is a weapon at your disposal to limit proof.

So while judges certainly have the

discretion to give me everything I want, it doesn't mean they will, and I think it's a message not to.

JUDGE CAMPBELL: Dean Klonoff.

DEAN KLONOFF: Two questions from your written submission. The first one, you say most cases require more than five depositions, and I'm wondering if you have any empirical support for that. And then secondly, you talk at some length about how bad it would be to have a four-hour deposition. I wonder if you're as vigorously opposed to a six-hour.

MR. DYLLER: I don't have studies about how many depositions. It's really my own personal experience that generally more than five are needed, and I can certainly give examples. I have a case, a wonderful case where there were 27 depositions taken, every one needed by both sides. It was about half and half, by the way.

DEAN KLONOFF: Well, that's a very different statement to say most of your cases than to say most cases.

MR. DYLLER: Well, that's true, that's true. And I am talking from my own experience. In terms of four hours versus six hours, most of my depositions aren't more than four hours, but it doesn't mean that many are -- you know, many are more than that. A

minority, but many.

I also think that it invites abuse. For example, I did have a deposition of a corporate president who after every question paused 25 or 30 seconds. A question like what is your name, and we would wait and we would wait and we would wait. And that was every question, and I waited, and I took the deposition over two days.

You know, I don't really want to have to go to a judge and while I think I would get what I want, I think it's a waste of the judge's time for me to go and say, you know, Mr. Smith, you know, paused a lot, please, judge, make him come back.

JUDGE CAMPBELL: Judge Harris, did you have a question?

JUDGE HARRIS: Thank you. With 4(m), have you ever had any trouble getting an extension of time to perfect service from a judge where you've had trouble?

MR. DYLLER: I never have had a problem. But I do think that it will make me think twice about trying to serve by mail. It is generally how I do serve because it is the most efficient. And it will make me think twice, but, you know, in the handful of times when I just couldn't find somebody or needed

more time, I have not had a problem.

JUDGE CAMPBELL: We've got about one more minute. Judge Pratter?

JUDGE PRATTER: Just very quickly. Thank you for the written submission because it's very helpful to put into context some of the things that you've mentioned. One of them that caught my attention was your suggestion that by reducing the number of interrogatories, the unintended consequence might be that lawyers being reduced in the number they can write will write the ones -- will draft them more broadly and therefore defeat what we're trying to accomplish. I thought that was a fairly interesting comment. Is that how you approach discovery?

MR. DYLLER: Well, actually, if I'm correct, that comment that I made was to the prior proposed rule about limiting document requests.

JUDGE PRATTER: I thought it was about interrogatories.

MR. DYLLER: The only reason I say that is I rarely use interrogatories, so I don't care how many there are personally. I personally think they're useless.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Dyller.

MR. DYLLER: Thank you.

JUDGE CAMPBELL: Mr. Dahl?

MR. DAHL: Good afternoon. My name is Alex Dahl, and I'm counsel for Lawyers for Civil Justice. Thank you very much for this opportunity to participate in the public comment process, and we appreciate your recognition that there is a serious problem. As you know, there's widespread agreement in the bar that discovery is too expensive, that costs are driving the outcomes of cases, and that discovery is being abused.

The overbroad scope of discovery is in a big picture the reason for these problems. We have filed a lengthy comment, so I just want to touch on three points briefly here. I'd like to start with Rule 37(e) because I believe that this is one area in which the public comment process has already achieved clarity on one issue, and that issue is what it means to say willful or in bad faith.

On the first day of the public comment process, the Sekisui case defined willful and made clear that willful means knowing but not necessarily with any culpability. In other words, that phrase has now been defined. Willful or in bad faith means willful.

It's been defined as such to one of the audiences that matters most, the people who make preservation decisions, because their job is to make sure that their organizations don't get sanctioned. And so, to those people, it doesn't matter whether that's the majority rule or most jurisdictions or almost all jurisdictions because if their jurisdiction is where that's the standard, that is the standard that they are going to use to make preservation decisions. So those people, they don't know whether a case is going to be brought or where it's going to be brought, but they know there's a chance that it's going to be brought in a jurisdiction where willful simply means knowing without any culpable intent, and they will make preservation decisions to preserve everything to avoid sanctions in that event.

So, if the committee is going to adhere to its goal, as the note says, to ensure that potential litigants who make reasonable efforts to satisfy their preservation obligations have the confidence that they're not subjected to serious sanctions, then the committee should change the "or" to the "and" or define willful in a way that makes that clear that there is a culpability requirement for that rule.

Now I'd like to address (b)(2). The

provision in (b)(2), the exception to the rule, is an example of rule writing for a very rare exception, but putting that into the rule, that will run a very high risk of being used more than the committee expects it to be.

As we laid out in our comment, we also believe that the exception is unnecessary. The cases that gave rise to the concern have some showing of culpability in the facts of those cases. They also could have been dealt with by what is incorporated in the current draft as curative measures. So the risk of a rule written for a very rare exception being overused does not outweigh the cost -- sorry -- the cost of -- the potential cost of that rule does not overweigh the usefulness of it, and we urge that the (b)(2) exception be removed.

Finally, I'd like to comment on the change proposed to 26(b)(1), and we addressed this in the comment as well, but I'd like to make the observation that it seems to me that the opponents of this change really aren't afraid of proportionality. They're afraid of not having proportionality.

What we've heard today is arguments why proportionality means different things to different cases, which is exactly the point of the

proportionality analysis to begin with, and demonstrates that thoughtfulness given to cases in advance is an appropriate way to gauge discovery because again there's widespread belief that the discovery is overbroad.

So putting that language into 26(b)(1) we think would be a substantial improvement for the reason that it will make people think about their case and their claims and have discovery that is related to the claims and defenses in the cases.

JUDGE CAMPBELL: Mr. Dahl, let me ask you a question on that last point. As I understand some of the comments on proportionality, the concern is this. Where it currently resides in the rule in (b)(2), it is a consideration a court can take in limiting discovery, and in order to invoke it, somebody needs to ask the court to limit discovery, and that's usually going to be the party who's received the discovery, and they then have to go to the court and say this isn't proportional, please limit it.

I think one of the points that has been made is that if we put that right into the definition of the scope of discovery, we now empower lawyers who receive discovery to say, I object, I won't produce it because even though it's relevant, it's not

proportional. And that then in effect creates a new obstacle that those lawyers who don't want to turn over information can invoke that isn't in the present version of the rule. Could you address that?

MR. DAHL: Sure. And I confess that that's a new idea, even though I've read the draft a number of times, a new idea to me because that's not what I understood the change to mean. And I frankly don't understand why that would be a change of burden because it seems to me that in discovery disputes as a pragmatic thing that they're going to arise in the same way today that they would in the future under the rule, which is that there's a request and a response, and one party or the other is going to move either to compel or for a protective order, and I don't understand how as a practical matter moving the language is going to change which party does that or what the burden is.

So that's off the top of my head. I admit that that's a new concept because that is not how I understood the change to mean.

JUDGE CAMPBELL: Professor?

PROF. MARCUS: I note you refer to the Sekisui case and in particular in relation to the use in our rule of willful. I'm right, am I not, that the

Sekisui case contains some fairly strong disagreement with our rule. Is it really the measure of our rule? I'm a little surprised at that idea.

MR. DAHL: The Sekisui case says that willfulness is sufficient for a sanction without culpability standard --

PROF. MARCUS: In the Second Circuit, citing Residential Funding.

MR. DAHL: Correct. And then it says or negligence. And in the footnote that you refer to, it says that the rule if adopted would abrogate Residential Funding with respect to negligence. And I can't give you the *Law Review* answer off the top of my head, but I can tell you that those two phrases together is enough to cause serious concern. And again, my point is to keep in mind the audience -- isn't most judges or most jurisdictions, it is the preservers, the people who are making decisions whose job is to avoid sanctions and whether that creates risk.

But the text of that case, of the Sekisui language says that knowledge without any degree of culpability is sufficient for sanctions or negligence. And I think that for the people making preservation decisions that's it. That's all they need to know,

that there are jurisdictions where they can get sanctioned under that standard, and therefore their option is only to preserve everything and to continue what's happening today, which is a really extravagant amount of overpreservation needlessly.

JUDGE CAMPBELL: Judge Grimm, last question.

JUDGE GRIMM: Mr. Dahl, help me out if you would. If the decision is made to have willful or bad faith, disjunctive instead of conjunctive, is there a definition of willful? Knowing that the definition in the footnote that you've been referring to is very broad, is there language that you believe you would think that we should be well-served to consider to define willful either in the rule itself or in the advisory note that you think gets at the conduct that would cause those decision-makers who may have to act before there's even a lawsuit to have some comfort as to where they can go safely without being fearful of sanctions?

MR. DAHL: Yes. I think the important concept to put in the definition is a level of culpability, bad faith or -- I can't dictate the exact words, of course, but to put that concept in so that it's not simply knowing without any kind of culpable conduct.

JUDGE GRIMM: Some notion of awareness of the consequence in terms of making the information unavailable as opposed to I'm not sleepwalking when I didn't do this.

MR. DAHL: Correct, something that is related to an intention to get rid of that data or information for the purpose of not allowing it to be considered in a future lawsuit.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Dahl.

Ms. Claffee?

MS. CLAFFEE: Good afternoon. Thank you so much for the chance to testify this afternoon. My name is Lily Fu Claffee. I am the general counsel of the U.S. Chamber of Commerce, which is the world's biggest business federation, as well as the general counsel of the U.S. Chamber's Institute for Legal Reform. I'm also the head of the Chamber's Litigation Center, which is a public policy law firm that litigates on behalf of the Chamber in state and federal courts all over the country.

Before I joined the Chamber, I was a litigation partner at Mayer Brown and the Jones Day law firms. I was a government lawyer for four years serving at three agencies, including the Justice

Department. And I've thought about the federal rules as a practitioner, as a government GC, as a corporate GC, and as a public interest litigator who tries to shape litigation policy. But today I'm speaking as a voice on behalf of the Chamber's tens of thousands of members who are affected by the federal rules every day.

I'm not going to rehash the Chamber's technical comments to the proposed amendments, but instead I just want to make one overarching point, and that is the proposed amendments to the federal rules overall in the Chamber's view is a cautious and well-reasoned, carefully balanced effort to address among other things two of the most important aspects of civil litigation that affects the business community today: one, the scope of discovery, and two, document preservation.

In the Chamber's view, the proposed changes represent moderate but positive steps toward clarifying the rules and making them work as they were intended. The committee correctly focused on scope and preservation. These are two areas that are major drivers of litigation costs. And I know that this committee is lousy with data at this point, but allow me to throw a few more points on the pile.

Studies show that discovery costs alone account for anywhere between 25 to 90 percent of litigation costs. Scope helps determine whether we're closer to the 25 percent side or to the 90 percent side. Preservation costs are a little bit more difficult for us to quantify on a broad basis, but preliminary reports suggest that those costs are pronounced as well, and testimony such as Mr. Levy's earlier would confirm that point.

The reason for this is the amount of material, as we've discussed -- other witnesses have discussed is so great today with electronic discovery, and overpreservation for safety's sake is so prevalent.

In my position, I can confirm that preservation exacts a heavy psychic toll on in-house lawyers and outside lawyers who are worried about it not just in the context of sanctions. Discovery costs are also not just an inconvenience or a drag on profits for the business community. Litigation costs have real-world implications for everyone, and I just want to raise three specific harms.

The first is a harm to our global competitiveness. In a June 2013 analysis by Nera Economic Consulting comparing liability costs across

Europe, Canada, and the United States, the analysis found that the United States has the highest liability costs of all the countries surveyed, comprising a full 1.66 percent of U.S. GDP. That figure is 2.6 times higher than the average level of Eurozone economies.

The oversized costs of litigation for companies doing business in the United States undermines our efforts to attract innovators and entrepreneurs to American shores. It puts companies doing business in the United States at a competitive disadvantage at least in this respect to companies that do not, and it does not matter if the company is a U.S. company, although U.S. competitiveness does disproportionately impact U.S. businesses, but it certainly affects the U.S. employee and the U.S. customer.

Whether analyzed in terms of foreign direct investment in the United States or the impact on U.S. businesses, litigation costs have negative real-world impacts on every person that's dependent on or has an interest in the health of U.S. markets.

The second harm I would like to raise falls squarely on the shoulders of small businesses, defined roughly as companies with 100 or fewer employees or in some other contexts companies with less than $10

million of revenue a year. Some circles are accustomed to talking about discovery costs in terms of terabytes and petabytes, but in my opinion, a much larger-scale problem exists with respect to discovery costs, is the effect that discovery costs have on small businesses. They make up the majority of the Chamber's membership, and as the Small Business Administration has reported, small businesses create most of the nation's new jobs, employ half of the nation's private sector workforce, and provide half of the nation's non-farm private real-growth domestic product, as well as a significant share of innovation.

It's estimated that litigation costs small businesses well over $1 billion a year. In one study, one in three small businesses reported that they had either been threatened or sued, threatened with a lawsuit or sued. If sued, more than two-thirds of them said that they would have to pass legal costs on to customers, reduce employee benefits, or delay hiring new employees.

A majority who were sued said their businesses suffered because litigation was very time-consuming, and almost a majority said that litigation caused them to "change business practices in ways that do not benefit customers". That is worse in my

opinion than any petabyte.

The third harm is more fundamental. The fact that it can be economically rational for a defendant to settle unmeritorious claims rather than pay the inevitable high cost of having to defend against them raises serious fairness concerns. It's disappointing that the very rules governing federal litigation can be manipulated to make the process itself more costly than a bad outcome on the merits or to make the process costly regardless of the merits.

So I just want to conclude by commending the committee for focusing on these important areas in a positive although a modest way. We don't expect that these proposed amendments will revolutionize litigation behavior, in part because the amendments are largely clarifying tweaks with court intervention mechanisms built in throughout as pressure valves.

Dire arguments suggesting that the changes will lead to cataclysmic problems are simply not credible. This committee's own memorandum proves its evident caution by laying out a series of more aggressive approaches it could have taken but that it then rejected. The committee obviously deliberated carefully before choosing not to pursue these more aggressive reforms at this time, and it's the

Chamber's view that the committee should not let its measured approach be watered down further by naysayers.

That concludes my remarks, and I'm glad to take any questions.

JUDGE CAMPBELL: All right. Thank you.

Questions? Judge Diamond?

JUDGE DIAMOND: Wouldn't the great majority of your small business members be covered by insurance of various kinds? Do you have data on that?

MS. CLAFFEE: I don't off the top of my head now, but regardless of that, they are affected by litigation regardless of whether there's ultimate insurance coverage. As you know, a lot of deductibles are quite high, and it's also the time and energy and the psychic pain it causes small businesses --

JUDGE DIAMOND: Many of those decisions, though, that you talk about are going to be made by the insurer. I mean, wouldn't it be more complete, wouldn't your analysis be more complete, if you figured what role the insurer and insurance companies play in all this?

MS. CLAFFEE: The rule amendments focus largely on scope of discovery and preservation, and those two areas impact small businesses in a way that

insurance companies can't really ameliorate.

JUDGE DIAMOND: Even if they're paying the legal fees?

MS. CLAFFEE: In terms of disruption and concern, yes.

MS. CABRASER: Thank you. Exxon Mobil's counsel gave us a snapshot a few minutes ago of employees at Exxon Mobil engaged in litigation hold. I believe he said 5100, and that they spent 10 minutes a day. Do you have any comparative data on the percentage of employee time or the percentage of employees that were engaged in record preservation activities back in the day of paper discovery?

MS. CLAFFEE: I did a lot of research on that before I came to the hearing today. I didn't find anything that I felt concrete enough to present to this committee, which is why I said it was harder to measure. There are some preliminary reports. I'm aware of one in particular, but that report calls on further study. I thinK the most compelling evidence on that is testimony like Mr. Levy's where he can say at my company this is what happens.

JUDGE CAMPBELL: Judge Matheson.

JUDGE MATHESON: It seemed to me towards the end of your remarks that you thought the committee

should go much further. Do you have any specific recommendations that the committee should continue to consider as we work through this public hearing process?

MS. CLAFFEE: Yes. The answer is yes. I'd love to submit a personal wish list, but in our written comments, we did suggest a number of ways in which although we are supportive of the proposed amendments as they currently read, we suggested a number of ways they could have gone even further.

JUDGE MATHESON: Well, I know we have limited time, but why don't you just give us your top suggestion.

MS. CLAFFEE: Top suggestion, okay. Well, as a GC myself, my worry with respect to preservation is trigger, scope, and duration. That's what I worry about. I worry about when I've got to do a hold how broad that hold has got to be and how long I've got to leave it in place. These amendments don't go there. I understand why not. I know that the committee considered it and decided not to go there.

Sanctions is the least of my problems, frankly. I'm not going to take actions for other reasons. My ethical duties, what's going to happen to me in court if I spoliate evidence, that stuff is

going to keep me from doing the stuff that I do now to preserve documents, and back-end sanctions are not what's going to drive me. So, as a result of the committee's suggested amendments, I'm not going to change how I preserve. I am a chronic overpreserver, and I'm going to continue to do that. So that's one thing.

On scope, I think that those changes are -- they're good. You can see this committee has pointed out a number of ways in which they're actually not that different from the way the rule currently reads. The big change is moving away from being able to ask a judge for evidence that's relevant just to subject matter rather than relevant to a claim or defense.

Frankly, I think you could narrow down relevance because I can drive a truck through relevance. My opponents in litigation certainly have before. I've never sat down and argued with somebody about whether or not something is discoverable because it's related to subject matter. They always argue that it's relevant, and relevance is a very, very broad concept.

I think that there could be an amendment to the rule that says that it should be material and relevant, and that gets us closer to a place where we

discover discovery is better matched to the small amount of documents that actually get used at trial or that get used in dispositive motions rather than the gigantic amount of paper and electronic paper that ends up getting discovered.

So I think there's not any number of ways to skin that cat, but there's a substantial distance that these rules could go to bring litigation costs under control.

JUDGE CAMPBELL: All right. Thank you very much, Ms. Claffee.

We're going to take Mr. Karl, and then we'll take a break.

MR. KARL: Mr. Chairman and members of the committee, I thank you for the opportunity to speak before you. My name is John Karl and I've been in private practice since 1979. I'm an adjunct professor at American University Law School, but I'm here speaking on behalf of my experiences, and I'm a member of the National Employment Lawyers Association and its local affiliate, the Metropolitan Washington Employment Lawyers Association.

And over the years, I've done practically every kind of litigation, from airplane crashes to medical malpractice to securities litigation. Much of

my current practice is employment discrimination, whistleblower cases, and the challenge of doing those kinds of cases is that you have to show intent. Those cases are different. It's not a question of merely satisfying a negligence standard.

I'm here to speak on behalf or in opposition to the proposals to severely limit the written discovery and the number of depositions that parties can take. As an attorney, I owe a professional obligation and a duty to my clients to prepare for the inevitable opposition to the motion for summary judgment or in other cases to prepare for trial.

And I'd suggest that it's simply impossible to do that in a professionally responsible way under the proposed changes. It has never happened to me in any of the employment cases that I've done where I could prepare the case for summary judgment or for trial doing -- or living under a five-deposition limit, to living under a 15-interrogatory limit. I just don't think it's possible to do it properly. I don't think it will work for employment cases.

I recognize that some cases require only a couple depositions, but in those cases that's all that's going to be taken in any event. And I had a recent wrongful termination case, and one of the

issues was -- and this just underscores perhaps some of the complexity and some of the issues that come up. There was a dispute over who was the decision-maker, who made the decision to terminate, and under Staub v. Proctor Hospital, this required additional depositions.

Obviously I had to take the depositions of the people who I thought were the decision-makers, but I certainly had to take the depositions of the people whom the defendants claimed were actually the decision-makers. And ultimately that judge ruled that that was a matter to be decided by the jury, and the jury rejected the defendant's claim as to who actually made the decision.

You've got all sorts of internal dynamics in a case like this because the defense really was the persons who made the decision to know about the protected activity. The jury didn't believe that explanation. And so, in addition to having to deal with the question of two possible sets of decision-makers, I had to depose the HR people. The defendant in the middle of the litigation started changing its rationale for the decision. That required an additional deposition. And then you've got the whole issue about what was said at a particular meeting and

how you go about proving pretext.

You've got a need certainly as an attorney, you have a need for defining corroborating witnesses. You need to find or want to find conflicting testimony. And it's just impossible to do that without taking a sufficient number of depositions. And so the attorney is faced with a situation where they're not properly preparing or incurring the additional cost of going to the court and asking for additional depositions.

I think in most cases, certainly in most employment cases, the lawyer's requirement of diligent representation -- I mean that the parties are going to have to certainly in employment cases seek permission of the court. It's one more delay, and it's one more thing for the judges to do, and I think the judges certainly have enough on their plates without having to get involved in the process or progress of discovery for cases that are filed before them.

And what this does is it unfairly increases the cost to the parties and increases an additional burden, particularly on the plaintiffs who are bringing the claims, and in a wrongful termination case, you've got a plaintiff who can't afford to pay these additional costs. And I can tell you that no

one on the plaintiff's side wants to incur additional deposition costs, and I can really be sure that I really don't want to pay any deposition costs that I don't believe that I absolutely have to pay.

I think it's going to have the impact of reducing the number of depositions and have the impact of discouraging pro bono attorneys, and it could very easily lead to having more people come in as pro se plaintiffs. I think with respect to the question of the time of the deposition, as a practitioner, I can say I don't know in advance how long a deposition is going to take. And if you're subject to a really severe time limit -- and I think certainly the seven-hour limit is something that we've learned to live with.

You've got a -- there's an incentive for opposing counsel and the witnesses as well to run out the clock. You've got to go through in many cases, certainly in employment cases that are document-intensive, you've got to go over the documents with the witnesses. You've got to ask specific and precise questions about it. And sometimes there's just obstreperous conduct on the other side.

I had one case, a whistleblower case, where the attorney objected to practically every single

question that I proposed. There was an average of 3.2 objections per transcript page. And when you think in terms of the impact that this has, what the attorney was doing was taking advantage of this opportunity to delay the deposition, to take up additional time, and ideally dissuade me from following up on some of the questions.

And I think shortening the time available or allowed for depositions runs the risk of encouraging this sort of conduct in other cases. I would ask that you take into consideration the impact that reducing the number of interrogatories, reducing the number of depositions and reducing the time allowed for these depositions, that you reject the proposed changes. Thank you.

JUDGE CAMPBELL: Thank you, Mr. Karl. Questions?

JUSTICE NAHMIAS: It sounds like many of your cases involved more than 10 depositions, much less five. Have you had any difficulties working with counsel to get the number of depositions that you think you need?

MR. KARL: Frankly, it depends who the counsel is. If the counsel is experienced, then I don't have trouble. But some of the local

institutional defendants often staff their cases with younger attorneys who while they are very competent just don't have the authority to agree to additional depositions.

JUSTICE NAHMIAS: And what about a judge and judicial involvement at that point in the cases that you have now when you're working with those talented lawyers but the ones that don't have authority? What happens then?

MR. KARL: I hate to bother the judges. I do it no more than once a year.

JUSTICE NAHMIAS: So, if you need more than 10 and the lawyer doesn't agree, you just take less than 10?

MR. KARL: No, because I've been able to reach agreement, and where I've needed a couple more than 10, we agreed to 12 or 13, and there's been no problem reaching an agreement with the other side.

JUSTICE NAHMIAS: Then why would you think that if five was a presumptive limit you'd have any less or any more difficulty in reaching agreement?

MR. KARL: Because I've dealt with a number of obstreperous attorneys who have given me a hard time on behalf of the institution that they represent.

JUDGE CAMPBELL: Judge Diamond?

JUDGE DIAMOND: I'm curious that you say that employment cases are document-intensive. Do you really think they are?

MR. KARL: Certainly with the production of emails. I have a Rehabilitation Act case that involved about a foot and a half worth of printouts and emails and I had to go through them.

JUDGE DIAMOND: Well, I don't doubt that you have an occasional case, but aren't the great majority of workplace discrimination cases rather straightforward? I was fired because of my age, I was fired because of my race, very few documents.

MR. KARL: I've had cases where the particular defendant had a policy of not backing up any part of its email system, and so there were perhaps no more than 15 or 20 documents at issue in that case. That's certainly correct that it varies from case to case depending upon what's at issue, depending on how many decision-makers were involved in the process. And the problem is that there's no precise rule of thumb to say that there's never just a few documents or that -- you know, part of the thrust of my concern is that if you look at it from the point of view of how many people do you have to depose, I think you've got to -- it's always in my experience

been more than five, and requiring the litigants to go to the court if they can't work it out just imposes additional burdens on both sides, but it's on the judicial system as well because then the judge has got to read the papers, he's got to decide whether or not the additional depositions are warranted, and so creating the presumptive limit just creates more work for anybody, and it's procedural work rather than work that's related or directed to the merits.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Karl.

MR. KARL: Thank you.

JUDGE CAMPBELL: We will break and resume at 3:00.

(Whereupon, a brief recess was taken.)

JUDGE CAMPBELL: All right, folks. Could you please take your seats? We're ready to get started.

(Pause.)

JUDGE CAMPBELL: Mr. Chertkof.

MR. CHERTKOF: Good afternoon. I'm Stephen Chertkof. I'm a lawyer in Washington, D.C. I'm speaking on behalf of the Metropolitan Washington Employment Lawyers Association, about 300 people who bring claims on behalf of individuals in employment

discrimination cases primarily and other civil rights cases.

The refrain we hear from the defense bar is essentially litigation takes too long and it's too expensive. And yet plaintiffs, the plaintiffs' bar, have no greater interest than getting inside a courtroom and in front of a jury as quickly and as inexpensively and efficiently as possible. Running up the clock and running up the bill are classic defense tactics, not the plaintiffs' bar.

I'm here to focus on two particular issues, although we'll submit written comments on others: the restriction of depositions and proportionality. Professor Miller, Arthur Miller, wrote an article earlier this year called "Simplified Pleading and Meaningful Days in Court" in which I thought he summarized eloquently and at great length the problem of asymmetrical cases, that is, where nearly all of the information is in the control of one side.

In such cases, deal-making and horse trading is virtually nonexistent. In your typical employment case, the employer has access to nearly all the documents and controls in one manner or another all or nearly all of the witnesses. You add on top of that that employers try to expand their reach by broad

claims, sometimes unreasonably broad claims, under Rule 4.2 of the rules of ethics to say every employee or virtually every employee is represented and you can't talk to them even if they're willing to talk to you.

Then settlement agreements and severance agreements are more and more often having gag orders that says in exchange for some money you can't voluntarily cooperate with anybody who's bringing a claim against the company. Only under subpoena can you talk to them. Sometimes these nondisclosure provisions end up earlier where as part of routine paperwork employees agree to nondisclosure and that everything they learn at the company is confidential. We've had such agreements applied to the personnel policies, to internal evaluation forms, saying what's company confidential.

You've heard in other contexts about doctors practicing defensive medicine. Well, I think that's true in employment cases and many probably civil cases in general where there's asymmetrical information. A lot of the depositions and other discovery devices we use aren't necessary for trial. That was one of the points made in the committee's report is that judges say, oh, in criminal cases, people cross-examine

witnesses they never deposed. That's true. I've done that. But you don't get to trial unless you overcome the summary judgment motion, which is virtually inevitable in every such case. It's virtually inevitable. Some defense lawyers have joked it would be malpractice not to file one.

And so we practice defensive lawyering. We take a lot of depositions and other discovery because we have to prove our case on paper before we ever get to trial. And defense tactics are good at hiding the ball. How do you do that? You can do that by not identifying a single decision-maker, by having decision-makers' decisions made by committees. Oh, this one recommended, but that one approved, but this one signed off.

We just had a recent case where the decision was made in a room with 12 people. Whether minutes were kept or not is in dispute, but they certainly weren't produced, and nobody could remember what was said. After deposing nine of them, we got bits that leaked out about what was said as the reason for the firing. And that was before we deposed anybody for comparative evidence or for me-too evidence, other people had brought claims, or to get things like how are the emails kept and destroyed and things like

that.

In a case where one side has all the information, they have no interest in offering to let the other side have any more discovery than the rules entitle them to. My experience -- I heard Mr. Karl testify -- my experience and other people I've talked to even during the break is you never get agreement to exceed the number of depositions in the rules from opposing counsel.

The nice ones laugh and say, yeah, I'd love to if I could, but, you know, my client would fire me if I agreed to give you an extra three or four depositions. And I've never in my experience seen somebody sanctioned for arguing that the limit in the rules is reasonable. Even when we win those motions, there is never a downside to the defendant. In fact, there's an up side because delay happens.

Every time we go to court, every time we file a motion to compel or a motion to exceed depositions, it's months and months of delays, sometimes years, which doesn't suit plaintiffs. It runs up the costs. It doesn't make things more efficient.

Under the current rules, active judges who want to be involved in discovery early on, who want to

be very involved and have reports and manage discovery, can already do so. But for many other judges where discovery motions are the unloved stepchildren who aren't gotten to very quickly, it is just a delay. Every time you go to the courthouse it adds time and money.

Here is what the rule on depositions looks like to me. The empirical data in the report was that around 80 percent of cases already, civil cases in the federal court, are done with five or fewer depositions per side.

So this is what it looks like to me. Suppose our state insurance commissioner said, we did a study and concluded that 80 percent of people only have five or fewer doctor visits per year, so we're going to pass a rule that says insurance companies only have to reimburse for five doctor visits a year. Now, of course, if you need more, you can ask for more, but it's up to their discretion.

And there's no analysis of whether the other 20 percent of cases and discovery are more complex, require more depositions, properly require more, none at all. All we get is anecdotes. So back to the example, that the insurance company says, well, I can tell you an anecdote about a claimant or two or three

that abused the system and was a hypochondriac, saw too many doctors. Great. I'm sure in any system there is abuse. But that's not the rule. There's no empirical data whatsoever here that says that the deposition rule needs to be changed. In fact, if 80 percent are already coming in at five or fewer per side, it's working.

If I can have one minute on proportionality. One of the problems we have in civil rights cases is that there's a tendency to view the value or the burden of discovery in monetary terms only. And that means in practical effect is that an employee who's earning minimum wage or slightly above and is getting paid 20- or $25,000 a year and has lost their job for discriminatory reasons, their claim is worth less in monetary terms maybe than somebody who's earning $100,000 or $200,000 a year.

While the rule, the proposed rule, suggests that other values come into play, I fear that it will be simply dollars and cents. Why should we spend $10,000 producing emails if the guy was only earning $20,000? And what will happen is people at the lower end of the pay scale whose entitlement to injury is just as valid and just as important under these private attorney general statutes, their claims get

much less discovery, which will translate into a much higher rate of dismissal on summary judgment.

I think I'm over my time, but I would welcome questions.

JUDGE CAMPBELL: Thank you.

Judge Koeltl?

JUDGE KOELTL: Thank you. You know, NELA has been very helpful to the committee both in terms of input into the proposals as well as in developing the employment protocols for early discovery in employment discrimination cases. So we really appreciate and respect NELA's views.

The one thing that you said I'm not sure is accurate, that there's no empirical information that suggests there's a problem in cases where you have five or more depositions on a side. In the report that accompanied the rules, proposed rules and Advisory Committee notes, we noted that in the FJC study when both plaintiffs and defendants take more than five depositions, about 43 percent of plaintiff's lawyers and 45 percent of defendant's lawyers report that they consider the discovery costs to be too high relative to their client's stake in the litigation.

Now we can't draw a causal relationship between that because there are other forms of

discovery that are still going on. On the other hand, it certainly is a source of concern when depositions get to be more than five and almost 50 percent of the lawyers say that the costs in the litigation are disproportionate to the stakes involved.

You know, similarly, when the NELA lawyers were surveyed with the assistance of the FJC, the NELA lawyers thought that there was a problem with disproportionate litigation. Eighty percent of the NELA lawyers thought that in small cases the amount of the discovery was disproportionate to the stakes in the case. And in larger cases, it was about 50 percent of the lawyers thought that the costs were disproportionate.

So I'm not sure that it's correct to say that there's no empirical data. My question really is don't you think that the Advisory Committee note to the five depositions makes it sufficiently clear that the judge ought to look carefully and that there will be many cases where just as the presumptive limit of 10 was insufficient, there will be more cases where the presumptive limit of five is insufficient.

So the judges must increase the number, must grant the request for an increased number. In even more cases, they've been doing it before, under the 10

limit, when they're faced with a five limit. But they should look at it.

MR. CHERTKOF: I fail to see how it's more efficient to have ever more motions going back to the judge to get depositions in fewer than 20 percent of the cases. On the committee's report on page 267, it expressly said there was no proof that depositions caused dissatisfaction or were even the major cost of discovery battles. So there is no empirical evidence that that's what we're relying on in this.

But let me go back because I again say that the problem with the expensive litigation and delay happens in two places primarily: the early motion to dismiss, which is fast becoming routine, and that can be fixed by -- it all can be changed by just changing Rule 8 -- this committee can do that -- and the summary judgment.

And one of the ways with summary judgment is the hide-the-ball shell game. If we're going to be living in a world where the presumptive limit is five and we have to file a motion and wait potentially for months to get a ruling, and we're afraid to use up our five, not knowing if we're going to get seven or eight or 12, how about if the defendant had to produce early on in discovery all the affidavits it plans to use for

its summary judgment motion? So now we know what the universe is we have to aim for, which people whose opinions matter, which people we're going to have to cross-examine on paper because we don't get to them at trial if we don't get past summary judgment. Pipe that up early, or make Rule 56(d), which is the rule that allows you to get additional discovery after seeing the summary judgment motion, not something that is very, very rarely granted and hard to get anything out of but the routine, that when the defendant has held you to five depositions because they haven't agreed to more, then you should almost presumptively get more discovery once you see what they put in their summary judgment motion, the people you haven't talked to, people haven't examined yet.

But what's happening here is we've got all the information and we've talked to our witnesses. We're not going to let you talk to them informally. We're not going to let you talk to them off the record. We're not going to let you see any documents unless you fight for them. And by the way, we're going to put in summary judgment stuff that you haven't seen and people you haven't talked to.

JUDGE CAMPBELL: We have a number of folks who want to ask questions, but we are about 13 minutes

into your discussion, and I fear if we go much longer we're going to shortchange those at the end of the schedule. So thank you very much for your comments, Mr. Chertkof.

And let's hear from Ms. Klar.

MS. KLAR: Thank you. Mr. Chairman and members of the committee, my name is Jennifer Klar. I'm a partner at the civil rights firm of Relman, Dane & Colfax here in Washington, and I'm the secretary of the Metropolitan Washington Employment Lawyers Association. And I thank you for hearing my testimony today.

My testimony will focus on proposed Rule 37(e), which would establish a new standard to govern remedial measures and sanctions as a result of spoliation. I have four principal concerns about the proposed rule. First and primarily, it will impede the search for truth. Second, it changes the substantive law of multiple Circuits. Third, it will disproportionately hurt civil rights plaintiffs. And fourth, at a minimum, it should not apply outside of the context of ESI, which is provided as the justification for the change.

First, the proposed rule focuses on the mens rea of the spoliating party instead of the search for

truth. The point of civil rights cases is the search for truth. Did the defendant violate our civil rights laws? Instead of focusing on the mens rea of the spoliating party, the question should be whether a remedial measure or a sanction is necessary to counterbalance the damage to the search for truth that was caused by the spoliation.

This is not just my point as a civil rights attorney. The D.C. Circuit has repeatedly held this, as have other Circuits, including the Second, Fourth, and Sixth. As the D.C. Circuit explained earlier this year, and this is a quote, "Where the evidence is relevant to a material issue, the need arises for an inference to remedy the damage spoliation has inflicted on a party's capacity to pursue a claim whether or not the spoliator acted in bad faith."

Negligence or gross negligence would be a more appropriate standard. The committee's comments say that the intent of this proposal is to protect parties who act reasonably in preservation. This goal is achieved by a negligence or a gross negligence standard because if a party has acted reasonably, they haven't acted negligent or grossly negligent.

Because the proposed willfulness or bad faith standard is so difficult to prove, the

destruction of evidence will go unchecked and it creates a perverse incentive to destroy bad evidence. Moreover, disallowing specifically an adverse inference instruction, which is in the comments, without willfulness or bad faith is specifically incorrect because an adverse inference is a remedial measure, not a sanction, as suggested by the comments to the proposed change.

Again, the D.C. Circuit has held that issue related sanctions like an adverse inference instruction are "fundamentally remedial" rather than punitive and are properly imposed when the destruction of evidence has "tainted the evidentiary resolution of an issue." Thus the focus should be on the effect of the spoliation on the search for truth and not the intent of the spoliating party.

Second, this rule represents a substantive change in the law of several Circuits, not a procedural change. The comments recognize there is a Circuit split on the substantive law and then they resolve it. And this should not be the role of the Federal Rules of Civil Procedure. It impedes the role of the federal judiciary also and individual federal judges and Circuits.

The comments foreclose reliance on inherent

authority and state law, also changing substantive law, and disregard established EEOC regulations requiring the preservation of personnel records.

Third, the proposed rule raises grave fairness concerns, especially for civil rights plaintiffs. In civil rights cases, documents that can substantiate discrimination where it occurred are largely in control of the defendant and not the plaintiff. For example, hiring and personnel documents and documents about comparators in an employment case are controlled by the employer.

If the employer destroys that evidence, the plaintiff, the court, and the public are all unable to determine the truth of what happened. In the words of Judge Lamberth, former Chief Judge of the DDC, "Plaintiffs alleging discrimination should not be forced to prove their cases based on defendant's choice of files and records due to spoliation."

The proposed rule sets out a standard that will be hard for civil rights plaintiffs or *any* requesting party to meet because the rule places the burden on the requesting party to show both substantial prejudice and the mens rea of the spoliating party.

Obviously it's hard to demonstrate

substantial prejudice when you don't know what was in the documents. You can't prove there was a smoking gun if you don't know what the document said because it was destroyed. That gives a perverse incentive to fail to preserve or destroy. It's hard to prove willfulness of bad faith of someone else because the knowledge of what was done and wasn't done is in the hands of the spoliating party. So the burden should be on the party that destroyed the evidence that we recognize it was obligated to preserve.

Finally, while I oppose changing the rule altogether, I would strongly suggest that if adopted it should only apply to ESI and not paper documents. The concerns expressed by the committee relate only to the cost of ESI preservation. The comments say electronic documents would likely be duplicative where alternatives exist. And while I disagree with that with respect to ESI, it's certainly not true with respect to paper documents that are frequently irreplaceable and important to prove discrimination: handwritten interview notes, application forms, comments on application forms that can be crucial to showing discriminatory intent.

Allowing more discovery or shifting attorney's fees is not a solution. If documents are

destroyed, many times additional discovery will not replace them, especially for paper documents, and shifting fees can't undo the harm to the search for truth and the requesting parties' ability to prove its case.

In sum, I urge you to reject this rule, leave the spoliation law as it now stands. If some version of the amendment is adopted, it should reflect a negligence standard or gross negligence standard rather than bad faith or willfulness. And additionally, the rules should be restricted to ESI.

I'm finished with my presentation on spoliation, but I'd like if I may have 30 seconds to provide an example with respect to the deposition rule that was discussed.

JUDGE CAMPBELL: Sure.

MS. KLAR: I recently had a case, an employment case where there were many witnesses disclosed by the other side on their initial disclosures, and I asked for additional depositions because they had identified these witnesses. That was very, very hard fought and litigated and opposed, briefed, et cetera, argued. And what I was allowed to get was two hour depositions where I had to pay for my transcript and the transcript for the other side

because they said that the depositions were unnecessary. But then they put those witnesses on their trial witness list and called them. So obviously they opposed and then intended to call the witness, which is a gotcha that will happen more and more often if the number is reduced.

The judge, who I think in the end was fair, pushed very hard on why is your case so different from the standard case, so special that you need extra depositions when you don't need them in another case. And that's just going to be more and more difficult with the normative effect of a rule where you have to prove your case is really more complicated, more difficult, bigger in order to get the depositions you need to depose people that will be put on at trial.

JUDGE CAMPBELL: Thank you, Ms. Klar.

Questions?

PROF. MARCUS: Regarding Rule 37(e)?

MS. KLAR: Yes.

PROF. MARCUS: As you've heard today and we've heard also, there are a number of reports that currently preservation is a very large and expensive burden for a significant number of enterprises. And I'm wondering, do you think those reports are inaccurate, or is the notion that that's the way

things should be?

MS. KLAR: Well, let me respond to that in two ways. First of all, the rule is and has always been under the current 37(e) that documents can be destroyed in the normal course. So there's no reason to just preserve everything. Under a normal destruction policy, they can be destroyed.

So the rule only attaches when there's a reasonable belief that there would be litigation, which should not be everything. And the proposed rule changes don't change that because while there was a discussion in the comments about possibly clarifying what has to be preserved, in fact, that's not the change that's being made here.

So I don't think the rule as it's written really goes to that problem, and instead we get a type one, type two error situation where in excusing negligent and grossly negligent conduct in order to make sure that defendants who -- or companies who behave reasonably aren't punished, when of course negligence, gross negligence, isn't reasonable, the search for truth is impeded.

So even if there is overpreservation right now, I don't think that this rule changes that without a clarification of what has to be preserved and also

creates a harm in the search for truth.

JUDGE CAMPBELL: All right. Thank you very much, Ms. Klar.

Mr. Woodfield?

MR. WOODFIELD: Good afternoon. My name is Nicholas Woodfield. I'm a principal at the Employment Law Group, a Washington, D.C.-based employment law firm. I'm also president of the Virginia Employment Lawyers Association, which is the NELA affiliate of -- or the Virginia affiliate of NELA.

JUDGE CAMPBELL: Could you pull the mike up just a little higher, please? Thanks.

MR. WOODFIELD: Yes, sir. I'm here today to speak about Federal Rule of Civil Procedure 4(m) and the proposal to shorten the time for service from 120 days to 60 days. There are a couple of concise points I'd like to raise.

First, it's problematic for employment law cases. Employment law cases have additional factors that are unlike other cases wherein you have frequently people coming to you at the last minute because they got a right-to-sue letter. Then they show up and say, I have to file this in the next day or two. In those situations, you're very often dealing with someone where you're trying to protect

their statute of limitations, but you cannot necessarily do the type of due diligence that you'd like to do. In those situations, you can prepare pro se complaints over your own name or you can file it. And while you have an admittedly lower standard, you've got to perform your due diligence. And to perform that due diligence, you have to go out in a situation where again, as Mr. Chertkof said, the evidence very often is asymmetrical, and who controls it?

In that situation, that 120 days can be used very quickly. You can also run into that situation of trying to get FOIA information waiting for results from other agencies and trying to get witness statements. In the False Claims Act area in which my firm also practices, you run into an interesting situation wherein when you file the government is immediately involved. The U.S. attorneys immediately are involved. At that point, to protect your client's interests and to stop the case from going out from underneath the seal order, to avoid violating the seals, the plaintiff's attorneys at that point are relegated to the back seat.

We can be in the back seat for six months to years depending on how long DOJ or the U.S. Attorney's

Offices may take. And at the end, they may simply say, we're not going to take a position on this or we're not going to intervene or we're going to intervene. Intervention occurs in roughly 18 percent of the filings.

On those other cases, we can be finding out 18 months down the road that they've spoken to any number of witnesses and got any number of documents, and at that point we have 120 days to FOIA documents potentially to find out who we may be able to speak to at that point. To shorten that in half is to put us in a difficult situation where you've halved our time to try and get the information necessary to come forward with very good cases.

Now not all cases are spectacular, but we try and put forward the very best that we can. Importantly, though, when we look at our cases, we have to make a decision at the beginning based on the evidence. And if we have finite evidence in front of us, we have to make less guided choices.

Many of these cases, the False Claims Act cases, are turned down by the government not because of the merits of them but because of internal politics at the agency or because of some issue or concern with the AUSA that doesn't stop the case from proceeding if

it goes forward as represented by individual counsel, but it puts the individual counsel at an incredible disadvantage in that they really can only prepare their clients and prepare their cases very, very briefly.

My suspicion, and this is my suspicion as Nicholas Woodfield, attorney who practices in Washington, D.C., that part of the impetus for this reduction is to shorten the time that these cases go from filing date to terminal date. And I would say to a degree that this is pointing at the wrong creature that's causing these problems. There are many reasons for the delays in these cases. There are many reasons for the length of federal dockets. One of them is the Iqbal and Twombly standard that becomes the de rigueur standard for -- or the de rigueur motion to dismiss motion that comes up in every case in the summary judgment.

In the last couple of years, in the last two years, in this particular jurisdiction, I have waited 18 months for a motion to dismiss ruling, and I have waited three years for a summary judgment decision where we had to mandamus the D.C. Circuit to get a decision on the summary judgment.

To say that we need to reduce 120 days to 60

days to speed these things up is pointing at the wrong creature. The reason that we are having this expedited or this shortening is I presume to expedite the process. I don't think that's it. Moreover, I think on a simple cost benefit analysis, there are times where when we have to file a case after we've been able to do a little more due diligence, we determine that this may not be the case to do and you voluntarily withdraw.

If you had to serve within 10 days, we would serve. There would be no voluntary withdrawal, and it would be proceeding forward. This gives us a chance to finalize when there is a short limitation or there is some other pressure on the case for us to pull back. That 120 days is of great value. And there is no cost to defending or not being served and the case being dismissed out.

If, however, the time is shortened, what we end up doing is having to go in those cases is trying without guarantee that we're going to get additional time filing motions, which creates more load on the dockets and potentially causes more issues with the courts. So I think we essentially on this rule have something that isn't broken and I don't think needs fixing. Unless there's any issue, I would yield my

roughly remaining one minute to Mr. Chertkof because I thought what he had to say was very astute.

JUDGE CAMPBELL: Well, thank you for that generous offer. Let's see if there's any questions.

(No response.)

JUDGE CAMPBELL: Okay. Thank you very much for your comments, Mr. Woodfield.

We'll come back to Mr. Chertkof at the end if that one minute remains.

(Laughter.)

JUDGE CAMPBELL: All right. Mr. Seldon?

MR. SELDON: My name is Bob Seldon. I have been practicing law for 37 years as a member of the District of Columbia Bar. And the primary place that I practiced have been in the federal courts here in the United States District Court and in the D.C. Circuit.

Several of my colleagues asked me to speak about the issue of the number of depositions and where the default rule would go to five and speak about it to the committee, and I think they did it because my background I think gives me some sort of unique experience.

I began as a plaintiff's lawyer for the federal government doing antitrust work. I became a

defendant's lawyer for the federal government as an Assistant United States Attorney here in the District working for former Chief Judge Lamberth and then a colleague of mine when he became the chief of the Civil Division, Judge John Bates. And we were entrusted with defending the federal government, largely during the Reagan Administration, from all sorts of attacks and in all sorts of trials.

It gave me broad experience, enough so that at one point I went next to head the litigation department of a corporate law firm, where I defended -- represented I should say for the most part financial institutions. Some of them are large enough to be on Main Street, and some of them are small enough -- I'm sorry, large enough to be on Wall Street. You can tell I messed that up. And some were small enough to be on Main Street. And then I went to open my own plaintiffs' law firm where I now work.

I think in my observation the great thing about the United States judiciary is that you can walk into court with anybody and you can say, I don't know what's going to happen with your case. But here, here as opposed to any other place on earth, you're going to get a fair shake, I can promise you that. And I've seen that for my many years of experience. I've seen

that as the rules have evolved. I've seen the concept of disclosures, and whoever came up with that idea for my money deserves to get the Nobel Peace Prize. Not the peace prize, but the prize.

I'm going to give you an example or two about how the five deposition limit rule would work if in my view this awful rule were put in place. I represented in one case a fellow who blew the whistle on the internal affairs division in the D.C. Department of Corrections and they paid him back by phonying up a report that he beat up a first degree murderer.

Before we could get to the people, before we could get to the defendants, before we could get to the investigators, we had to do the witnesses. We started with the two who said they saw him do it. And those depositions showed they really didn't say that until they were put under investigation.

There were nine more people who said, you know, they didn't see anything. And we sort of sorted our way through, saw from some of the reports that the first eight didn't see anything because they couldn't see anything. And we get to the ninth guy and I said, did you see anything, and he said no. And I said, could you. He said, sure. I said, what happened. He

said, that man did not beat up the prisoner.

That's before we could start with the real depositions. I have another case where a fellow was intentionally exposed to asbestos at the workplace by the Department of Commerce. There were many, many witnesses, and there was a report that went to the President of the United States that confirmed this. We had to prove that case with many, many witnesses or would have had to had we not had in the third witness of what was going to be 10 or more, when asked about this, said everybody knew he wasn't given medical monitoring equipment. Everybody saw him coughing up blood at the workplace. And I said, do you know that the supervisor knew that and wouldn't help him out. She said, sure. We were both watching him coughing up blood one day, and I said, why don't you transfer him to my staff, I've got an opening. And she said no.

Now this first fellow is a Gulf War vet and a Marine, and he's driving a FedEx truck today. And if I didn't start his case five years ago and I started it next year, I'd have to say, Emmett, you know, there's a lot here and I don't think you did it. But there's a new presumptive rule, and if I can't talk a federal judge into giving us more than five depositions, I don't think you're going to get that

fair shake.

And if I say to the next guy, Dion, I know you're a Gulf War vet and I know your lung tissue is so brittle you are never going to see your young children grow up, but I'm here to tell you there is a new presumptive rule, your case is not proportionally big enough, and I may not be able to tell a federal judge and convince them to let me take more than five depositions.

Now I am here to tell you that that rule is beneath the dignity of the United States Courts to put in place. And I am just here as one practitioner to ask you don't ever make me go to court and have to say to a client I don't think these courts are going to give you a fair shake. I just don't think you should do it. Thank you.

JUDGE CAMPBELL: All right. Thank you.

Questions for Mr. Seldon?

(No response.)

JUDGE CAMPBELL: All right. Thanks so much.

Mr. Williams?

MR. WILLIAMS: Thank you, Mr. Chairman. My name is Marc Williams. I'm president of Lawyers for Civil Justice, and I'm a practicing lawyer in Huntington, West Virginia, with the firm of Nelson

Mullins Riley & Scarborough.

You've had the benefit of LCJ's written comments, and Mr. Dahl and Mr. Levy have expanded on those. I'd like to if I could give a little bit of a different perspective for those LCJ members who are practitioners in the federal courts, essentially talking about my experience over 28 years having a practice that was primarily in the federal courts and various districts. And I would like to direct my comments to the proportionality component of Rule 26, which is in the proposed amendments, and the presumptive limits on discovery. And if I could, I'll deal with the proportionality change first.

A lot of the discussion, and I've been here since this morning, has been pointing out the fact that proportionality as it exists in the current rule and being moved would allow the courts to have the benefit and the lawyers and practitioners to have the benefit to focus on that issue early in the case when we are preparing our discovery plans.

The most recent case that I litigated the current iteration of proportionality unfortunately -- and I might add is the only time that we had to go to a magistrate judge on that issue -- unfortunately got bogged down in the whole question of whether or not

the discovery that was being requested was reasonably calculated to lead to the discovery of admissible evidence.

Even though it's clear from the language of the rule that that's not what it was intended to define as scope, by eliminating that language and pushing proportionality into the scope of discovery, it will allow us then to focus on proportionality as it relates to the discovery that is necessary for the type of case that is being prepared.

Ultimately, if you go back to the '93 amendments and go forward, the efforts that these committees have made in trying to amend these rules has been to try to force lawyers and judges to not make the same mistake generals have made of trying the last case -- or discovering the last case or fighting the last war, but to focus on the facts that are in dispute, the issues that have been raised by the pleadings, and craft a discovery that is necessary for that.

This amendment would allow that to happen and would give us the tools to make a decision. And frankly, to the extent that there are objections about proportionality and the prospect that it could end up eliminating meritorious claims, I think that the way

this committee has drafted the proposed rule has provided an excellent balance to guarantee access to justice, to deal with what most lawyers from plaintiffs and defense would acknowledge, and that is discovery is too expensive and oftentimes too extensive. It provides a good balance for that so that at the beginning of the case we can sit down lawyer to lawyer and perhaps with the judge if that's the way that they do that in that district and craft a discovery plan that would incorporate and consider proportionality in relation to the case.

So, to that extent, we would avoid what I see unfortunately often, and that is cases that are resolving because of the costs of discovery or, as described by Mr. Mason in his comments, discovery that is used as leverage not to find the facts of the case but to exercise leverage points to try to force a resolution.

Good lawyers, very smart lawyers, have recognized that most of the work that takes place in a case is in the discovery process, and they use discovery, especially with the explosion of electronically stored information, to demand information as a result of which parties are then forced to make judgments as to whether or not they are

willing to go forward to test the merits of the claims or whether they have to make an economic decision in that resolution. This amendment would put us back in the position of actually using discovery for the purpose of searching for truth, which I think is the intent.

In the last minute, I'd like to talk about presumptive limits. In the 20 years that I've been practicing since presumptive limits were put in place, I can tell you that the '93 amendments on interrogatories, for instance, eliminated many of the abuses that I had grown up learning about in terms of written discovery. And frankly, over 20 years, whenever there was a question about the number of interrogatories, the number of depositions, the length of a deposition, I can only think of one case in 20 years in handling hundreds and hundreds of cases in the federal courts where we were not able to work out an agreement, whether it was horse trading with opposing counsel in terms of, well, you want this, I need this, why don't we agree on that, or just saying, okay, you need more than 10 depositions. Why don't we -- tell me how many you need and who you need to depose, and then we can make a judgment on that.

It's almost invariably resolved by

agreement. And on one occasion, when we had to go to the judge, the judge was able to work out an agreement once again by asking the parties to define exactly the type of deposition schedule that they needed.

The vast majority of cases in my experience -- and I've handled a lot of big cases and small cases in federal court. The vast majority of cases are going to fall within the presumptive limits that are set out in these amendments. But I trust the judges to know that if I make a request and can justify my request for something that falls outside of those limits that I'll get that.

That's the comments I wanted to make, and I'll be happy to answer any questions.

JUDGE CAMPBELL: Judge Oliver.

JUDGE OLIVER: It sounds like you haven't had any problem with the 10-deposition limit.

MR. WILLIAMS: None.

JUDGE OLIVER: And so you haven't had to fight over someone getting too many or what have you.

MR. WILLIAMS: Only one time in 20 years, Your Honor. And I can't say that most of the cases that I've handled -- because as I get longer in the tooth, the cases get more complex. That's what we all hope as we advance as experienced lawyers. But I can

tell you that most of the cases I see across the platform in our firm fall within that, and to the extent that they fall outside of it, it usually is resolved by agreement.

JUDGE OLIVER: So you're not here to argue for a five-deposition limit based on your experience.

MR. WILLIAMS: I think a five-deposition limit is appropriate because I think that falls within what most cases that are in the federal courts are actually using. For instance, the note that came with the proposed amendment indicates that the way that that five-deposition limit was identified was because that should handle the majority of the cases that fall in the federal courts.

JUDGE OLIVER: But it's not based on the fact that you've had a problem with the prior limit.

MR. WILLIAMS: I believe that five is a good default from which we can start, and I can tell you that the 10-deposition limit that we currently have has not been a problem in cases where it's justified to ask for more than that.

I can tell you this, though. I've never had a case at the end of the resolution that I thought, gosh, I wish I'd had more time for discovery. Lawyers will expand the discovery to the outside limits. It's

like air in a bottle. And at the beginning of a case, if I know that the presumptive limit is five, what I'm going to be forced to do is sit down and think about who do I need to depose in this case, what are the sorts of witnesses I'm going to need to identify so that I can then have a plan in place as opposed to prior to the '93 amendments when it was open season and we could just hopefully within the time limited for discovery take as many depositions as possible.

Five makes sense as a starting point. Ten has not been a problem for what we currently have. And I trust the judges that in appropriate cases that they will allow the parties to take more than five if necessary.

JUDGE CAMPBELL: Parker?

MR. FOLSE: I'd like to get your reaction to some themes that have come through in some of the comments we've heard today. There's been an argument made that by taking the proportionality factors and moving them explicitly into the scope definition in Rule 26 that what that will do in practice is to provide a new range of tools that can be used as objections by people who want to resist discovery, which will in turn lead to a lot of satellite litigation in front of federal judges who are already

overworked and already underfunded, which will in turn lead to delays in the resolution of cases on the merits. And as someone who has been in the trenches of litigation and has seen the way people use objections, I'd like to get your reaction to that.

MR. WILLIAMS: Well, if I make a proportionality objection, which we're entitled to do now, and on occasion we do based upon looking at the nature of the claims, the scope of the questions that are being asked, particularly let's say in a 30(b)(6) deposition notice where oftentimes the net is cast very broadly and I'm trying to narrow it down to the actual issues in dispute.

To the extent that I make a proportionality argument, it seems to me that I have the responsibility to make that showing as to why it's not in proportion. I understand that the offering or the demanding party has certified that under 26(g), under those circumstances, they believe that it is proportional to the needs of the case. If I'm going to make an objection on burdensome or privilege or proportionality, then that falls to be my responsibility. And I suspect that the magistrate judges or the judges that hear that are going to demand me to make that showing.

So I'm going to have to think about that as to how I can justify limiting that within the parameters of how proportionality is defined in the proposed amendment, which gives pretty good guidance to me as a practitioner on the showing that I'm going to have to make in order to prevail on that issue.

Ultimately I suspect proportionality objections are going to result in a narrowing or a focus of the discovery, with an understanding that once that is completed, we would give them the right to revisit that issue, much in the same way we do, for instance, when we're negotiating 30(b)(6) notices of saying let's narrow it down to these topics, let's have witnesses testify to those, and then after you've heard those, if you need additional -- if you want to broaden it from that point, let's come back and revisit that issue.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Williams.

MR. WILLIAMS: Thank you.

JUDGE CAMPBELL: Mr. Relman?

MR. RELMAN: Good afternoon, Mr. Chairman and members of the committee. Thank you for the opportunity to testify today. My name is John Relman. I'm the managing partner of Relman Dane & Colfax.

And our firm specializes in litigating civil rights cases. Our focus is on discrimination cases in the areas of fair housing, fair lending, unemployment, and disability discrimination, and my comments are based on more than 25 years of experience litigating literally scores of civil rights cases both at the firm and before that at the Lawyers Committee for Civil Rights, where I worked before founding the firm.

I want to focus my remarks in the couple of minutes that I have on concerns that I have about two of the changes, and the first is the proposed reduction in the number of depositions, and the second is the proposed amendment to Rule 26(b) regarding the scope and burden of discovery.

First, with respect to depositions, lowering the cap, the presumptive cap, on the number of depositions is a change that I believe in my judgment in the context of individual civil rights claims will dramatically tip the balance in favor of large companies and against individual plaintiffs. The restriction is going to make it much more difficult for plaintiffs to prove the case, and it's not going to have the same effect on defendants. And I want to take a minute and explain why, and I'll focus my comments specifically on the civil rights

discrimination context.

Discrimination cases today are rarely proven by a smoking gun, but rather they depend upon inferences that are drawn from circumstantial evidence. The key to any individual case is proving pretext, that is, that the asserted reason or defense is not true, it's a lie. And the way that you test that to determine if it's pretext is that you've got to test the reasons that are given and explore the treatment of similarly situated individuals to the plaintiff so that you can show that individuals not in the protected group, people who are not African American, someone who is not a woman or someone who is not Hispanic, for example, is not treated the same way, that the excuse doesn't apply.

Establishing the evidence of how similarly situated folks are treated requires multiple depositions, and the reason for that is very simple. Ethically, plaintiffs' attorneys are often barred from informally speaking with employees of companies. We've got to rely on formal depositions to explore their knowledge and testimony.

If multiple reasons are given by a defendant for why an adverse decision is made, for instance, why he didn't get the housing, why he didn't get the job,

the only way we can test the truthfulness of that statement, the only way we can do it is to identify potential similarly situated folks, and we've got to depose them. We've got to test out and ask them questions. That frequently requires well more than five depositions, and in fact, it may take a deposition or two just to determine who the actual decision-maker was in the process, who was the person who actually sets the rules and made the decision.

So for this reason, this restriction in this critical discovery tool of depositions is going to weaken the ability to prove meritorious discrimination cases, and it's ultimately in my view going to undermine the enforcement of civil rights laws.

In contrast, this change for depositions doesn't hurt the defendant because they have access to all of their own employees. They can conduct their own informal discovery without restriction. They don't need depositions to test that out or to check for whether there are actually similarly situated folks. They only need to depose the plaintiff. That's one deposition, and that's it. And because the plaintiffs bear the burden of proof, the defendants have more to gain by blocking discovery. So they're going to have an incentive to try and limit the

depositions to the bare minimum that are there. So defendants have little to lose by lowering that limit. Plaintiffs have a lot to lose.

Second, there is no risk of an abuse or overuse of depositions under the current system by plaintiffs because most of the plaintiffs are indigent and can't recover the costs of litigation. And so attorneys are working on a contingency or a fee-shifting basis. They front the costs of litigation, and they have no incentive to take unnecessary depositions. And, of course, depositions are costly.

If there is to be a change, I think the more palatable change -- I don't think there should be a change, but if there is to be a change, the change should be one where there is a limit on the number of hours, total number of hours, and that would preserve the plaintiffs' access to the witnesses they need to depose while ensuring that the overall time spent in deposition is reasonable. It preserves the flexibility for the plaintiff to be able to address the evidentiary needs of each case on a case-by-case basis, and it's going to reduce discovery disputes by decreasing the likelihood that a plaintiff will file a motion for leave to take more depositions.

If I could have leave just to say just a few

words about the proportionality test, would that be permissible?

JUDGE CAMPBELL: Yes.

MR. RELMAN: With respect to proportionality, here is the problem with the change that moves the language up into 26(b)(1). The problem is that the factors in the proposed rule weigh the amount in controversy against essentially the cost and burden of discovery on the defendant. In a typical individual case, the amount in controversy may be 50-, $60,000. But in almost every case, that is going to be outweighed by the cost to a large defendant of searching for emails or producing loan files, for example, if it's a lending discrimination case or even in a housing discrimination case. It's almost always going to be overweighed, and the defendant will almost always say that it is too burdensome and more costly to produce those files to check that email than the amount in controversy.

But for the reasons I've said, that discovery is essential. You can't prove the pretext without seeing the emails, without getting into the files.

I'll give you one example as I wrap up my comments. I represented an individual who was here in

D.C. years ago who was HIV positive and gay and was applying for housing. He had a rental application for a townhouse that was rejected. The property management company first told him that he didn't qualify because he had a blemished credit record. He said, I'll find a cosignor, and the management company said, we don't take cosignors, sorry, rejected.

He then offered to pay a second month's rent as security. They said, we don't do that. We don't accept that. And finally he said, I will prepay the entire year's rent, $11,000, just to show you that you don't have a risk here. They said, we don't do that. We can't take that. That's not our policy. We've never done that.

I didn't believe that was true. That defied logic. It didn't make any sense why you wouldn't accept that. So we said we want to see the files. We're certain it was a large management company that ran it. We said, we're certain we're going to find similarly situated individuals for whom you've either taken cosignors, accepted extra rent, or even taken a whole year's of rent.

They resisted, saying, of course, it would be burdensome, costly, it shouldn't be done. The judge ultimately, Judge Kessler in the case, ruled

that we were entitled to that discovery because she said this is essential to proving pretext. The result was we got into the files, we found out what they said was pretext. They did take cosignors, they did allow for prepay, and their reasons were not true.

The point is that were this a proportionality test, and where that was the case because there wasn't a lot of damages involved in this case, we would never have gotten into those files and the rights of a deserving plaintiff would have gone unvindicated.

And finally, the last thing I want to say, and then I'll stop, is that the problem here in moving the rule is that it takes the proportionality test out of an issue that is squarely in front of a judge when there is a contested motion for protective order and puts it, the plaintiff, at the mercy of the defendant because the plaintiff, who has the burden, is asking the defendant for that discovery, for those emails, in a bank case for those loan files. There is no bank, there is no large company that will not tell me that it's way too burdensome in light of how much is at stake to produce those emails, to produce those loan files, and if that's the test, I'll never get what I need.

That means every single time there is going to be a disputed discovery motion I will have to go to the judge every single time to fight this battle and I'll have the burden to show it. Sometimes I may win if the judge is favorable, other times I may lose. But the point is the presumption is being set against an individual civil rights plaintiff who may have a very meritorious case. I think this sets civil rights back. I would ask that these changes not be put into effect.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Relman.

Malini Moorthy.

MS. MOORTHY: Good afternoon, Mr. Chairman and members of the committee. My name is Malini Moorthy, and I'm a vice president and assistant general counsel at Pfizer, Inc. Specifically, I head the company's civil litigation group, which includes oversight of our e-discovery team.

Pfizer is frequently a defendant in a wide variety of civil litigation matters, including product liability, securities, and antitrust litigation. But Pfizer is also occasionally a plaintiff in litigation, and it is from these dual perspectives that I'm speaking here today.

Rather than reviewing point by point the proposed amendments, I'd like to give you a concrete narrative of our experience. This narrative complements our written comments, which were submitted earlier today, and illustrates how the current rules have forced Pfizer to preserve, collect, and produce staggering amounts of information at even more staggering costs, and much of the information has no bearing on the litigation we face.

In the hormone therapy litigation, Wyeth, which was subsequently acquired by Pfizer, it was subject to a discovery preservation order Rule 26 that required us to preserve 1.2 million backup tapes over the course of six years.

Backup tapes are intended for disaster recovery to enable companies to restore data on our systems in the face of a catastrophic event. Like most companies, Pfizer's policy is to recycle its backup tapes at regular intervals as the data on the tapes becomes duplicative and it is expensive to purchase new tapes and store huge volumes of old ones.

In connection with the hormone therapy preservation order, we estimate that Wyeth and Pfizer spent nearly $40 million to buy and store the 1.2 million backup tapes that were preserved. Each one of

the tapes holds roughly 100 gigabytes of data, so in total they hold approximately 100 petabytes of data.

I was largely unfamiliar with the term petabyte until recently, and the number meant very little to me. But I've since learned that 50 petabytes is roughly equivalent to the entire written literary works of all mankind in all languages since the beginning of recorded time, and we preserved twice that much.

The most remarkable fact is that despite preserving 100 petabytes of information, we never went back to those backup tapes to retrieve a single document, not once, as the information on those tapes was completely redundant. There was no need to go to the backup tapes because in the same litigation Pfizer collected millions and millions of documents from its live data environment, which included retrieving data from more than 170 custodians and more than 75 centralized information systems.

From those collection efforts, Pfizer produced approximately 2.5 million documents, representing more than 25 million pages. Of those 2.5 million documents, we estimate that only about 400 company documents were marked as exhibits in the 23 trials that have taken place in the litigation to

date.

Over the course of those trials, plaintiffs consistently used the same 400-odd documents, most of which were produced early on in the litigation, notwithstanding our continued production of documents. This means that for every one document used at trial, about 625,000 additional documents were produced.

Another point to consider is that fortunately or unfortunately depending on your perspective, Pfizer was able to comply with the overbroad preservation order and plaintiffs' discovery demands notwithstanding the significant expense and burden.

The hormone therapy litigation is only one example. Pfizer dedicates substantial time and resources to complying with overbroad discovery obligations on a daily basis. In order to support these efforts, Pfizer employs 10 full-time colleagues and three full-time contractors to manage our legal discovery exclusively.

In addition, we have a team of dedicated vendors, including 13 people devoted exclusively to document collection, eight people responsible for the technology side of electronic discovery, and on average 215 people reviewing documents at any given

time.

Surely the great majority of defendants cannot bear this expense. The impact of burdensome preservation and discovery obligations on small and midsized companies must be immense. And even though many companies will not have the volume of data that Pfizer generates, preserving even one backup tape has the potential to directly impact the bottom line of a company.

Yet under the current rules, companies like Pfizer preserve, collect, and produce documents that, as the hormone therapy example illustrates, bear little, if any, relationship to the real claims and defenses raised by the litigation it faces and serve no business purpose whatsoever.

I thank the committee for the opportunity to testify, and I also thank you for your efforts to address the much needed amendments in the rules.

JUDGE CAMPBELL: Thank you.

Questions? Justice Nahmias.

JUSTICE NAHMIAS: You give us an example that has some astounding numbers, but the proposed amendments, what effect do you think they would actually have on that type of case?

MS. MOORTHY: I think they'll have a fairly

significant impact, particularly the amendments to Rule 37(e). I would like to see them go further, but at least it eliminates the risk of sanctions in the event of pure negligence. I do think, as I think others have suggested, that it should not be just be limited to -- that willfulness alone is insufficient and that sanctions should only be afforded in instances where a party has intentionally deprived a litigant of information or data that should have otherwise been produced.

Just to add to that one point is that at this point we've just taken the most conservative road because of the risk and threat of sanctions. And I think what this gives us the opportunity to do is with the amendments to the rules just continue to focus on being responsible and take the most defensible position but also one that is responsive to the discovery obligations that we face.

JUDGE CAMPBELL: Parker, did you have a question?

MR. FOLSE: I'd just like to follow up on the last question that was asked because I'm still having trouble understanding how that example you gave relates to amendments under the rules that we're considering. It sounded to me like that was a court

order entered in that litigation that defined and prescribed what you had to preserve, which obviously sounds like it was a $40 million escapade. But what part of the rules that we are considering now does that story help us decide?

MS. MOORTHY: Absolutely. I think there's two things. One is I actually think this one reflects the proportionality requirement and the amendments to Rule 26(b)(1) because I think what has happened is and what our experience is is that it's quite disparate in terms of how courts have interpreted that rule and in terms of what constitutes relevance and the extent of our discovery obligations.

So it is because of the lack of uniformity in the approach and also I think the lack of consideration of proportionality within the concept of scope, which is what resulted to the extensive preservation order there.

Now I should say that after six years we were able to convince the court to lift that order, but it was after significant spend and demonstration that it was overburdensome and demonstrating that the parties had never gone to the backup tapes a single time.

JUDGE CAMPBELL: All right. Thank you very

much, Ms. Moorthy.

Mr. Smith?

MR. SMITH: Good afternoon, Mr. Chairman and members of the committee. I am a lawyer with the NAACP Legal Defense and Educational Fund. LDF was founded in 1940 by Thurgood Marshall. It is the nation's oldest civil rights legal organization, and we are here today because we are deeply concerned about a number of the proposed changes to the discovery process currently under consideration by the committee and the impact it will have on the ability of civil rights plaintiffs to obtain relief through the federal courts.

We are deeply concerned about these changes. And in fact, earlier this week our president and director counsel, Sherrilyn Ifill, testified before a Senate Judiciary subcommittee about this very important issue.

It is our view that the most troubling change currently under consideration relates to Rule 26(b)(1). Throughout the history of the Federal Rules, the scope of discovery has been defined through a lens of relevance. Adding a proportionality requirement to Rule 26(b)(1) represents a sea change in the discovery process and will lead to a dramatic

reduction in the scope of discovery.

This change will be particularly harmful to civil rights plaintiffs, who are often dependent on discovery to substantiate their claims. Very often victims of discrimination are not in possession of information they need to support their claims. That information is in the exclusive province often of a defendant and can only be obtained through the discovery process.

Moreover, as Mr. Relman just explained, as discrimination has become more subtle and sophisticated, civil rights plaintiffs face an even higher burden as they are often required to establish discrimination through circumstantial evidence. Thus, civil rights plaintiffs use the discovery process to ferret out and expose discriminatory policies, practices, and actions.

The addition of this proportionality requirement to Rule 26(b)(1) will only exacerbate the information asymmetry between plaintiffs and defendants in civil rights cases and will give defendants a multitude of opportunities to squirrel out of their obligation to produce relevant and necessary discovery.

For example, we are particularly concerned

about allowing defendants to rely on the amount in controversy as a factor determining the scope of discovery, and they will use it as an opportunity to minimize the significance of civil rights cases which often don't involve large sums of money or primarily seek injunctive relief.

To be clear, we do not deny that proportionality has a role to play in the discovery process, but the current formulation of the rule, which places that review squarely in the hands of the court, strikes a far better balance. It has been our institutional experience that federal judges and the magistrates who assist them in the discovery process are more than capable of making assessments about the extent to which discovery should be allowed in a particular case and then overseeing the discovery process.

I would also like to address the argument that dramatic changes to the discovery rules are necessary to curtail abuses on the discovery process and control litigation costs. As an initial matter, we are aware of no empirical data or research showing that civil rights cases are categorically prone to have exorbitant discovery costs. And that certainly has not been our experience for the last seven decades

litigating civil rights cases across the country.

At most, there may be a small handful of cases where discovery costs have grown exponentially. However, the appropriate solution is not to narrow the scope of discovery in all civil litigation. Such a heavy-handed approach will only have a devastating result on civil rights actions.

Moreover, this proposed amendment will likely have the unintended consequence of making discovery processes longer and more costly. The addition of a proportionality requirement will likely lead to greater motion practice, which itself is costly, takes time, and consumes judicial resources that can be spent in other ways.

We do, however, believe there is a cost consideration that this committee should pay careful attention to as the costs that these proposed amendments if adopted would have in preventing civil rights plaintiffs from obtaining the relief they deserve.

Our system of civil rights enforcement is by design dependent on individual plaintiffs serving as private attorney generals who use civil litigation to vindicate important congressional policies and fundamental constitutional rights. Procedural changes

such as the ones currently before this committee will only have the unintended consequence of undermining this vital component of our justice system.

There are a number of other proposals that we also have a concern about that are detailed in greater length in our written comments. I did want to note, though, that the lowering or imposition of presumptive limits for depositions, interrogatories, and requests for admission will also have the net result of making it harder for civil rights plaintiffs to get access to the discovery they need.

Also, interrogatories and requests for admission are some of the least expensive forms of discovery. If the committee is concerned about cost, it should consider proposals that increase and do not decrease the use of these very important and useful discovery tools.

In closing, the proposed amendments are at odds with the longstanding and fundamental premise that the federal courts should be open and available to those who seek redress for civil rights violations.

Thank you again for this opportunity. I'm happy to answer any questions.

JUDGE CAMPBELL: Thank you, Mr. Smith.

Questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much.

Ms. Fleishman?

MS. FLEISHMAN: Good afternoon. Thank you very much for permitting me to testify today. My name is Wendy Fleishman, and I'm here on behalf of the New York State Trial Lawyers as well as the AAJ and specifically the members of AAJ that are involved with environmental toxic tort and product liability litigation.

I want to address two specific changes of the rules, and then I will submit papers in addition. Rule 26(b)(2)(C) already encourages judicial involvement in the discovery process and empowers judges themselves to limit duplicative or disproportionately burdensome or expensive discovery, and sanctions are already available in the case of truly egregious abuses.

There is no evidence that suggests that these mechanisms are insufficient or ineffective. In many instances, we already have in place the Rule 16 conference, at which time we can then address and deal with any issues that will arise that will perhaps raise the specter of an abuse of discovery, and it's

through that mechanism that is already in place that we can address the specific and very important issues.

Countless costly and time-consuming disputes would arise from the proposed changes in the scope of discovery in Rule 26(b)(1), from changing the relevance standard to a proportionality standard. This will give rise like the Daubert change to a plethora of new motions and lots of discovery disputes, which will just encourage defendants, frankly, to bring more and more objections and be more and more obstreperous to the form of discovery possible for plaintiffs in environmental torts, in toxic torts, in individual cases involving medical devices and pharmaceutical devices.

In each of those cases, the individuals, the small businesses are faced with defendants that are huge multinational corporations with enormous amounts of money, rooms full of lawyers, who will then come in and file motion after motion, and now by changing the rule, we are just setting up a new device for them to utilize.

We cannot know the value of a piece of information until we get the information. The most classic example of that, of course, is the Vioxx case. In that case, the defendant, Merck, had failed to

disclose to the *New England Journal of Medicine* and failed to adequately disclose to the FDA that its painkilling medicine actually increased the risk of cardiovascular episodes. And it wasn't until thorough discovery was able to unearth the fact that Merck and the authors that it supported had failed to disclose that to the *New England Journal of Medicine* when the drug was first put on the market, and the *New England Journal of Medicine* then endorsed the drug.

It was that fraudulent concealment, that secret that would have been otherwise impossible to unearth without the ability to do adequate discovery. And that discovery was brought on because Judge Fallon was able to oversee the discovery and because he in his wisdom used Rule 26(b)(2)(C) to control that discovery.

Rule 30 now calls for a presumptive limit of 10 depositions. And you've heard over and over today people talk about and testify before the committee about how difficult it will be for plaintiffs to appear and limit their discovery to only five depositions. It will be impossible to know what five depositions are critical. It will be impossible to develop their case in that way, especially in the case of a toxic tort, in the case of an environmental tort,

in the case of a simple product liability case.

In each of those cases, it is necessary to do more than five depositions. And by utilizing a presumptive limit of five, the plaintiffs will be forced to come before the court time and time again to ask for more depositions and to involve the court and further overburden the court and further increase their costs. Thank you.

JUDGE CAMPBELL: Thank you.

Questions? Judge Koeltl.

JUDGE KOELTL: How would the Vioxx case have been any different under the proposed rules? You must have taken far more than 10 depositions in the case. The judge controlled the case by using the standards in 26(b)(2)(C), which now under the proposal would be part of the first sentence in the scope of discovery. The judge would still have to do the same thing.

MS. FLEISHMAN: The way it would be different would be that the plaintiffs would have to show that the information was available, that the information existed. And without doing the discovery, they couldn't show that because what typically happens, Your Honor, is that the plaintiff comes up with a list of depositions that they think are necessary. The defendants then say, oh, no, those are

too many depositions, it's completely unnecessary, and it's going to cost us gazillions of dollars to produce those megabytes of data.

And then they'll say there is no proportionality. You can't prove in that instance that a drug caused cardiovascular events and that we failed to disclose that, that was a fraud. So they will argue that the proportionality will not justify or warrant that intense investigation and discovery.

JUDGE CAMPBELL: Professor Marcus?

PROF. MARCUS: One of the things we've heard from a number of witnesses today has been that they represent low-wage workers where the monetary value of the claims may be relatively limited. Isn't Vioxx a case where the monetary value of the claims is astonishingly high? Wouldn't proportionality in such a case actually operate to support very broad and aggressive discovery, indeed perhaps more than would otherwise be legitimate?

MS. FLEISHMAN: In that case, as Your Honor remembers or rather the professor remembers, there were many instances where the claims were very minimal, where the claims, the individual claims were simple claims where there was a cardiovascular event, but it was difficult to prove that the event was

caused by the increased risk of the Vioxx in addition to the circumstances. And so, as a result, there were defense verdicts when these cases went to trial.

It's only when the cases are aggregated under an MDL that the position of power changes. But if the rules are changed by the rule changes, the rule will adversely impact the individuals who go to trial and the individuals who bring these cases even when the cases are not abrogated as part of an MDL.

So, for example, the painkiller case. In those cases, the JPML denied the request for the motion to transfer and centralized those cases. So those individuals all have to prove their cases by individual discovery. In that instance, they don't have the power of the number of cases abrogated together.

JUDGE CAMPBELL: Thank you very much, Ms. Fleishman.

Mr. Regan?

MR. REGAN: Good afternoon, and thank you for the opportunity to testify before this committee. I am Patrick Regan, and I'm a lawyer practicing here in Washington with the law firm of Regan Zambri Long & Bertram. I'm a trial lawyer, and I represent plaintiffs in civil actions in state and federal

courts throughout the D.C. area. I'm a fellow of the American College of Trial Lawyers and a longtime board member of the American Association for Justice.

I regularly practice in four courts, four federal courts, and I tell you that so that you can take my comments in context. The federal courts are in D.C., Baltimore, Greenbelt, and Alexandria. During the course of my career, I've litigated somewhere between 300 and 400 cases in federal court and tried more than 50 civil jury trials.

The proposed rule changes in my judgment will make it much more difficult for my clients, ordinary citizens, small businesses, to achieve a fair trial in federal court. They will be denied the ability to meet their burden of proof and thus denied access to the courts and in the end be denied justice.

I will be submitting extensive written comments to this committee detailing my concerns with all of the rules, and today I'll address just two of the proposed changes: the harm caused by the proportionality, which you've heard a lot about during the course of today, and two, the presumptive limits in Rules 30, 31, 33, and 36.

Rather than repeat what's been said throughout the morning and afternoon about the

proportionality, let me cite to you and take a minute if you'll allow me to talk about a case that was pending just down the street here before former Chief Judge Thomas Hogan in the D.C. Federal Court.

This case I submit to you illustrates the problem with the proposed proportionality issues. This particular case involved the death of a 22-year-old construction laborer who was accidentally shot in the head by a nail gun on a construction site. This young man had just graduated from community college, was not married, and had no dependents.

Under the D.C. statute, his case, the value of his claim, was capped at roughly $750,000. Why do I tell you that? Because it relates to one of the factors, which is the amount in controversy. The nail gun in question was a high-velocity nail gun, and it was capable of firing a nail at a speed slightly faster than an M16 rifle. We took deposition after deposition of the employees of the manufacturer and the distributor of the product, probably 12 or 14 witnesses, all of whom said that it was perfectly safe for use and that it was suitable for use in the construction industry.

Well, the 13th or 14th witness had a different view and testified that five years earlier,

before my client was killed, the manufacturer had recommended that it only be used in shipyards where you're attaching two-inch thick steel plates to each other and not be used in the construction industry.

Well, that was a sea change, as you can imagine, in my case, resulting in a resolution of the case. But it had a much greater societal impact, and that is as a result of this case, those guns were taken off of construction sites throughout the country. I would have failed on the proportionality factors on several of the cases.

Judge Hogan, who I'm sure is well known to most of you, is one of the fairest jurists that I've ever appeared before. He would have been confronted at the outset after my fifth deposition with a motion, and as fair as he is, he probably would have said, Regan, you can have two more depositions. So I would have gotten to seven. And the defense argument would have been, look, it's too burdensome, it's too expensive, and they're all saying the same thing.

Well, they were all saying the same thing until the 13th or 14th witnesses, which resolved it. They would have said it was a waste of time, and so with all of this, that's a perfect example. I mean, the folks that I represent are ordinary people.

They're teachers and firefighters and lawyers and judges and civil servants and so forth. I don't do class action work or anything else. These are ordinary folks.

And the other thing I want to talk about in the remaining time, which is only 40 seconds at this point, is the presumptive limit on five depositions. I think that Mr. Williams, who was up here just a few witnesses ago, said it about as succinctly as it can be said, and I would echo his comments. There is no problem with the current limit of 10. He has never had a problem. I've never had a problem with it. Five would result in a -- in virtually every case I have, the judge is going to have to be involved.

Another witness before Mr. Williams said it's silly to think that there will be an agreement on that issue because there won't be. The defense counsel would indeed be in trouble with their client if they agreed to more depositions without getting a ruling from the court. So that presumptive rule -- I know I'm out of time. That presumptive rule would simply increase the burden on the federal judiciary. Every single case would now involve motions.

One final point, and I'll take your questions. The limit on requests for admissions I

would submit is a solution in search of a problem. The purpose of requests for admissions is to narrow the issues. Why should I file a motion with a judge asking to increase the number of requests for admissions, which will only serve to limit the issues that that judge has to decide?

I have never in those 3- and 400 cases that I've talked about, plus all the cases that I've litigated in state court, ever, ever had a problem with the excessive number of requests for admissions.

I apologize for exceeding my time. Thank you for listening to me.

JUDGE CAMPBELL: Thank you.

Questions?

JUSTICE NAHMIAS: We've heard today a number of cases where there was an extensive amount of discovery that proved justified because the case ultimately turned out to be meritorious. Have you ever had a case where you ended up taking 15 or 20 depositions and then lost them and required the defendant obviously to bear the additional cost of that discovery and then lost on the merits?

MR. REGAN: Well, Judge, you know, if there is a lawyer who stands before you and says that they haven't lost a trial, they're not trying cases. So,

yes, of course I've lost trials.

JUSTICE NAHMIAS: But I think that's the real issue. I mean, obviously, if every case in which there was enormous discovery and preservation produced a result for the plaintiff, then obviously that would be justified. The question is the cases where all of that extra discovery and all of the enormous costs that may be involved don't do anything to advance justice and how to balance it. And that's why I'm a little concerned when we only hear kind of the positive stories of we did all this extra discovery, the defendant beared the cost, but that turned out to be entirely justified. What is on the other side of that? What cases is all of that discovery paid for by the party that prevails?

MR. REGAN: Well, I think -- I was tempted to make a joke about trial lawyers never talking about their losses, but it's a serious question that deserves a serious response. And the answer is that it's not as if -- the fact that one party loses at trial doesn't mean that their prosecution or defense was nonmeritorious. In every case that I win, that doesn't mean that it was a nonmeritorious defense from the outset and that I should be awarded costs for that defense. And the flip side is true.

And to the extent that there are nonmeritorious cases, I think you have more than enough tools at your disposal right now under the current rules to deal with abusive tactics. I don't have a lot of discovery disputes, and maybe it's because I'm getting long in the tooth, as one of the other witnesses commented earlier, but I don't have a lot of discovery disputes. But I have found that when I do, the judge is perfectly competent and comfortable in calling it a ball or a strike and making a resolution on it. And I don't see where any of the presumptive limits or the proportionality issues will advance the goal of every single person in this room, which is, you know, trying to make sure justice is done.

I recognize it has to be done. I have to advance the costs. My clients can't afford the litigation costs, very few of them. You know, maybe the doctors, lawyers, and judges could, but the others can't. So I'm not wasting my time or money when I do it. I try to think about it. I try to be appropriate. So, you know, it's a long-winded answer to a simple question. I apologize.

JUDGE CAMPBELL: Judge Sutton?

JUDGE SUTTON: Just a quick question. You

know, several witnesses have been concerned about limiting depositions from 10 to five or changing the presumption, and I think the suggestion is that the change is designed to encourage district court judges to allow fewer depositions. So I've heard that from a lot of people.

I'm not sure that's what the committee has in mind. I mean, the idea of a presumption is to reflect the norm, so as I understand the number five, it's that there is a study that showed that in 75 percent of cases there are fewer than five depositions taken. And I'm just wondering from your perspective, given the anxiety of, oh, we're not going to get these depositions in the future, if it would help to have the committee note explain that, in other words, explain this is not designed to prevent depositions. It's designed to explain to the world what the norm is. And all you have to do in one of your cases is say, well, I'm just not in that 75 percent category, here is why.

MR. REGAN: Well, that sounds reasonable, and if every jurist --

JUDGE SUTTON: Well, it is.

MR. REGAN: -- was as reasonable as you, it wouldn't be a problem. But the point is I am now at

the discretion of someone when I don't think that this needs to be. I would say that in my cases -- you know, obviously surveys are surveys, and you don't really know the quality of the respondents in terms of, you know, how big a sample it is.

But I would say this. I can tell you in my personal cases very few of my cases have involved more than 10 depositions, and I cannot think of one that has involved five or less. So I sort of fall into the category of Mr. Williams, who stood here before me and while he was a proponent of the changes admitted that 10 was fine. And when it needs to be exceeded, you work around it. So I don't think it needs to be changed. Anyway, I don't think it needs to be changed.

JUDGE CAMPBELL: All right. Thank you very much, Mr. Regan.

MR. REGAN: Thank you, Your Honor. Thank you.

JUDGE CAMPBELL: Mr. Rakower.

MR. RAKOWER: Good afternoon, Mr. Chairman and members of the committee. Thank you for hosting today's event. My name is Michael Rakower. I'm a principal of a commercial litigation law firm in New York City called Rakower Lupkin. I'm also on the

executive committee of the New York State Bar Association of the --

JUDGE CAMPBELL: Could you just pull that mike up a little higher, please?

MR. RAKOWER: Sure.

JUDGE CAMPBELL: Thanks. That's better, thanks.

MR. RAKOWER: You're welcome. I'm also on the executive committee of the commercial and federal litigation section of the New York State Bar Association and the co-chair of the federal procedure committee of that section, and I stand here before you today as a representative of that section. We have submitted a fairly detailed report to your committee identifying our thoughts and responses, and today I just wanted to cherrypick a few significant or fine-tuning points that we raise in our report. And I thought I would follow the style that the committee followed in its memo. Instead of going in seriatim from one rule to the other, I would go thematically.

Your memo begins with case management proposals. I would note that we support the proposal for Rule 4(m). But we do recommend that an Advisory Committee note be included to provide examples of when good cause could be found because we think that the

good cause component, the good cause exception, is an important exception to this acceleration of the service rules, and it would help practitioners and the court I think for you to show the situations in which good cause can be employed so that parties don't think that good cause should be a limited form of remedy.

Similarly, with Rule 16(b)(2), we also support the rule, and we again think that the good cause exception should be underscored. We support adding the preservation in Rule 502(d) orders to the list of issues which may be included in discovery plan, as we think that would very much help the parties when they commence discovery discussions.

We think that early Rule 34 requests would substantially assist litigation so that when the parties come to court and discuss the discovery plan, they would have a set of discovery requests in hand, and they would have actual real-life issues to face rather than theoretical ones with respect to the scope of discovery.

Rule 26(b)(1), proportionality, here is where we begin to -- we continue to support the proposal, but we do so with caution. I think there was a question earlier today about whether proportionality would increase the amount of

litigation that would occur. We think it probably would in the early stages while parties and courts become comfortable with the notion and the boundaries and how to assess proportionality, but because we think it's a good move, we think that that collateral litigation will even itself out over time and proportionality will prove to be a very good thing.

We do want to point out that with respect to proposal 26 -- the proposed amendment to 26(c), the allocation of costs, internally as we read that proposal, there was some discussion as to whether or not that was intended to change the American rule, and we don't think it should. We don't think the Advisory Committee meant to do so, but because there was some doubt and question, we thought perhaps it might be advisable to include an advisory note with that proposed rule so that there's no confusion on that front.

With respect to the presumptive numerical limits, here is where we diverge. We weren't comfortable with those presumed limitations. We didn't feel as if the data supported a reduction in the number of depositions. I did read the report fairly carefully and I did hear the questions today. And I think the primary question was, well, what --

it's not so much that there's discovery abuse on one side, but as a whole, if parties each take their fair share of depositions collectively, that increases the costs of litigation to a degree that becomes unsupportable for the dollar figure at stake.

We didn't feel as if in our experience -- and we come from a cross-section of lawyers, through all the big firms and the small firms, working on a variety of types of commercial litigation. We didn't see an extensive amount of abuse that would warrant a reduction in the number of depositions. We thought that the data supported leaving things as they are. And to the extent that there's a concern that collectively the use of depositions increases the cost of litigation, we thought there must be a better way to solve it than these presumptive limits.

This time the clock is going up. Does that mean I've actually run through my five minutes already?

JUDGE CAMPBELL: It does, it does. But if you have concluding thoughts, we want to hear them.

MR. RAKOWER: I do, and I apologize.

JUDGE CAMPBELL: That's all right.

MR. RAKOWER: I will skip to the end, which is Rule 37. I think that's probably the most

significant area where we have concerns other than with respect to the limitations on the number of depositions and so forth. We support the formulation of sanctionable conduct. We do recommend that willfulness be defined. We think willfulness should be defined in terms of either intentional conduct or conduct that's sufficiently reckless to enable someone to foresee the high likelihood of harm. And I think our report formulates a definition better than I just did off the cuff, but I tried to paraphrase as best as I could.

We do also think that action should be defined as actions or omissions, and we assume that the Advisory Committee intended that, but we think it should be laid out clearly. We think that the prefatory language in Rule 37 should explicitly direct courts to impose the least curative measure or sanction necessary to repair prejudice. We think that that's consistent with the methodology of the courts, but we also think it would be helpful to set that forth.

I realize my time is up, so unless the committee has questions.

JUDGE CAMPBELL: All right. Are there questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much, Mr. Rakower.

MR. RAKOWER: Thank you.

JUDGE CAMPBELL: Mr. Henderson?

MR. HENDERSON: To the members of the Advisory Committee, good afternoon. I'm Wade Henderson, president and CEO of the Leadership Conference on Civil and Human Rights. Thank you for the opportunity to testify at today's hearing.

The Leadership Conference is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons of the United States. The Leadership Conference is committed to building an America that is as good as its ideals, an America that affords everyone access to quality education, housing, healthcare, fairness in the workplace, economic opportunity, and financial security.

We understand the vitally important role federal protections play in ensuring equality of opportunity and fair treatment under the law. It is with that understanding and history that we express our concerns about the proposed changes to the federal

rules, which we believe would place unequal burdens on plaintiffs seeking to have their rights redressed in federal courts.

The cumulative impact of the proposed changes to the discovery rules, specifically the proposed changes to Rule 26(b), 30, 31, 33, 36, and 37(e), will have serious adverse impacts on civil rights litigants. The burden that these changes would impose is heavy. Simply put, the upending of reliable and settled rules will create a continually moving goalpost, resulting in additional burdens and barriers for civil rights plaintiffs and their attorneys, often keeping plaintiffs from having their rights protected and enforced.

For decades, the federal judiciary has served as the place where individuals facing unfair and illegal treatment have turned for the enforcement of their rights. Private parties bring more than 90 percent of actions under civil rights and other statutory enforcement actions that implicate the public interest. In 2005, out of 36,096 civil rights cases brought, the U.S. was the plaintiff in only 534 cases or 1.5 percent of all civil rights cases brought that year. The rest were brought by private plaintiffs.

Now virtually all modern civil rights statutes rely heavily on these private attorneys general whose importance has been recognized by courts, academics, and Congress. If these private litigants are restricted in their ability to bring cases, the system breaks down. Recent Supreme Court rulings have limited access to the courts for vulnerable Americans, narrowing both procedural and substantive rights for civil rights litigants.

In this context where the courthouse door has now been shut on so many, a move by this body to further restrict access to justice is ill-advised and antithetical to the pursuit of justice. Although the goals of the proposed changes to the federal rules, such as improving efficiency and increasing costs, in an overburdened system are laudatory, many of the proposed changes will fail to accomplish those objectives and will in fact have unintended consequences that are far more damaging than the potential good contemplated by the proposals.

Civil rights litigants will be the ones most burdened by these changes. Specifically, the rules limiting discovery and particularly creating the proportionality standard under Rule 26(b) will impact plaintiffs such as the victims of employment

discrimination, who already bear the burden of proving their claims in the face of severe imbalances and access to relevant information.

Such information asymmetry requires discovery rules that rectify these imbalances, not exacerbate them, limiting discovery and creating a proportionality standard that will only function to wide the gap between those who control the information and those who need to access to it to vindicate their rights.

I refer you to an article written in 2004 in the *Journal of Empirical Studies* entitled "How Employment Discrimination Plaintiffs Fare in Federal Court." It's by Kevin Clermont and Stewart Schwab. And one of the findings is that in employment discrimination cases plaintiffs won 4.23 percent of pretrial adjudications in those cases compared with 22.23 percent in other types of cases.

That imbalance that already exists under present rules will be exacerbated to an even greater degree under the proposed changes that you have submitted. Now, placing additional procedural barriers in the path of those trying to protect, vindicate, and enforce their rights, and the rights of the public is not only bad policy. It is bad

precedent and bad for efficiency.

Now one additional point needs to be underscored. The federal judiciary is in crisis. I don't have to tell you that. We know that judicial resources are limited and that judges have limited time. Yet the problem should be dealt with through the confirmation of pending judicial nominees, not by changes in the discovery rules that will place additional barriers in the way of the most vulnerable plaintiffs.

Although I'm confident that it was not the intent of this body, the result of many of these proposed changes would be to impose the greatest cost on those least able to bear that burden. Those most vulnerable with fewest resources and least access to information should be protected rather than harmed.

Thank you for giving me the opportunity to share these views.

JUDGE CAMPBELL: Thank you.

Questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much, Mr. Henderson.

Ms. Dolkart?

MS. DOLKART: Good afternoon, and to the

chair and the members of the committee, my name is Jane Dolkart. I'm a senior counsel at the Lawyers Committee for Civil Rights Under Law, and I was for 17 years a law professor teaching in the area of civil procedure. The Lawyers Committee is presently celebrating its 50th anniversary this year of fighting in federal courts to secure equal justice under law. It certainly has had much experience using the Federal Rules of Civil Procedure.

We oppose the proposed amendments to Rule 26(b)(1), 30, 31, 33, 36, and 37. And I'd like to make four points. First, the federal courts have traditionally been the last bastion of the disenfranchised. Civil rights legislation has provided plaintiffs with a private right of action in federal courts to protect them from the prejudices and passions of state courts.

Attorneys bringing civil rights cases have been seen as private attorney generals going forth to protect the rights of the less powerful. The federal courts have been unique tribunals for preserving the civil rights of people. There should be a compelling reason to roll back the protection of the federal courts through rule changes, and there is no such compelling reason.

First, these rule changes have, as many have suggested, a vastly disproportionate effect of plaintiffs in civil rights cases. As has been noted, in 80 percent of the cases, there are fewer than five depositions taken, which means that these rule changes have absolutely no effect on those cases. There is also at the other end of the spectrum a significant number of what would be called large and complex cases. Some of them are class action, some of them may be large commercial litigation.

In all of those cases, it not only is likely to be but almost always will be more than 10 depositions taken by either side. And indeed, there's some greater equality because defense counsel also have an interest in taking a number of depositions.

I did an informal poll at the Lawyers Committee to see if there was anyone who had litigated a case in recent years that went through most of the discovery process and had used fewer than 10 depositions, and the answer was that there weren't any.

Now most of these were class actions, although not all of them. So we are talking about a small group of cases involving individuals or a few individuals who bring suit in federal courts. A large

percentage of federal court dockets that fit this category are civil rights cases, and thus these rules will have a significant effect, particularly on civil rights cases.

For over 40 years there has been a debate over the cost and efficiency of discovery, with corporate defendants urging more restrictions and plaintiffs urging broader discovery. This debate appears intractable. The discovery rules have been amended many times with major amendments meant to respond to costs and delay. None of these amendments have lowered the volume of criticism from corporate defendants, and in particular the 1993 amendments, like the present proposed rules, had a particularly significant impact on civil rights cases.

The fact that there is a debate does not in any way answer several fundamental questions. Are discovery costs and delays excessive and disproportionate, and are the present proposed amendments likely to remedy such perceived excesses?

The Federal Judicial Center's 2009 study of discovery finds no empirical evidence in support of excessive and disproportionate discovery. That does not mean that there aren't costs that can't be perceived as excessive, but it did not find the actual

amount of discovery was excessive, nor have any other empirical studies. The study found that the primary factors in driving up litigation are complexity of the case, high monetary stakes, and discovery disputes. And I suggest that contentious litigation is in fact a good part of the reason that there are unnecessary costs in discovery, and that perhaps that is what we should be focusing on.

And in particular, I'd like to suggest that there is apparently already some consensus that we should look at early and active case management. There are presently several pilot projects that have established protocols in areas where there are significant amounts of discovery, and I think it would be useful to wait and see what we learn from those protocols in terms of whether more aggressive and different case management helps.

The second thing is that we could reduce the time and delay of contentious litigation. And I would suggest that judges in some instances are already trying to do that. They are using letter motions instead of full-blown motions. They're holding hearings by phone. They're attempting to resolve discovery disputes more efficiently and more quickly. And I think and the Lawyers Committee thinks that

these are areas that promise benefit in terms of cost and efficiency that will not impact negatively on one or the other side of litigation. Thank you.

JUDGE CAMPBELL: All right. Thank you.

Questions?

(No response.)

JUDGE CAMPBELL: Okay. Thank you very much, Ms. Dolkart.

Mr. Steeves?

MR. STEEVES: Good afternoon. My name is Frank Steeves, and I am the general counsel and secretary of Emerson Electric Co., which is headquartered in St. Louis, Missouri.

Emerson is an American corporation, as opposed to the Korean Emerson Radio Corp. Some people get us mixed up a little bit. Makes clock radios. We don't do that. Made up of five business platforms that produce products and provides services in areas from process management, network power control systems, to climate and industrial automation systems, renewable energy products, and all the way to products for the home. In 2013, Emerson was named as one of *Fortune*'s world's most admired companies, and also in 2013, it was placed on Thomson Reuters' list of the top 100 global innovators.

I'm speaking today from a background that is perhaps unique among general counsels of global companies. I began in the early 1980s with the Wisconsin State Public Defender's Office defending impoverished juvenile defendants, and I spent after that more than two decades trying commercial and tort cases in state and federal courts in the upper Midwest. During that time I tried many, many juries. I tried many, many court trials and argued countless discovery motions in state and federal court. And I also held many appeals.

My direct involvement ended six and a half years ago when I joined Emerson and I took my present position, and I now see civil justice in a broader light, particularly with respect to the types of cases and with respect to how justice systems function on a global scale just as in other countries that we also work within.

Emerson is a company, I want to make it very clear, that believes deeply, deeply in the American system of justice and in particular in the jury system. As a matter of philosophy and as a matter of policy, whether we are a plaintiff or a defendant, we will always preserve our right for a trial by jury, always. We will never waive that right, even when the

plaintiff and our co-defendants are begging for us to enter a stipulation to waive the trial.

The reason is that we, contrary to much popular belief, have found that juries with a very high level of consistency find justice with a clear-eyed, bottom-line, common sense view.

Last night I reviewed Sherrilyn Iffil's comments, the president and director counselor of the NCAA Legal Defense and Education Fund, and I couldn't agree with her more that it is the procedures in civil litigation, the procedures when applied evenly that protect all of us. Tragically, though, the well-meaning protections enshrined in our statutes do not function the way they are intended. They do not.

Long ago and throughout my courtroom years, they, together with a reluctance of judges to manage their cases, have allowed civil justice in the United States to become reduced to a series of guides where cases can be just as much about finding and exploiting the other side's errors during pretrial phases as it is about finding what truthfully happened and therefore finding justice.

This unhappy fact may be denied by many, but I'm telling you as a practitioner that it is the truth of our otherwise great justice system. It is the

truth whether acknowledged or not that is crystal-clear to those who actually practice in the system on either side of the courtroom. And as a consequence, both plaintiffs and defendants both suffer. And it goes even further.

It's tragic that the United States justice system, which has contributed so much to making this the greatest nation on the planet, is cited as a reason not to come here to do business. In this job I work constantly with the chief legal officers of companies across the globe, and the U.S. justice system often comes up for discussion. Sadly, I find myself in the role of first an explainer and occasionally an apologist.

I cannot recall a single conversation where what our system has become is not cited by many of my peers as a reason to stay away from the United States. People and their businesses should be coming here because of the great justice system. They should be here because of it, not citing it as a reason to stay away.

The changes proposed in my opinion will go far to knocking down opportunity for abuse. They will move the process in the right direction for all parties in litigation. They will do exactly what is

needed for a long time by encouraging critical behavioral changes.

First, shortened discovery will force lawyers and parties to better focus at the outset of the suit. Very important. Secondly, involvement of judges will enhance their early understanding of the focus of a suit, which is also critical. And third, the rule changes will reduce in my view the got-ya mentality that clogs the courts and impedes the ability of litigants on both sides who seek justice from finding justice.

Each of these reforms is needed now to get our system working in the way it was intended. The proposed rules do not do everything, but they're a very good start. And I want to thank you for allowing these remarks, and I also want to thank each of you for taking time out of your lives to sit in these long days that it takes to review these rules. It's an important part of the process, and I want you to know that we at Emerson are grateful to you for that.

JUDGE CAMPBELL: Thank you, Mr. Steeves.

Questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you for your comments.

Mr. Sellers?

MR. SELLERS: Mr. Chairman, members of the committee, thank you for hearing from me today. I am a partner in the Washington, D.C. law firm of Cohen Milstein Sellers and Toll and have been practicing law for more than 30 years, primarily civil rights law.

I come today to tell you that while I share the committee's concerns about the costs of litigation and the protracted nature of litigation, I believe the changes for the most part that the committee is recommending will not achieve the goals that it seeks to achieve.

You've heard a good deal today, and I won't repeat it, about the concerns from the civil rights community, about the numerical limits on discovery, about the proportionality rule, and about some of the cost shifting that is proposed. I share those concerns. I believe that there are a good deal of self-imposed limits that parties who bring these cases have on the discovery that they pursue. Many of us handle cases on a contingent basis, as I do, and I can assure you we are very careful about the discovery we undertake, and I believe that the FJC's studies confirm that most often parties self-police the discovery that they undertake.

I find it somewhat curious that the committee feels compelled to raise these proposed changes now when there are some excellent pilot studies that exist which might generate some of the evidence with which further thought can be given to particular limitations if the committee wishes to proceed in that direction.

I am concerned, however, and I raise this reluctantly at the end of a long day, but I think there is a third way. There is a debate going on whether discovery is too much or too little, and I think that the issues that we confront about discovery today are largely a product of a system that provides a one-size-fits-all set of discovery limits and a use-it-or-lose-it approach to discovery where those who bring the case and those who defend the cases feel very concerned about passing up any discovery for fear that they may later believe it's necessary to prove the case or to sustain their defenses.

The third way that I want to propose is a modification of Rule 16. I believe that a much earlier and more active involvement by the courts in the management of discovery would help greatly. I recognize the courts are empowered to do this. I cite in my written comments, which I just submitted this

morning, some examples of courts that have adopted rules of this sort, but there is no largescale approach to this.

I think there is some value in having courts be directed to hear from the parties early in the case about what particular issues are pivotal to assessing the value of the claims and the defenses and focus discovery initially on what appears to be the pivotal issues. And I give some examples in my written remarks. I'll give you one or two here. There may be a Daubert issue that's lurking there. There may be a question about the viability of an economic model or whether there are statistically significant disparities that ultimately are evident from a body of data.

Those go to the heart of the valuation of these cases, and often you don't get to those issues until months or years into litigation. Courts are empowered -- and I suggest that a rule change might actually direct them initially to stage discovery, focusing on those matters that they believe after hearing from the parties are especially central to one side or the other or both of their particular interests, and they are undoubtedly not the same in terms of what discovery will be relevant to evaluating

the claims, and putting off the balance of discovery until there is an opportunity to explore some initial discovery that may be central, and then allowing the parties to explore the possibility of a resolution of the matter.

I think the other thing this does is it permits courts to tailor the discovery limits if there are limits of one sort or another to the particular needs of a case. And I submit the one-size-fits-all approach is either going to lead to, as there have been debates for a decade or more, a couple of decades, about there's too much discovery, there's too little discovery. I've been sitting here for a couple of hours. It seems to me that in large part that view is determined by which side of the V you're on and probably will be forever that divide.

But I suggest that the courts are empowered and should be directed to be much more focused on the particular needs of discovery in a particular case. And I'll pause there.

JUDGE CAMPBELL: All right. Thank you.

Questions for Mr. Sellers?

MR. FOLSE: Do you not think that Rule 16 requires what you just described in its current form?

MR. SELLERS: Well, I don't think it

requires it, and in my 30 years-plus of legal practice, I virtually have never seen it used that way. And more often than not, courts advise the parties to produce a Rule 16 plan, and the plan allows the parties to go forward with discovery. And because there are differences in tactics that parties use to decide what sequence and the like of discovery, you may never get to the issues on my side that really are important for quite a while.

MR. FOLSE: If we directed, as you described, judges to do what you say and judges don't do what the rule might provide, as you suggested, what would the remedy be?

MR. SELLERS: Well, I'm not sure I have a -- I think we'd have to convene another meeting to talk about what to do with judges who don't follow the rules. But I submit, by the way, that there are countervailing advantages for the court's incentives to do this, lest judges think you're just imposing more work on us when we are already heavily burdened with busy dockets. This could lead to fewer trials, shorter cases for shorter litigation, less motion practice. I think they will free up time on the other end of the litigation. And so I would hope the courts, besides feeling obliged to follow the rule,

would regard it as advantageous to do so.

JUDGE CAMPBELL: Judge Pratter.

JUDGE PRATTER: One observation and one question. Having been part of this process, I assure everybody I don't think I recall hearing that any of these rules came up because the judges were feeling burdened and that we had too much to do. So I don't think the rules come from that concern.

My question is which of the pilot programs do you recommend we focus on?

MR. SELLERS: I think there are two that are particularly interesting. The complex litigation program in the Southern District of New York, as I read the protocol, actually has some components in it that are similar to my recommendations, and I'd be very interested in hearing after you've seen the results. I believe it's due to conclude at the end of 2014.

There may be some very interesting information collected about early intervention by courts in managing discovery because I believe that the protocol permits that in complex cases. I also think that the protocols that are adopted, to the extent they are, with respect to handling employment cases and the early interchange of evidence would

likewise be very informative in assessing the extent to which that adequately informs the parties so that they have an early opportunity to assess the strengths and weaknesses of their respective positions and perhaps resolve the case earlier.

JUDGE CAMPBELL: Any other questions?

(No response.)

JUDGE CAMPBELL: All right. Thank you very much, Mr. Sellers.

And thank you, everybody, for your comments. I think I speak on behalf of everybody on the committee that this has been a very valuable, very informative day. We recognize that there are earnest and honest beliefs shared on all sides of this issue. I wish I could say everything is clear after today, but obviously these are hard issues, and the things we've learned today from you have been very valuable.

We will hold another hearing on January 9 in Phoenix and one on February 7 in Dallas, and we continue to look forward to written comments as well. Thank you very much. We are adjourned.

(Whereupon, at 5:05 p.m., the Judicial Conference Committee in the above-entitled matter was adjourned.)

//

1 //

REPORTER'S CERTIFICATE

CASE TITLE: Proposed Amendments to the Federal Rules of Civil Procedure, Judicial Conference Advisory Committee on Civil Rules

HEARING DATE: November 7, 2013

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: November 7, 2013

Diane Humke
Heritage Reporting Corporation
Suite 600
1220 L Street, N.W.
Washington, D.C. 20005-4018