1 **TRANSCRIPT OF PROCEEDINGS**

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4 **In the Matter of:**)
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5 **PUBLIC HEARING ON PROPOSED**)
AMENDMENTS TO THE FEDERAL)
6 **RULES OF CIVIL PROCEDURE**)
JUDICIAL CONFERENCE ADVISORY)
7 **COMMITTEE ON CIVIL RULES**)
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Pages: 1 through 335
11 Place: Phoenix, Arizona
Date: January 9, 2014
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BEFORE: HONORABLE DAVID G. CAMPBELL, CHAIR
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1 P R O C E E D I N G S

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3 JUDGE CAMPBELL: Good morning, everybody.
4 And thank you for being here. We particularly
5 appreciate those of you who've traveled from afar
6 to help us address the issues we are wrestling
7 with on the Civil Rules Committee. We need your
8 input, we welcome your input. And we appreciate
9 both the oral and the written comments that you
10 will be sharing with us.
11 So far, we've received about 405 written
12 comments, hundreds of pages of them. We are
13 reading them. I can't say that we have all read
14 all of them. In fact, I can say we have not all
15 read all of them, because I haven't read all of
16 them, but we are working on it. And we give you
17 our assurance that we will read every one of them
18 before we get together for making any final
19 decisions.
20 There have been no final decisions made on
21 this -- these issues. The Committee is very much
22 in a listening and learning mode. We won't be
23 meeting to actually discuss things until after
24 we've held all of these hearings and heard
25 everybody's input, because we want to make sure

1 that we consider all of the comments that have
2 been made.
3 So we are very appreciative for the
4 efforts you're making to help us address these
5 matters.
6 We have a lot of folks who are scheduled
7 to speak today. We have 39 individuals who are
8 scheduled to speak. And given those numbers,
9 unfortunately, that means about ten minutes total
10 per speaker.
11 We wish we could have you address us for
12 longer periods of time, but we have 39 scheduled
13 here. We have 43 scheduled in Dallas, and we have
14 29 on a waiting list hoping to have an opening
15 come up somewhere where they could speak. So we
16 feel we really need to move along and give
17 everybody an opportunity to speak.
18 So when you do speak, what we've done is
19 set a timer for about five minutes. We borrowed
20 some lights from somewhere in D.C. You'll see a
21 yellow light come on when you've used three
22 minutes up there on the lectern, a red light when
23 you get to five minutes. We are going to then
24 have about five minutes for comments.
25 And after we've spent about ten minutes

1 addressing those issues, then we will move on to
2 the next speaker so everybody gets an opportunity
3 to speak.
4 Please feel free to submit to us in
5 writing any points you wish to make that you
6 didn't have time to make here.
7 We are going to also ask that you pull
8 those mics together and speak directly into them,
9 because we have folks on the phone who want to
10 hear what is said by you as well.
11 In terms of just logistics, important
12 matters, we will break at about 10:30 for about 15
13 minutes. There are rest rooms in this building.
14 If you go out the door and to your right, there's
15 two sets of rest rooms on this floor. And there's
16 two sets on every floor above it for the four
17 floors above it if you need to get into a restroom
18 that's not crowded upstairs.
19 When you do speak, we are going to ask you
20 to please identify, if you would, your firm or the
21 organization you're with and your practice area or
22 the focus of your -- your studies or your efforts.
23 That is helpful background for us.
24 So with that introduction, we are going to
25 go ahead and get started, and the first speaker is

1 Bob Owen.

2 MR. OWEN: Good morning, and thank you.
3 My name is Robert Owen. I'm a litigation partner
4 and partner in charge of the New York office of
5 Sutherland, Asbill & Brennan. I've been a
6 commercial litigator in New York City for 40
7 years.

8 In addition, to my regular litigation
9 practice, I've been privileged to counsel four
10 global corporations on eDiscovery issues, two
11 pharma companies and two oil companies. I want to
12 focus on Rule 37(e).

13 The most vexing aspect of our current
14 regimen for my clients is the uncertainty and
15 inconsistency that litigants face when attempting
16 in good faith to make preservation decisions.
17 When to start preserving, the trigger is not
18 certain.

19 How to preserve, whether by central
20 collection, or custodian self-selection or
21 otherwise is not certain.

22 What to preserve, especially when
23 preservation decisions must be made
24 precommencement in the absence of a complaint is
25 not certain.

1 How long to preserve, if the anticipated
2 claim is not filed, is not certain.
3 It's been said in order to be just in its
4 application, the law must be clear to those whose
5 conduct it regulates. Because of the current
6 law's lack of certainty concerning preservation
7 and because of my -- of corporations' aversion to
8 becoming the next Echostar or Qualcomm or Rambus,
9 they overdo it. This is a waste of our country's
10 resources, and proposed Rule 37(e) is a tremendous
11 step in the right direction.
12 I applaud the difficult and hard work
13 that's been done by the Committee. Its most
14 important contributions are to provide a single
15 national standard for spoliation sanctions, and to
16 require a showing of culpability higher than
17 negligence or gross negligence.
18 Preservation of ESI, when residential
19 funding was decided in 2002, was a relatively
20 simple matter. It is anything but simple now.
21 The explosion in volumes and the explosion in
22 complexities make the opportunities for mere
23 mistakes far more numerous than they were ten
24 years ago.
25 My clients' line employees don't need

1 extensive of training to know when they are doing
2 something in bad faith. They come prewired to
3 know when something is wrong. Training them to
4 avoid mere mistakes in this area, however, is a
5 different matter. In this area, frankly, it's
6 almost impossible to train every line employee
7 about the nuances of preservation.
8 The single point I want to emphasize in my
9 testimony this morning is that whatever form the
10 final Rule 37(e) takes, it is vital that the rule
11 be tightly written. The guidance it provides to
12 practitioners and judges must be clear. And there
13 must be no wiggle room to misapply the spirit of
14 the rule.
15 I particularly applaud the Committee's
16 intention to displace inherent power, which has
17 been -- that is certainly not a certain source of
18 counseling for us.
19 Why do I say this? There are three
20 reasons, really.
21 First, although the Committee and its
22 groupies of which I am one, live and breathe these
23 topics, the vast majority of practitioners in the
24 country do not routinely encounter these issues.
25 The Rules of Civil Procedure normally

1 provide clear guidance. How many days do I have
2 to answer? How many depositions can I take? Do I
3 have to produce my expert's drafts? What form
4 does ESI get produced in? Pull the book off the
5 shelf, look it up, and act accordingly. That's
6 what practitioners expect from the rules.
7 Rule 37(e) ideally should conform to that
8 expectation, especially because those
9 outside-the-bubble practitioners have to make
10 preservation decisions precommencement, with no
11 complaint, no adversary to talk to, and no judge
12 to resort to.
13 So the preservation rule has to be as
14 clear and as unambiguous as possible in order to
15 be fair.
16 Second, understandably, many judges and
17 magistrate judges themselves are also less
18 familiar with the nuances in this area than you
19 and the people in this room. In a recent Southern
20 District case one of our most respective district
21 judges was called upon to decide a preservation
22 issue as one of about six motions before him,
23 including summary judgment. A spoliation motion
24 was in the mix. His decision on summary judgment
25 was entirely reasonable. His decision on the

1 preservation issues was just wrong.
2 Third, there are also judges whose
3 personal views are out of step with the Committee
4 and for whom tightly worded guidance is essential.
5 One such judge in my district for whom I have both
6 deep respect and affection issued an opinion
7 recently which construed "willful" to mean merely
8 intentional conduct. If applied as part of the
9 new Rule 37(e), that construction of willful would
10 enable residential funding to survive and possibly
11 drag the other circuits down to the negligence
12 level.
13 So my overarching point here is in light
14 of these three reasons, please write a clear and
15 unambiguous rule if at all possible. How to do
16 this?
17 First, "willful" is a confusing term.
18 When a client destroys documents pursuant to a
19 document retention program, that's a willful act.
20 The term should be either eliminated from the rule
21 or clearly defined, or the "or" should be changed
22 to "and." I prefer the latter.
23 Second, the (b)(2) clause is, I submit, an
24 invitation to construe any loss of data as an
25 irreparable deprivation. The deleted e-mail

1 account of the defendant, Mr. Hart, in Sekisui had
2 no bearing on the case. Plaintiff had alleged a
3 single count of breach of warranty. His state of
4 mind had nothing to do with that. But the judge
5 there found that the willful destruction of his
6 e-mails was sufficient to infer relevance even in
7 the absence of any bad faith.
8 I submit this shows how this will go if
9 you leave (b)(2) in the rule in any form. And I
10 suggest that you take it out.
11 I deeply appreciate the opportunity to
12 come and testify. Thank you very much.
13 JUDGE CAMPBELL: All right. Thank you,
14 Mr. Owen.
15 Are there questions from members of the
16 Committee?
17 PROFESSOR MARCUS: Mr. Owen, one
18 follow-up. You said among your preference,
19 preferred results for the culpability provision
20 would be saying "willful and bad faith" rather
21 than removing "willful" altogether.
22 Can you explain why?
23 MR. OWEN: First of all, I think that bad
24 faith needs to be a part of this as the Committee
25 has recognized. Because without a -- an act taken

1 in bad faith, and without an act taken willfully,
2 you can't apply the presumption that what was
3 destroyed was harmful to the spoliating party's
4 case.
5 And so I just think willful and bad faith
6 emphasizes that there must be a relevance
7 connection between what was destroyed and what the
8 jury hears in the way of an adverse inference.
9 JUDGE CAMPBELL: John?
10 MR. BARKETT: You mentioned
11 precommencement several times and I wanted to get
12 your reactions to factor C in (e)(2), the factor
13 that describes sending notice to a potential
14 defendant as a factor that courts could consider
15 in evaluating the conduct of the preserving party.
16 MR. OWEN: I think preservation demand
17 letters are a tool for parties to begin
18 discussions. I would like to see in the factors a
19 suggestion or a reference that if an overbroad
20 preservation demand letter is sent, it should be
21 regarded as a fishing expedition and as a nullity.
22 I think there ought to be a certification
23 requirement that if you send a preservation demand
24 letter, you're sending it in good faith and it's
25 as narrow as possible, because it can be misused.

1 But, you know, I think that starting to
2 talk about these things earlier rather than later
3 is a plus. The problem is that you don't have a
4 starting place from which to negotiate, and so
5 it's very formless. And you don't have a judge to
6 go to and you don't have a complaint. And so
7 those things make it difficult for my clients to
8 make scope decisions.
9 JUDGE CAMPBELL: Paul?
10 JUDGE GRIMM: You've given us some helpful
11 thoughts in terms of drafting. I appreciate that.
12 With regard to the willfulness and bad
13 faith, willfulness or bad faith or eliminate
14 willfulness altogether, you've given us your
15 preference. You've explained why.
16 If one of the options to be considered is
17 to define "willfulness," and you have talked about
18 the malleability of that term as it can be used to
19 range from anything starting with an awareness of
20 what you are doing, namely that you are not in a
21 coma while you are doing it, all the way up to
22 trying to have an awareness of some consequence of
23 what you are doing.
24 Is there language that you would offer us
25 if we are trying to evaluate a definition for

1 "willfulness" to have it remain in the rule as
2 it's presently drafted?
3 MR. OWEN: Yes. And I would suggest you
4 look at the Sedona Conference submission on this
5 point. They are proposing a definition of
6 willfulness as follows: The spoliating party
7 acted with specific intent to deprive the opposing
8 party of material evidence relevant to the claims
9 or the defenses.
10 I think that's an excellent definition.
11 JUDGE GRIMM: Thank you.
12 JUDGE CAMPBELL: Thank you very much,
13 Mr. Owen.
14 Mr. Garrison?
15 MR. GARRISON: Good morning, my name is
16 Joe Garrison. I'm NELA's liaison to this
17 Committee. And I represent employees in
18 employment cases.
19 I want to focus on proportionality. Under
20 the proposed rule change, proportionality will
21 become much more prominent, and I want to ask how
22 does this proposal change -- these proposal
23 changes address two major objectives of the rules.
24 And I would like to express it this way with a
25 couple of questions.

1 Question one: Will the focus on
2 proportionality lead to acceptance of our civil
3 justice system as having more fairness with rules
4 that are more even handed?
5 And question two would be: Will the focus
6 on proportionality lead to a process with less
7 cost and more efficiency?
8 How to achieve fair, just, and even-handed
9 rules is the most important of the questions. If
10 the case is only about money, the case with a
11 value of X should generally not have a discovery
12 cost of 2X or 3X.
13 But in making rules, we can't set the
14 value of cases by the potential recovery. In
15 employment cases, for example, the wrongful
16 discharge of a high-level officer will have much
17 more money, quote, value than the wrongful
18 discharge under the same legal theory with roughly
19 the same factual proof of a salaried salesperson.
20 You all know there are hundreds of
21 examples I could give you that would be the same.
22 Just recently in my office, for example, we are
23 representing a very high-level woman who earned
24 almost half a million dollars a year. And over
25 the summer, we represent a bunch of massage

1 therapists who were lucky if they made $30,000 a
2 year.
3 The value of those cases, I would suggest,
4 was a lot greater for the ones who were making
5 30,000. And that's because they were facing
6 foreclosures of their houses, they were facing
7 losing their cars, they were going on food stamps,
8 and they were suffering the humility and
9 embarrassment of all of that.
10 There are parts of our system that cause a
11 great deal of admiration and respect by the
12 public. And that's largely because the public
13 sees that when individuals come into court, those
14 individuals have the -- have the value of
15 impartial judges and juries and the rules don't
16 tilt in favor of a large corporate party.
17 But if the amount in controversy is the
18 primary factor in evaluating proportionality, then
19 we will, in fact, categorize citizens who use the
20 courts as rich versus poor and the rich will get
21 greater discovery solely because the amount in
22 controversy is greater.
23 This strikes me as neither fair nor just
24 nor even handed. And I would respectfully suggest
25 that the amount in controversy factor be

1 eliminated as a factor. That would leave as
2 relevant factors the importance of the issues, the
3 parties' resources, the importance of discovery in
4 resolving the issues, and the cost or burden
5 versus the benefit.
6 So this last one implicates question two:
7 Will the process be less costly and more
8 efficient?
9 I believe the plaintiff's bar has reacted
10 adversely in substantial part because we strongly
11 predict that the -- that the present so often
12 untenable discovery objection of burdensome,
13 harassing, and vague will be replaced by the word
14 processor that's going to say objection, the
15 discovery sought is not proportional.
16 And what happens then to the touchstones
17 of cost evaluation and efficiency enhancement? It
18 will depend where the burden lies.
19 The way the rule is written now,
20 there -- or proposed, the burden is going to lie
21 with me, the proponent of the discovery, to show
22 that my requests are proportional. And while I
23 ought to have the burden to show that my requests
24 are relevant, the objecting defendant shall have
25 the burden to show lack of proportionality.

1 Otherwise, the defendant has got no reason at all
2 to be cooperative.
3 Just say no might work. Especially at the
4 beginning of the case where discovery is
5 asymmetrical. How does my client know what
6 discovery lies where and what the costs are to
7 retrieve it? The burden to show lack of
8 proportion should be shifted to the party who
9 bears the cost and who knows where the material is
10 and how to get it.
11 Allocating the burdens in this matter,
12 relevance is for the proponent to show and lack of
13 proportion is for the objector to show, will go a
14 long way in avoiding motion practice in every case
15 and should lead to much more productive
16 cooperation between counsel.
17 So I've got three seconds left.
18 Judge Grimm, you and Elizabeth Cabraser
19 wrote a paper that cited to Susman's Checklist.
20 And Susman's Checklist says for depositions, each
21 side gets ten lasting for six hours each. And our
22 rules ought to keep this ten deposition
23 presumption.
24 JUDGE CAMPBELL: Thank you, Mr. Garrison.
25 Let me, if I can, ask a question about

1 the -- one of the points you made regarding the
2 relative value of the case. Your point about
3 somebody with a $500,000 claim getting more
4 discovery than somebody with a $30,000 claim has
5 been made in many of the written papers. And it's
6 a very legitimate point.
7 But I'm interested in your thoughts on the
8 sort of reverse of that. If somebody has a
9 $30,000 claim and to prove it they believe in good
10 faith they need to conduct discovery which will
11 cost a defendant $60,000, and as a result, the
12 defendant settles, not because of the merits of
13 the claim, but because they are going to spend a
14 lot more litigating it than it's worth.
15 What about that problem? I mean, isn't
16 the amount -- I mean, that arguably is not just to
17 the defendant. And it's not inexpensive as Rule 1
18 would suggest.
19 So I guess my question is: How can we not
20 consider the amount in controversy when -- when a
21 court is trying to decide what the appropriate
22 level of discovery is in a case?
23 MR. GARRISON: I think it's an overblown
24 factor is what I'm saying. I think it is a factor
25 that can be misread by a number of courts. And

1 the -- what you were just saying would become the
2 only factor or the major factor or the
3 preponderant factor and it shouldn't be.
4 You know, it's easy to say from a
5 practitioner's side, and this is what we see is
6 that most of those cases that you're talking about
7 settle. I have no reason to want to conduct
8 $60,000 of discovery myself in a $30,000 case when
9 I have a contingent fee. It's cost me then six
10 times as much as it ought to cost me to do that
11 case.
12 Sometimes that happens. But it doesn't
13 happen with your better lawyers, Judge. It
14 happens with your lawyers who don't know what they
15 are doing, to state it clearly.
16 And those of us who do know what we are
17 doing look at the cost of cases before we start
18 them. We reject cases that aren't going to be
19 effective for our client. And for them to be
20 effective for our client, they have to be
21 effective for us as well.
22 That's one of the reasons. The other one
23 is that in employment anyway, we enforce a lot of
24 statutes that don't have high value attached to
25 them. And the FMLA is a really good example of

1 that.

2 We did a case involving intermittent
3 leave. Intermittent leave is, Your Honor, leave
4 that happens only once in a while. And the
5 deprivation of intermittent leave by a large
6 corporation can be important to every single
7 worker in that corporation. But it isn't worth
8 much. It's going to be worth maybe $5,000.

9 A case like that we take to make sure that
10 the law is being read the way we think it should
11 be read. And the value of the recovery is
12 minimal.

13 JUDGE CAMPBELL: John?

14 JUDGE KOELTL: Mr. Garrison, you said that
15 under the proposal, judges would treat the amount
16 in controversy as the primary factor. The
17 proposed rule would list that as one of -- one of
18 the factors. That came in because it's already in
19 26(b)(2)(C)(3) that it's one of the factors that
20 the judges must consider. It's already in there
21 in 26(g)(3) that lawyers have to consider that in
22 making their requests and responses.

23 And in Dallas, we were told that it all
24 works just fine, that people know how to balance
25 those factors.

1 There are some cases, as you've pointed
2 out, where there are interests at stake that are
3 nonmonetary. And many of those cases reflect
4 congressional judgments by -- by fee shifting at
5 the end where the lawyers who pursued the cases
6 are able to get attorneys' fees.
7 And one would think that judges would
8 appreciate that there are cases where there are
9 factors that have to be taken into account that in
10 an individual case are more important than amount
11 in controversy. And the list doesn't prioritize
12 the various factors.
13 So the question would be if judges had
14 been able for 30 years to be able to look at the
15 rule and to interpret it fairly, as we were told
16 in Dallas they were able to do it, why do we
17 expect that judges faced with exactly those same
18 considerations, which they were supposed to be
19 imposing for 30 years, would now begin to
20 interpret them differently or establish priorities
21 which don't exist there?
22 If it weren't true that there are some
23 cases, employment cases, civil rights cases, where
24 the interests involved are plainly more important
25 than the specific amount in controversy, that

1 provision wouldn't have been included in the rule
2 and wouldn't continue to be included in the rule.
3 Why do you think judges will begin to
4 interpret that differently?
5 MR. GARRISON: Because I think this
6 Committee didn't move this rule up to where it's
7 going for nothing. I mean, you moved it up
8 because I think, in fact, it was buried in the
9 rules and it really wasn't used.
10 Amount in controversy, I don't dispute at
11 all that amount in controversy is a factor judges
12 look at, and they ought to. When you are looking
13 at what kind of costs and benefit is going to
14 arise in a discovery dispute, I'm not suggesting
15 that's wrong. I am saying that it's listed as
16 number one.
17 Number one on my list, you know, when I
18 make my lists, when my wife makes lists to go
19 shopping, number one is the first important thing.
20 And it's number one on this list and it shouldn't
21 be.
22 If you're going to keep it, move it to
23 number five. Put it where it belongs, which I
24 think is not anywhere. But at least move it down.
25 And include the interests of litigants otherwise.

1 JUDGE CAMPBELL: All right.

2 MR. GARRISON: Sorry to take so long,

3 Judge Koeltl. Your question was very short and I

4 couldn't finish it on time.

5 JUDGE CAMPBELL: Your answer was right to

6 the point. Thank you very much, Mr. Garrison.

7 Mr. Pratt?

8 MR. PRATT: Good morning. I'm privileged

9 to give my perspective on the proposed changes to

10 the Rules of Civil Procedure.

11 I'm here as the president of the

12 Federation of Defense and Corporate Counsel. It's

13 an organization that's invitation only, limited

14 membership. Its history goes back to 1936. It

15 consists of 1400 of the best and brightest defense

16 and corporate counsel around the world. I speak

17 on behalf of those 1400 members in my November 13

18 comment letter as well as my comments today.

19 I'm also here to share my experience with

20 the civil justice system in two ways. One, I was

21 a trial attorney for over 30 years handling

22 litigation, trying cases around the country. I

23 was a pretty heavy user of the federal court

24 system.

25 My more recent role in the last six years

1 is a general counsel of a medical device company
2 called Boston Scientific. It's in the business of
3 health care, and it has over 24,000 employees and
4 has 15,000 products available to physicians and to
5 patients. And we have litigation, intellectual
6 property, products, commercial, you name it.
7 Some of the cases we are the plaintiff,
8 often we are the defendant. I've seen firsthand
9 the cost delays and disruption that our civil
10 justice system creates for parties that find
11 themselves embroiled in that system. A
12 significant percentage of my litigation costs are
13 attributed to litigation and discovery matters.
14 I'm not suggesting we can eliminate all
15 litigation costs. Companies like mine, we are
16 going to have to preserve materials, review them,
17 and produce them. It's not just because our
18 opponents want documents that they think will help
19 their case, but also because I want to find the
20 documents that prove my case.
21 All parties have an interest in getting
22 the documents that count. And that's the rub,
23 what counts. The current broad standards of Rule
24 26 go way beyond what counts and that creates a
25 looming fear that you have to hold and produce

1 more documents lest you be sanctioned for not
2 doing enough.
3 Let me give you some numbers. Since 2005,
4 my company has preserved 107 terabytes of data, in
5 just the last year, we have preserved 35 terabytes
6 of data, including 90 million messages.
7 Roughly half of our U.S. employees are
8 subject to litigation holds. We pay our outside
9 discovery vendor approximately $32 million to
10 process, host and provide our document review tool
11 since 2005. And it's averaging $5 million a year
12 right now to that outside discovery vendor.
13 Since 2010, I've paid document review
14 teams $7.35 million to review roughly 56 million
15 pages.
16 You hear these stories over and over again
17 from companies. But don't be numbed by them
18 because therein lies the critical evidence that
19 shouts out for change. All parties know this.
20 The requesting party often gets millions
21 of documents that have absolutely no bearing on
22 the lawsuit so they are not used. Estimates vary
23 but my best guesstimate is far less than one
24 percent of all produced documents are used for any
25 reason in litigation.

1 Think about that. Let's reduce that
2 excess, the ones that no party needs. And that's
3 what these rules will help accomplish.
4 We favor the proposed revisions to Rule
5 26. The goal is to bring common sense, reasonable
6 and proportional restrictions on the scope of
7 discovery.
8 The problem with the current rule is
9 really twofold. One is "relevant to the subject
10 matter of the lawsuit" is very broad, and
11 requesters can engage in fishing expeditions by
12 allowing discovery of anything reasonably
13 calculated to lead to the discovery of admissible
14 evidence.
15 The changes in Rule 26(b)(1) are laudable.
16 They would permit discovery materials relevant to
17 a party's claim or defense and proportional to the
18 needs of that particular case.
19 Moving proportionality into the scope of
20 discovery is critically important. It sets the
21 framework for how much discovery is appropriate in
22 that case rather than deal with that issue from a
23 protective order standpoint.
24 I don't see how these changes can be
25 portrayed as the end of the world as we know it.

1 Focusing on the documents relevant to a party's
2 claim for defense and the custodians who have
3 those documents will narrow the universe of
4 potentially relevant documents without sacrificing
5 the true needs of the parties.
6 All parties will get the ones that are
7 meaningful. We should see more accommodation
8 rather than expensive motion practice.
9 I believe in the capacity of good lawyers
10 to treat each other with reasonable and
11 professional ways. If there are outliers, there
12 are ways to deal with them rather than craft the
13 rules to accommodate them.
14 I see my time is running out. I do want
15 to comment briefly on proposed changes to Rule 37.
16 I agree with the comments that "willful" or "bad
17 faith" undefined is dangerous. It's got to be
18 tethered to some level of culpability.
19 I subscribe to the definition of
20 "willfulness" as provided earlier this morning.
21 There is a specific intent to deprive the opponent
22 of material evidence relevant to the claims or
23 defense.
24 I am very concerned about the section of
25 Rule 37(e) that deals with the irreparable

1 deprivation of information. And keep in mind, my
2 company makes products that are often relevant in
3 litigation. Sometimes the plaintiffs lose them,
4 sometimes we don't lose them, but there's a
5 potential that we could lose them. And most of
6 those devices are actually helpful to my defense.
7 So the idea that if that is lost,
8 irreparably, without any showing of materiality,
9 and I could be sanctioned for that, I think it's
10 an untoward outcome and will result in lots of
11 litigation.
12 Finally, I favor the presumptive limits on
13 depositions, interrogatories, and requests to
14 admit as they are included under these proposals.
15 These are reasonable limits, they are not
16 impenetrable ceilings, and lawyers can figure out
17 where their case fits on that scheme.
18 Cases are different. Most lawyers can put
19 these cases on the right point of importance on
20 the spectrum, which important in my view for all
21 of those rules is to set a reasonable mark or
22 target regarding discovery. They should not
23 default to the position that every case is
24 critically important and that excessive discovery
25 should be allowed. Nor should they default to the

1 issue that cases should not have a lot of
2 discovery.
3 I think these hit the midpoint of
4 reasonableness and leave it to the attorneys and
5 judges to move the buoy up and down in accordance
6 with the circumstances of that case.
7 These changes will help the parties better
8 achieve the objectives of Rule Number 1. And the
9 true winner, I believe, will be our system of
10 justice.
11 Thank you.
12 JUDGE CAMPBELL: All right. Thank you,
13 Mr. Pratt.
14 Questions? Sol?
15 JUDGE OLIVER: Mr. Pratt, I address the
16 question to you relative to what Mr. Garrison said
17 earlier. He indicated that under these proposed
18 changes that the burden of proof changes in regard
19 to proportionality. His position is that the
20 plaintiff should have the burden in regard to
21 relevance, but the defendant should continue to
22 have the burden in regard to showing that the
23 discovery is not proportional.
24 What is your response to that?
25 MR. PRATT: My response is that you can't

1 really define in terms of plaintiff and defendant.
2 I've been on both sides of that V, and I've been
3 the requesting party no matter which side I am.
4 So I wouldn't deal with it in terms of burden. I
5 don't think it's the right way to look at it.
6 If my company submits a discovery request,
7 I've got to certify that that's consistent with
8 the Rules of Civil Procedure and I have the burden
9 of proving it. So the requesting party for a long
10 time has had the burden of certifying and proving
11 its compliance with the Rules of Civil Procedure.
12 I wouldn't talk about it in terms of
13 burden in my view. I think this is a question of
14 balance. I think that's the right word. When you
15 take a look at the factors of proportionality,
16 some of them, the -- the receiving party can
17 answer, what are the resources.
18 JUDGE OLIVER: What happens, and I didn't
19 mean to say plaintiff, I guess the person who is
20 seeking the discovery would have to show it's
21 relevant, but the person who produces discovery.
22 So I was wrong in saying plaintiff.
23 But -- but the court has to have
24 some -- some guidance. The court has to look to
25 some party in regard to what the burden is,

1 wouldn't it?

2 MR. PRATT: Yeah. I mean I think what the

3 court would look at and what I would urge to the

4 court if I were urging that right now is to take a

5 look at all of these factors.

6 Take a look at the amount in controversy.

7 Take a look at the issues, the importance of

8 discovery in that particular case. And in

9 balance, is the discovery right or wrong?

10 I wouldn't -- it isn't like a trial on the

11 merits in my view, Your Honor, where you have a

12 preponderance of the evidence or clear and

13 convincing evidence or anything like that. I

14 think it's a question of listening to the parties

15 present their side of it and saying in this view,

16 this case fits here. I don't think it changes the

17 burden of proof. I really don't. And I wouldn't

18 look at it that way.

19 This is a balancing of the interests with

20 both parties contributing information that will

21 allow the court, if they can't reach an

22 accommodation mutually, to decide what the level

23 of discovery ought to be allowed.

24 JUDGE CAMPBELL: Other questions?

25 JUDGE KOELTL: How does your definition of

1 "willful" differ from bad faith?

2 MR. PRATT: It may not. It may not. So

3 in my letter submission to you, I said you put

4 "and" in there, you are making it clear it could

5 be an intentional act if that's the way the courts

6 define "willful." And it's been defined that way

7 at least in one case, and bad faith has the

8 element of culpability.

9 So, but if you define "willful" in that

10 way, which has a level of culpability, it may be a

11 difference, Your Honor, between actually doing

12 something, willfully actually doing something,

13 versus if it's a bad faith, not doing something.

14 When you're sitting back and you're allowing

15 documents to be destroyed, you are not taking an

16 affirmative action.

17 So I think if you define "willful" in the

18 way that we describe it, I think it -- it will get

19 to the point of what I think the primary concern

20 is, in my viewpoint, which is allowing just an act

21 to be a basis for sanctions. I think it either

22 has to be some intent, some culpability, some

23 element of wrongfulness, if you will, within that

24 particular sanction rule.

25 JUDGE CAMPBELL: All right. Thank you

1 very much, Mr. Pratt.

2 MR. PRATT: Thank you, Your Honor, thank

3 you.

4 JUDGE CAMPBELL: Mr. Miller?

5 PROFESSOR MILLER: Good morning,

6 Mr. Chairman. My name is Arthur Miller. I appear

7 for no one other than my own point of view. In

8 other words, I'm here on my own dime.

9 I know how hard this Committee works. I

10 was an assistant to reporter Benjamin Kaplan in

11 the '60s. I was a reporter to this Committee in

12 the '70s. And I was a member of this Committee in

13 the '80s. Those were three very hard working

14 periods in my life.

15 It's also very difficult for me to stand

16 up here and critique the work done by a reporter

17 and an associate reporter, both of whom are my

18 coauthors. How do we write books together,

19 friends? I don't know.

20 I've been very disturbed and I will speak

21 impressionistically, that for 30 years or so, a

22 pendulum has been swinging against civil

23 litigation in general, plaintiffs in particular.

24 What used to be a sleek pretrial process

25 is now littered, literally littered with stop

1 signs, whether they be motions to dismiss, expert
2 testimony, class certification, summary judgment,
3 now, of course, discovery.
4 That pendulum swing to me has lost the
5 moorings of the original rules and has worked
6 against those who seek compensation, and worked
7 against those who tried to enforce public policies
8 reflected in federal and state statutes, and
9 common law principles.
10 I don't think that's very good. I don't
11 think it befits the American civil justice system
12 to have this preoccupation with cost, abuse,
13 extortion, clichés that have been thrown out by
14 the defense bar that sadly in my judgment have
15 been picked up in judicial opinions without any
16 empiric demonstration whatsoever.
17 We just heard an anecdote. There are
18 dozens of those anecdotes. But some of the
19 research suggests that the costs of litigation are
20 not that high when compared to stakes. Abuse is
21 basically something in the eyes of the beholder.
22 And extortionate settlements are the settlement
23 you made.
24 Now this is the fourth time in recent
25 decades that the rules will be amended to restrict

1 discovery. '83, '93, 2000, and now 2014 or '15.
2 There is yet to be any demonstration that any of
3 these amendments have had any effect, yet you've
4 gone back to the same old well without considering
5 the possibility that: A, do some empiric work on
6 these clichés; B, are there alternative approaches
7 to abuse, cost, extortion if they are ever
8 demonstrated to exist. No, you limit discovery.
9 Make no mistake about it, moving the
10 proportionality concept from where it is now into
11 the scope of discovery provision is a major shift
12 in the balance of discovery. I'm the unindicted
13 coconspirator.
14 I can almost feel Judge Koeltl laughing at
15 me.
16 JUDGE KOELTL: No.
17 PROFESSOR MILLER: Because it was on my
18 watch, my watch, that that provision was inserted
19 in the rule. We were concerned with needless and
20 excessive discovery. That's what we said in the
21 advisory committee note. We lacked empiric
22 evidence because the FJC at that time did not
23 provide those services.
24 We viewed it as a very limited safety
25 valve on the scope provision. You've now put it

1 into the scope provision so that the proponent
2 must show relevance and proportionality, and the
3 advisory committee note makes it clear you are
4 intending a limitation on discovery.
5 Now, Judge Koeltl said: Well, that stupid
6 provision that Miller put together in '83, that's
7 been working like a charm, almost as good as US
8 Airways, who knows.
9 Well, let me suggest, Judge Koeltl, that
10 when you put something in as sort of a discount or
11 safety valve on relevance, that is quite different
12 than pushing it as an adjunct, a correlative, a
13 coequal with relevance.
14 So the relative paucity of motions under
15 the existing provision that the last 30 years has
16 seen, you've got to think about the incentive to
17 defense interests or any interest opposing
18 discovery to make a motion or to try and stop
19 discovery based on proportionality.
20 We did the best we could in '83 to
21 describe needless and excessive. You describe
22 proportionality with the same subjective terms,
23 the same abstract terms.
24 I agree with Mr. Garrison, the cure may be
25 more vicious than the disease if there is, as may

1 well occur, a tidal wave of discovery motions
2 addressed to blocking discovery based either on
3 relevance or on proportionality, and you've taken
4 out that very important safety valve which allows
5 a district judge discretion to expand the ambit of
6 discovery from claims or defenses, which came in
7 only in 2000, but allowed anything relevant to the
8 subject matter of the action. That's an important
9 safety valve.
10 Why are you depriving district judges of
11 discretion to open up relevance and
12 proportionality, if you keep it there, and
13 prohibiting that judge from saying: In this case,
14 I want to see what's relevant to the subject
15 matter of the action.
16 So it's a double whammy in there. These
17 proposals, by my light, this is me speaking, are
18 one sided. Even your obliteration of Rule 84 in
19 the forms is a very stealth-like signal that
20 you're approving Twombly and Iqbal.
21 It's time that this pendulum of the last
22 30 years be stopped. I would hope to live long
23 enough to see what pendulums always do, namely
24 retrace its arc. But I'm an old fogie.
25 JUDGE CAMPBELL: Thank you, Professor.

1 Questions? Yes, John.
2 MR. BARKETT: Professor, the original
3 Rule 34 you mentioned in your comments that we've
4 lost the moorings from the original proposals.
5 The original Rule 34 provided that documents were
6 produced only upon motion and showing of good
7 cause.
8 Is it your view that that language is
9 something that we should have today in the rules
10 if we are going to go back to 1938?
11 And I'll just give you -- my sense of
12 having studied the original rule making is that
13 the real focus was on deposition discovery.
14 PROFESSOR MILLER: Absolutely.
15 MR. BARKETT: And I went back and reread
16 Hickman versus Taylor which you cited in your
17 paper. And the paragraph that you cite to
18 actually is talking about deposition discovery in
19 terms of the importance of gathering facts.
20 And there's a Charles Clark symposium from
21 1951 that contains a survey of the uses of
22 discovery tools in the first ten years of the
23 rules. And five district courts in four percent
24 of the cases at the time even involved document
25 requests. So it seemed to me like the focus back

1 in the late '30s and '40s was really about
2 depositions.
3 And we live in a different era today. So
4 part of what I think that we are reacting to is
5 the effect that electronic discovery is having.
6 So when I hear comments about let's go back to
7 1938, and I realize that it was also apparently on
8 your watch when requests for production went
9 extrajudicial in 1970 when the motion and good
10 cause requirement was eliminated, I wonder what
11 was the original reason why you couldn't get
12 documents unless you showed good cause in motion
13 and now we've basically taken judges in 1970 out
14 of the business and we now have eDiscovery, so
15 that the world sort of turned.
16 And I'm not sure that Edson Sutherland
17 would have written the rules the same way today
18 had he been facing the electronic storage
19 information market that we face today.
20 PROFESSOR MILLER: Number one, the
21 original 34 in part reflected concerns about
22 privacy that there was something about documents
23 and things, remember it's about things, too, that
24 cautioned the rule makers to sort of create that
25 barrier of the motion. By '48, and later, the

1 motions were being granted without any difficulty.
2 So the requirement of the motion was removed
3 because it was a needless procedure. It was just
4 a motion that was unnecessary.
5 The original people, and through my watch
6 in the '80s, we and they were very concerned,
7 certainly Ben Kaplan was very concerned, don't
8 create transaction costs. We had Mr. Garrison
9 speaking about the transaction cost that this
10 proposal might generate, might exceed the benefits
11 that you might get from proportionality.
12 So in 34, that was taken out. Now, we
13 understand that the 800-pound gorilla right now is
14 electronic discovery. The last speaker addressed
15 that. You've addressed it. It is a problem.
16 There is no doubt there is a problem. But, it may
17 be a shorter-term problem than most people think
18 because the development of information retrieval
19 sciences and linguistics have now already achieved
20 a massive improvement in data retrieval analysis.
21 MR. BARKETT: I read that reference in
22 your papers but do you have a sense of the costs?
23 PROFESSOR MILLER: Lower. Lower.
24 MR. BARKETT: But who can afford that kind
25 of assistance in routine cases?

1 PROFESSOR MILLER: I assume that the very
2 people now complaining about electronic discovery,
3 about the terabyte concept, those people can
4 afford it.
5 The study done by the FJC shows that the
6 cost of discovery is not that great. It resonates
7 to stakes, stakes resonate to the economic
8 viability of the parties.
9 We've already got pretty good evidence
10 that the district judge working with counsel on
11 protocols for electronic discovery, coupled with
12 the constantly improving retrieval and analysis
13 techniques produces lower costs, and forgive us,
14 since we are humans in this room, higher accuracy
15 than human retrieval. With costs that
16 undoubtedly, as we know from the electronics
17 industry, will constantly decline, techniques will
18 constantly improve.
19 And I would hate to see a premature
20 rule-making reaction to something that is really a
21 moving target. Electronic discovery frightens
22 everyone. But some very talented district judges
23 have managed to capture and control this 800-pound
24 gorilla. And I don't think that tail should be
25 wagging this dog, namely discovery as we have

1 known it since 1998.

2 JUDGE CAMPBELL: All right, thank you very

3 much for those comments, Professor.

4 Senator Kyl?

5 SENATOR KYL: Judge Campbell and members

6 of the panel, my name is Jon Kyl. I'm a senior

7 advisor of the Washington firm of Covington &

8 Burling. My practice is primarily in public

9 policy.

10 I'm here for the firm because lawyers in

11 the firm and clients of the firm have become

12 increasing concerned about the abuse of federal

13 discovery rules by some, driving up the cost of

14 litigation and in some cases forcing settlements

15 in situations where it probably is not

16 appropriate.

17 So I commend the Committee for its hard

18 work, for its proposals, and express support for

19 those proposals. Indeed, I would even go further

20 in at least one area. But I think for those of us

21 who not only support the substantive changes, but

22 also believe that this is the appropriate process

23 for making rules changes in the Federal Rules of

24 Civil Procedure, it's important to move this

25 process to successful conclusion.

1 There are frustrated parties and interests
2 who have other options, such as the congressional
3 action that's being pursued on patent litigation
4 reform. I think some were surprised at how
5 quickly that process has moved forward.
6 My point is that it's fine to say that we
7 need more time or more empirical evidence or more
8 meetings, but this Committee, the standing
9 committee, the Judicial Conference, the Supreme
10 Court, and eventually the layover time of the
11 United States Congress, by my calculation, will
12 take about five years before this process has
13 concluded and the rules are changed and become
14 final.
15 So I don't think anybody can deny that
16 this process has been thoughtful, it's been
17 deliberative, it's been fair, and by all the
18 materials I've read, exhaustive. And as a result,
19 as I said, I not only commend the Committee for
20 the substance of its proposals, but also urge
21 support for moving the process to conclusion.
22 Others have talked about and will continue
23 to document the high cost and low relative return
24 of the value of discovery that is currently
25 allowed in some cases. University of Virginia law

1 professor John Setear gave this function of
2 discovery I think a quaint and interesting name a
3 few years ago. He called it the impositional
4 function of discovery. In other words, the
5 ability to impose costs on the other side. That's
6 the concern being addressed here.
7 And I don't think it's really necessary.
8 We have -- our system allows successful
9 conclusions in criminal law, in administrative
10 law, in the arbitration context. Other countries
11 have systems that don't require this kind of
12 expensive discovery.
13 And indeed, it's one of the reasons that
14 some foreign firms find it difficult to
15 contemplate coming to the United States because of
16 their fear of our judicial system and the costs
17 that would be imposed upon them in cases.
18 So what to do? Let me limit my comments
19 to Rule 26 and briefly make three points here.
20 First of all, the elimination of language
21 about leading to evidence admissible at trial I
22 think is a positive step. Many have misunderstood
23 this language as really reflecting the real
24 standard for discovery. And the Committee has
25 made clear, I think, the reality.

1 Second, moving the proportionality
2 language from the back to the front of Rule 26, I
3 think, will be very helpful. And I think that
4 while it technically changes very little, if
5 anything, the protest from opponents reveal its
6 true value that just maybe parties and judges
7 might take this requirement more seriously.
8 And for this reason, I'm particularly
9 supportive of the Committee's recommendation to
10 clarify that judges have the power under Rule
11 26(c), relating to protective orders, to allocate
12 the costs of discovery in some situations to the
13 party requesting the discovery, the so-called
14 requester pays rule.
15 This gets the incentives right. And it
16 puts incentives on the parties to determine what
17 they really need. And a party who determines that
18 he really or she really needs something should
19 have the ability to get it if that party is
20 willing to pay for it.
21 It's very difficult, I appreciate, for
22 judges, and very time consuming for judges to try
23 to manage the discovery process in litigation.
24 And giving the parties the incentive for, in
25 effect, self-policing could go a long way to help.

1 This is something my colleague at
2 Covington, Don Elliott, has been advocating since
3 1986.
4 Finally, I think it would be very helpful
5 if the Committee provided some examples in the
6 advisory committee note of when judges should use
7 this authority to allocate the cost of discovery
8 to the requester rather than the responder.
9 I noted that Dean and later Judge Clark
10 drew as one of the main lessons from his
11 experience that to be effective, a rule should not
12 merely grant power but explain how that power is
13 to be used, giving illustrations. This could be
14 very helpful.
15 For example, when you have an
16 administrative proceeding from the EPA or the FDA,
17 determining, after exhaustive examination, the
18 safety of a drug or substance, this might be an
19 appropriate case in which to go beyond that or to
20 try to pierce that should require a requesting
21 party to pay for the -- for the attempt to do
22 that.
23 And I understand that administrative
24 determinations don't necessarily restrict the
25 right to sue. But that doesn't necessarily get at

1 the question of who should bear the cost of
2 investigating something for the second or third
3 time after an agency has already done so, and
4 especially given the long-standing presumption of
5 the regularity of administrative determinations.
6 This, I think, should provide at least a
7 sufficient basis for, in these kinds of
8 circumstances, creating a rebuttable presumption
9 that in that situation, the requester should pay.
10 So my suggestion is that the Committee
11 encourage judges to actually use the power by
12 specifying examples of where it is appropriate to
13 do so.
14 And I'll, in my written comments, expand
15 on this a bit further. But for now, again, I
16 commend the Committee for its hard work and urge
17 that advocates here try to help the Committee
18 bring this to conclusion so that we can have a
19 successful result in the Committee's process.
20 JUDGE CAMPBELL: Thank you, Senator.
21 Questions?
22 Perhaps I could ask one of you.
23 You mentioned requester pays. As I expect
24 you know, we have a subcommittee of the rules
25 Committee right now looking into the proposal of

1 requester pays in the form that Don Elliott has
2 advocated it, which I understand to be that there
3 should be some threshold of discovery a party can
4 get for free. But if they exceed that threshold,
5 whether it's a dollar amount or some other metric,
6 they pay for it.
7 That would be a very significant change in
8 the way discovery is done. And we are not
9 recommending that. We are studying that, because
10 we've heard from Congress and others that it's a
11 legitimate point to look at.
12 Do you think the change that we are
13 proposing in Rule 26(c)(1)(B) for the allocation
14 of expenses would cause judges to think that we
15 are supporting that broad notion of requester pays
16 that Don Elliott is advocating?
17 SENATOR KYL: No, Judge Campbell, even
18 though I support what my colleague is proposing,
19 and I am aware of the fact that there will be a
20 look at that to determine whether something beyond
21 what the Committee is doing now might be
22 appropriate.
23 What the Committee is recommending right
24 now would not do that. But it certainly gives
25 judges the discretion in certain situations to

1 determine whether or not the requester should pay.
2 And what I'm suggesting is that the Committee
3 could help the judges to guide them to situations
4 when this might be appropriate with some
5 illustrations.
6 One way would be, as I suggested where
7 there's already been an administrative
8 determination. A more drastic way, as you imply,
9 would be the notion of, and I shouldn't say
10 drastic, but a different approach would be where a
11 certain level of discovery is, in effect, free.
12 And then beyond that, the requester, absent
13 extraordinary circumstances, would bear the
14 burden.
15 But that's a proposal that I understand is
16 not included within the Committee's
17 recommendations.
18 JUDGE CAMPBELL: All right.
19 Other questions?
20 Thank you very much.
21 SENATOR KYL: Thank you very much.
22 JUDGE CAMPBELL: Mr. Kelston.
23 MR. KELSTON: Good morning. My name is
24 Henry Kelston. I'm a partner at Milberg LLP in
25 New York. Milberg primarily represents plaintiffs

1 in class actions and other complex litigation.

2 Based on just that one piece of

3 information, each of you now probably assumes with

4 a fairly high degree of confidence that I will

5 urge the Committee not to adopt the proposals

6 altering the scope and amount of discovery, that

7 is, the proposed amendments to Rules 26, 30, 33

8 and 36. And your assumptions on that score would

9 be correct.

10 So rather than discuss specific proposals,

11 I would like to draw attention today to some

12 larger issues that I believe should frame the

13 Committee's deliberations.

14 Issue one, does it matter that the

15 response to the proposed amendments is so highly

16 polarized between the plaintiffs' bar and the

17 corporate defense bar?

18 On the first day of public hearings on

19 these amendments, 41 witnesses testified. And

20 while they voiced widely divergent opinions about

21 the merits of the amendments, there was one point

22 on which there was a clear consensus. That is

23 that the proposals to limit discovery individually

24 and collectively will be beneficial to large

25 corporate litigants and detrimental to plaintiffs.

1 The next day, Law360 described the hearing
2 this way, quote: Top attorneys from the defense
3 bar and major corporations urged the Federal
4 Judicial Committee on Thursday to adopt proposed
5 changes to federal rules that curtailed discovery
6 in depositions in civil cases, while plaintiffs'
7 attorneys and nonprofit law groups warned that the
8 changes would limit their clients' access to the
9 justice system.
10 Reading that, I was struck by the
11 realization that no one close to the rule-making
12 process seemed either surprised or concerned about
13 the highly partisan response to the proposals.
14 Everyone inside the rules' bubble had already come
15 to accept that the proposed discovery amendments
16 are highly skewed in favor of large corporate
17 defendants.
18 And so I pose this question: Should the
19 Committee consider enacting a package of
20 amendments that so clearly favors one group of
21 litigants over another, as evidenced by the
22 comments of both the favored and disfavored
23 groups?
24 I would suggest that if the public comment
25 process means anything, the intensely polarized

1 response to the proposed amendments limiting
2 discovery should raise a caution flag at the very
3 least.
4 Issue two: Why is the response to this
5 proposal so polarized?
6 The goal of reducing discovery costs is
7 not an inherently polarizing one. On the
8 contrary, like lowering taxes, one might expect
9 nearly unanimous support if the benefits and
10 sacrifices are perceived to be fairly distributed.
11 But if the benefits are seen as running mainly
12 from one group -- mainly to one group at the
13 expense of another, those groups become
14 adversaries rather than cooperators in the
15 process. And that is precisely what we are seeing
16 in the response to the pending proposals.
17 The reason for this, which is not being
18 acknowledged by proponents of the amendments, is
19 that if corporate litigants spend less on
20 discovery as a result of these amendments, it will
21 not be because the amendments have made discovery
22 more efficient, more effective, or have caused
23 less time to be wasted on unproductive adversarial
24 conduct. There is nothing in the amendments that
25 requires or even incentivizes conduct that would

1 reduce the overall cost of discovery.

2 The concept of cooperation may get a brief

3 nod in the notes to Rule 1, but no one really

4 expects that to change conduct on the ground.

5 By design, these amendments will reduce

6 discovery costs for large corporations, simply by

7 reducing plaintiffs' access to the information

8 they need to prove their claims. This is not true

9 cost saving. This is cost shifting with

10 plaintiffs paying the price in reduced access to

11 justice. This is why the proposals, the reactions

12 to the proposals are so deeply polarized.

13 Issue three: Are the proposals necessary?

14 Do they represent the best, most effective and

15 fairest solution to a genuine problem?

16 I will not go through the detail as

17 Professor Miller discussed much of this. There is

18 simply no evidence that there is a genuine

19 problem. And in the end, these amendments may

20 well end up raising discovery costs, not reducing

21 them. By reducing the number of depositions,

22 interrogatories, and requests for admission, which

23 are relatively low cost mechanisms, the amendments

24 may increase the cost of document review, which is

25 already the most expensive part of discovery.

1 Regarding the change in Rule 26, scope of
2 discovery, this Committee wrote in its report to
3 the Chief Justice after the Duke conference, that
4 there was no demand at the conference for a change
5 in the rule language, which there is no clear case
6 for present reform.
7 In closing, there's understandably a
8 strong desire to make changes in the wake of the
9 Duke conference to show some concrete results.
10 But it is vitally important to the millions of
11 plaintiffs seeking justice in the federal courts
12 that we do not confuse action with progress.
13 Thank you.
14 JUDGE CAMPBELL: All right. Thank you,
15 Mr. Kelston.
16 Questions? Peter?
17 MR. KEISLER: A few years ago, several
18 years ago, we did a rule change that relates to
19 discovery that both plaintiffs and defendants
20 liked a lot from the beginning. And that was to
21 protect the confidentiality of expert -- draft
22 expert reports and communications with counsel.
23 And that was, you know, uniformly liked both
24 because it was sensible, and because both sides
25 have equal stakes in that kind of thing.

1 I'm wondering if we are in a situation
2 where, to the extent we are addressing the scopes
3 and limits of other forms of discovery where the
4 needs and burdens aren't going to be symmetrical,
5 whether almost anything we do will be polarizing
6 in the way you describe in one direction or
7 another. Or if not, if there are thoughts you
8 have about things that would address that part of
9 the rules that wouldn't be as polarizing either
10 one way or the other.
11 MR. KELSTON: I think there are measures
12 we can take to reduce costs and burdens of
13 discovery without shifting those costs on to
14 plaintiffs in the form of reduced access to
15 relevant facts and reduced access to justice.
16 Examples would be incentivizing
17 cooperation in a meaningful way.
18 Revitalizing initial disclosures is
19 another possibility that's been briefly discussed
20 but not in any serious way.
21 Sanctioning parties, for example, for late
22 production of material adverse evidence. There's
23 another way to speed up discovery, essentially so
24 the parties that are bearing high costs of
25 discovery I would say, if you want to lower the

1 costs of discovery, go get the information and
2 turn it over. Stop making it difficult. Stop
3 arguing about every response.
4 Yes, it's wonderful to talk about, you
5 know, serving only targeted responses so we don't
6 get the millions of irrelevant documents. But the
7 likelihood is, we are not going to -- in -- we are
8 not going to get the really meaningful documents
9 either unless we ask with a description that we
10 know covers it. And that -- and that's just the
11 facts of life the way it is.
12 But, yes, there are absolutely things we
13 can do that would genuinely reduce the costs of
14 discovery as opposed to simply shifting by
15 reducing the amount of discovery available to the
16 plaintiffs.
17 JUDGE CAMPBELL: Gene?
18 JUDGE PRATTER: Mr. Kelston, could you
19 give us an example of a meaningful incentive to
20 cooperate?
21 MR. KELSTON: I think I can.
22 JUDGE PRATTER: Good.
23 MR. KELSTON: I think we should consider a
24 rule that says -- discussing, let's say
25 preservation, the requirements of preservation,

1 what a party is required to serve. To the extent
2 that a party discloses to the other side what they
3 are doing and what they are not doing to preserve
4 information with sufficient specificity that it's
5 meaningful to the other side, and does not
6 receive -- excuse me, my mouth is dry -- but does
7 not receive objections in return, again, with
8 sufficient specificity to make them meaningful,
9 that the preserving party should be entitled to a
10 rebuttable presumption that what they have done is
11 meaningful. I'm sorry -- is reasonable.
12 This provides a real incentive for a party
13 in litigation to open up and describe what they
14 are doing to preserve and not preserve. That
15 gives the other side an opportunity to voice
16 objections and get them resolved by the court, if
17 the parties can't resolve them, and avoid the
18 later disputes that end up causing so much
19 distress about --
20 JUDGE PRATTER: Just one follow-up if I
21 might.
22 We've heard from all quarters and all
23 corners that the effort to promote cooperation and
24 speed up the process by the so-called
25 self-executing discovery, which I frankly think I

1 was hearing a little bit in your example there,
2 has been a complete charade and been totally
3 unsuccessful.
4 Do you agree with that?
5 MR. KELSTON: No, I don't think it's been
6 a complete charade.
7 JUDGE PRATTER: How about a partial
8 charade?
9 MR. KELSTON: Yes, it's definitely been a
10 partial charade.
11 JUDGE PRATTER: So it's been a little
12 mask.
13 MR. KELSTON: There are genuine
14 cooperators, there are pretend cooperators and
15 then there are parties that don't even pretend to
16 cooperate. And it makes a lot of difference in
17 the way the litigation proceeds, which variety
18 you're working with or against.
19 JUDGE CAMPBELL: All right. Thank you
20 very much, Mr. Kelston.
21 Mr. Beisner?
22 MR. BEISNER: Good morning, I'm John
23 Beisner. I'm partner with the Skadden Arps law
24 firm in Washington. I've been involved on the
25 defense side of civil litigation for about 35

1 years. And I appreciate the opportunity to appear
2 before the Committee this morning.
3 And I also want to express appreciation
4 for all of the hard work this Committee does.
5 It's very important to everyone out in the civil
6 litigation community.
7 I've submitted written comments addressing
8 a number of issues raised by the proposed
9 amendments, but I would like to seemingly join the
10 crowd this morning in focusing on the proposed
11 proportionality change to Rule 26.
12 I guess I'm having difficulty seeing this
13 as any sort of radical change to the rule.
14 Indeed, several of the members of the Committee
15 have pointed out Rule 26(b)(2)(C) already says
16 that either on motion or on its own, a court must
17 limit the frequency or extent of discovery if it's
18 not proportional. This is not a new concept there
19 at all.
20 And I think the movement of these
21 considerations to Rule 26(b)(1) really is just an
22 elegant solution to the fact that these
23 considerations have lived, as the proposed
24 advisory committee notes observe, in relative
25 obscurity back in Rule 26(b)(2).

1 I've heard the expression of concern that
2 this change is going to create many more disputes,
3 and a lot more motion activity. I have a hard
4 time appreciating that assertion, because the rule
5 is there. It has not produced an avalanche of
6 disputes or motions. And I really think it may
7 actually serve to diminish the number of disputes.
8 Right now, 26(b)(1), in my view, is
9 lacking criteria that encourage meaningful
10 discussion when discovery disputes arise. I mean,
11 in my experience, you get into these discussions,
12 and the proponent of the discovery is basically
13 saying, "Well, I can basically get whatever I
14 would like under this rule."
15 And the responding party says, "No, you
16 can't."
17 And you end up presenting the issue to the
18 Court unless cooler heads prevail.
19 And I think putting proportionality into
20 Rule 26(b)(1) will actually give the parties
21 something to talk about. There is some tangible
22 criteria there that I think the parties can get
23 their teeth into and hopefully reach some
24 compromise.
25 The suggestion has been made here this

1 morning that the change will shift the burden of
2 proof in obtaining discovery. And I think we need
3 to look at this at two levels.
4 First of all, there's the burden of moving
5 to obtain discovery. Most of these disputes arise
6 in the context of Rule 34. This change isn't
7 going to modify who has to move. The person
8 requests discovery, objections are made, and if
9 you can't resolve the dispute, the requesting
10 party makes a motion. That's not changed by
11 anything that the Committee is proposing to do
12 here.
13 And I think the change, frankly, just
14 simply gives more prominence to the
15 proportionality considerations that should already
16 be part of that discussion, particularly given the
17 fact that the attorney making the request, I
18 believe, can fairly be said, should be certifying
19 under Rule 26(g) that the requested discovery is
20 proportional.
21 Judge Oliver, to your question earlier, I
22 think it's important to look through the
23 considerations that are already in the rules and
24 think about this notion of burden of proof. These
25 considerations don't create any sort of rigid,

1 one-sided burden. As was suggested earlier, it's
2 a discussion to which both parties have to
3 contribute.
4 Let's look at them for just a moment. The
5 first consideration, amount in controversy. Well,
6 obviously that's something the plaintiff is going
7 to be declaring in the case. The importance of
8 the issues at stake in the action is something to
9 which both parties are going to contribute
10 discussion. No burden on that issue.
11 Each side presumably will speak itself to
12 the available resources, the third factor that's
13 in the rule. I suspect the requester of the
14 discovery, at least in the first instance, will
15 need to speak to the importance of the discovery
16 in resolving the issues in the case.
17 But conversely, it's the responding party
18 that will need to address the burden or expense
19 issue. And I assume the requesting party
20 presumably will take the first shot at describing
21 the discovery's likely benefit.
22 But in -- in sum, the rule just simply
23 articulates consideration. On some of these the
24 court will probably be looking in the first
25 instance to the requester and to the responding

1 party in other instances. Both sides offer their
2 views and the court will have to make a
3 determination as to whether the proportionality
4 requirement is satisfied.
5 With that, I'm happy to respond to any
6 questions.
7 JUDGE CAMPBELL: Questions? Parker?
8 MR. FOLSE: When Professor Miller made his
9 remarks earlier, he said, as I think Mr. Pratt
10 also said, that in fact, moving the
11 proportionality standard into Rule 26(b)(1) would
12 be a quite significant change.
13 And I took from his comments the idea that
14 where it is currently placed in Rule
15 26(b)(2)(C)(3) reflected the intent of the
16 drafters that it operate as a safety valve on the
17 scope of relevance. And that moving it into
18 26(b)(1) would make it coequal with relevance and
19 not just provide an additional subject to be
20 discussed, but work a material change in the scope
21 of discovery.
22 So how do you respond to his comment?
23 MS. BEISNER: Well, I think it's more than
24 just a safety valve where it is presently. I mean
25 I think it's a requirement. When I file a

1 request, I've got to certify under 26(g) that that
2 limitation is satisfied. I think it's an up-front
3 consideration.
4 Will it make that a more prominent part of
5 the discussion in determining whether discovery is
6 available? Yes. But I don't think it's a radical
7 change. I think it should be part of the
8 discussion already. And it probably isn't being
9 raised frequently enough.
10 But I think if you have right now a motion
11 to compel discovery, and you're the responding
12 party, there's no reason you can't, as part of
13 your response to that, say it's disproportionate.
14 MR. FOLSE: How do you explain then why
15 there has been relatively little motion practice
16 under the element of the rule as it currently
17 appears? And don't you foresee that if it goes
18 into 26(b)(1) that it will become a much more
19 significant aspect of discovery motion practice?
20 MR. BEISNER: There's no question it's
21 going to become a more important part of the
22 discussion, I'm not rejecting that, that concept
23 at all. But I think that the fact that it's going
24 to create some sea change in all of this, I think
25 may be overstating the issue.

1 It's going to make it more prominent. I
2 think it should be. I think it's been lost back
3 where it is now.
4 But I think the idea that it's going to
5 preclude any requesting party from getting
6 important discovery, which I took it to be the
7 gravamen of what Professor Miller said, to me
8 doesn't make any sense.
9 The considerations that are there that are
10 being moved repeatedly use the term "importance of
11 the discovery." That's a major focus of that.
12 And so, you know, I don't think it's going
13 to deprive anyone of access. It may require
14 parties that are requesting information to make
15 some choices to prioritize what they want, but
16 that's not a bad outcome.
17 I think unless we get to that point, the
18 discovery problems that we are experiencing will
19 not be resolved.
20 JUDGE CAMPBELL: All right. Thank you
21 very much for those comments, Mr. Beisner.
22 Mr. Lopez?
23 MR. LOPEZ: Thank you. My name is David
24 Lopez. I'm the general counsel for the
25 United States Equal Employment Opportunity

1 Commission. Before being appointed to that
2 position, I practiced in federal court here for
3 several years. It is nice to be home, Judge
4 Campbell.
5 JUDGE CAMPBELL: Welcome back.
6 MR. LOPEZ: The EEOC is the federal law
7 enforcement agency responsible for enforcing the
8 federal antidiscrimination laws. As we prepare to
9 celebrate the 50th anniversary of the Civil Rights
10 Act of 1964, it is useful to remind ourselves that
11 Congress contemplated that the federal employment
12 discrimination laws implement national values of
13 the utmost importance to the institution of public
14 and uniform standards of equal opportunity in the
15 workplace.
16 These civil rights laws are the envy of
17 the world. And the federal courts are an
18 essential component of the statutory scheme.
19 On March 4th, 2013, I commented in writing
20 on the rule changes proposed by this Committee.
21 We currently, at the EEOC, have approximately 250
22 cases pending in the United States Federal
23 District Courts across the country. This rule, I
24 believe, provides us with an enormous and unique
25 perspective on the broad range of case management

1 and discovery practices used by judges across the
2 country.
3 This morning I want to raise three points.
4 First, I believe that the Committee has come up
5 with some proposals that would actually streamline
6 and make discovery less expensive.
7 We agree, for instance, with proposals to
8 shorten time limits for service of the complaint
9 and require Rule 34 objections to be stated with
10 specificity.
11 Perhaps most importantly, we concur in the
12 importance of early court involvement in discovery
13 planning as well as informal conferences with the
14 court prior to filing what are often very
15 expensive discovery motions and would recommend
16 that these be mandatory.
17 Second, I want to express my opposition to
18 the presumptive limits on depositions, admissions,
19 and interrogatories. The numerical discovery
20 limits are a blunt instrument to address supposed
21 over discovery. Several civil rights
22 practitioners have noted the asymmetry in
23 information. We wanted to approach this problem
24 empirically.
25 Based on the survey of cases over the past

1 three years, the proposed discovery limitation
2 would impact a significant portion of the cases we
3 prosecute. And we prosecute both small individual
4 cases, and large systemic cases.
5 Currently, over 40 percent of our cases
6 seek relief for more than one person. And
7 approximately 20 percent of the docket consists of
8 these systemic cases.
9 For this three-year period of time, the
10 agency took over five depositions in over 40
11 percent of the cases. The agency took over 25
12 requests to produce in over 40 percent of the
13 cases, and served over 25 requests to admit in 15
14 percent of these cases.
15 As do most plaintiff-side attorneys
16 submitting comments, we believe the more likely
17 result from reducing the presumptive limits will
18 be the considerable time faced and spent in motion
19 practice on requests to exceed the limits. This
20 will be a particular obstacle for the EEOC that
21 often needs to go over the deposition limits.
22 Now, I recognize that many judges are very
23 flexible in terms of increasing the current
24 presumptive limits, but not all judges. Not all
25 judges. And as you lower this, as you lower the

1 presumptive limits, we think that what we are
2 going to see is much less cooperation on the part
3 of the defense bar to agree to raise the
4 presumptive limits.
5 And in cases involving individuals, in
6 cases involving low-wage workers where there's a
7 tremendous amount of discovery required, often to
8 obtain fact witnesses within the control of the
9 employer, we think that this will be a real
10 burden.
11 As I started to look at the proposals, and
12 I came to this process late, I will admit. I was
13 struck by the sharp demarcation in views on the
14 presumptive limits between the plaintiffs' civil
15 rights bar and the defense bar. Given this sharp
16 demarcation in views, any proposed changes should
17 be based on a factual foundation.
18 As I started to look at what the factual
19 foundation was for these presumptive limits, what
20 I saw mostly were anecdotes and impressions. I
21 recognize that discovery costs are rising and
22 there have been studies that indicate discovery
23 costs are arising. But it is not clear how much
24 of this is attributed to the over discovery in
25 cases, how much of this is attributed to raising

1 legal fees, how much of this might be
2 distributed -- contributed to other factors.
3 Thus, I urge the Committee to wait on any
4 proposed changes and to ensure first that any
5 reduction in the presumptive limits rest on an
6 empirical foundation before adopting what would
7 certainly now be viewed by many as a retreat on
8 the part of the federal court from its historical
9 role as a forum for the vindication of civil
10 rights violations.
11 This might include an examination of the
12 effectiveness of various protocols that have
13 been -- pilot protocols that have been adopted
14 across the country in federal court and state
15 court. There is a body of empirical evidence that
16 I think is emerging that will allow this Committee
17 to assess whether these changes are in fact
18 needed. I think at this point, I don't think the
19 case has been made that they are needed.
20 Thank you.
21 JUDGE CAMPBELL: Thank you, Mr. Lopez.
22 Judge Matheson.
23 JUDGE MATHESON: Mr. Lopez, the data that
24 you provided in your March 4, 2013 letter, and you
25 have alluded to this morning, leads me to ask

1 whether data also was collected on the frequency
2 in which you had cases that exceeded the current
3 presumptive limits and how often requests were
4 made to exceed and what the results of those
5 requests were.
6 Does that data exist?
7 MR. LOPEZ: I actually requested that
8 information from our regional offices. And what
9 we found is that in many cases, the judges,
10 particularly in the large systemic cases, the
11 judges certainly were cooperative. The other side
12 was cooperative, because I think what we are
13 seeing in many of the systemic cases is that the
14 defendants want to take depositions of many of the
15 claimants and many of the individual charging
16 parties. So it's almost a situation of a joint
17 interest in terms of raising these presumptive
18 limits.
19 But I think where we have run into
20 problems anecdotally are really on the cases
21 involving one or two workers or the small class
22 cases that often embody very important public
23 values and often involve really extreme asymmetry
24 of information in terms of trying to be able to
25 obtain testimonial evidence from individuals

1 within the control of the corporation.

2 Often the charging parties, for instance,
3 in low-wage cases, don't have full information as
4 to even the names of the individuals who were
5 involved in the decision. So that often demands
6 additional discovery to get some very basic
7 information that if you had a different charging
8 party, for instance, who had been in the
9 corporation for a while, would have readily
10 available.

11 So sometimes it really takes a lot of work
12 to try to get that information. And it does
13 require discovery sometimes above the presumptive
14 limits to take short depositions or to get
15 information that's necessary.

16 And in some instances, we have had some
17 problems in those case.

18 JUDGE CAMPBELL: Other questions?

19 JUDGE KOELTL: Mr. Lopez, I take it from
20 your written comments that you support the change
21 in the scope of discovery in Rule 26(b)(1); is
22 that right?

23 MR. LOPEZ: You're talking about
24 proportionality?

25 JUDGE KOELTL: Yes.

1 MR. LOPEZ: We support it although I do
2 have some reservations about -- that were raised
3 earlier about the --
4 JUDGE KOELTL: Calculated to lead to the
5 discovery of admissible evidence?
6 MR. LOPEZ: Not only that, in terms of the
7 proportionality factors, in terms of the
8 importance of the cost of the case.
9 We are a law enforcement agency. So what
10 we try to obtain in our cases is not only
11 individual relief, we try to obtain nonmonetary
12 relief that will make sure that the violations do
13 not recur.
14 This is a law enforcement function and it
15 is something that cannot be monetized. And we
16 would want to make sure that those considerations,
17 those public interest considerations are weighed
18 as well in this assessment.
19 JUDGE CAMPBELL: Other questions?
20 Professor Cooper.
21 PROFESSOR COOPER: In your written
22 comments you suggest that the limit on requests to
23 admit, something that has been very seldom
24 addressed, should be considered in light of the
25 need to submit what sounds like essentially the

1 same request to admit essentially the same fact in
2 several different forms so that in the end, you
3 will hit on a form the respondent feels compelled
4 to admit.
5 How frequently do you encounter that use
6 of requests and how well do they work?
7 MR. LOPEZ: I think requests for
8 admissions can be a very, very effective tool. I
9 think the problem that all lawyers face is that
10 often the ideals of cooperation are not
11 necessarily achieved in the discovery process. I
12 think there are many of us who would just love to
13 try cases and bypass discovery altogether.
14 But I think given the realities that we
15 often face in our litigation in terms of the types
16 of objections that are raised, the sort of
17 instinctive objections that are raised, I think my
18 point really went to the fact that it's really
19 important that we craft these right. And to the
20 extent that one formulation triggers an objection,
21 that it's often important to craft an alternative
22 formulation as well.
23 JUDGE CAMPBELL: All right. Thanks very
24 much for your comments, Mr. Lopez.
25 We are going to have one more speaker

1 before the break, that's Mr. Howard, and then we
2 will take our morning break.
3 MR. HOWARD: We have a demonstrative that
4 we are going to just spend a minute setting up.
5 JUDGE CAMPBELL: Okay.
6 MR. HOWARD: Good morning. My name is
7 David Howard. I am corporate vice president and
8 deputy general counsel at Microsoft Corporation in
9 charge of both litigation and antitrust. And I'm
10 honored to be here.
11 I want to state at the outset that
12 Microsoft is very supportive of this Committee's
13 work and this set of proposals. The rules
14 governing discovery have not kept up with the
15 explosion of electronic data generated and
16 maintained by businesses.
17 For a company like Microsoft, to do what
18 we believe is necessary to comply with the rules
19 is expensive, disruptive to the business of doing
20 business, and in many if not most cases
21 disproportional to the benefits gained.
22 I'm happy to answer any questions later
23 about other proposals, but I want to focus my
24 testimony on Rule 37(e) and the proposals relating
25 to that rule. And I'm going to do that by

1 focusing on some specific Microsoft data and then
2 talking about how I think the proposed rules will
3 help address the problem.
4 In 2012 as we prepared for the Dallas mini
5 conference, we debated whether to share Microsoft
6 hard data with this Committee, data which had
7 previously been considered pretty confidential.
8 We decided to do that and to put our money where
9 our mouth was. And today we do it again with
10 updated data based on even more recent
11 information.
12 As you can see at the top of the
13 demonstrative, and we are going to leave some
14 handouts in the courtroom and append a copy of
15 this inverted pyramid to our comments that we will
16 file later.
17 In 2013, we preserved on average over 59
18 million pages per average case. In the average
19 case we processed over ten and a half million
20 pages of data. And by "processed," I mean that we
21 applied technical tools to filter and to
22 duplicate.
23 After this processing was complete in the
24 average case, attorneys reviewed about 350,000
25 pages for privilege and responsiveness. We

1 produced about 87,500 pages in the average case,
2 which we believed to be responsive. And according
3 to industry data, which is consistent with our own
4 experience, about one in a thousand pages produced
5 are actually admitted into evidence at trial.
6 To put it another way, for each page that
7 is actually used in evidence, we produce 1,000
8 pages, review 4,000 pages, process 120,000 pages,
9 and preserve over 670,000 pages.
10 Depending on the tape of case, we spend 30
11 to 50 percent of our out-of-pocket litigation
12 dollars on discovery. In the last decade, we paid
13 about $600 million in fees. $600 million in fees
14 to outside counsel and vendors to manage
15 discovery.
16 And the figure does not even begin to
17 address all of our costs. It doesn't address our
18 internal costs. It doesn't address our
19 opportunity costs based on the time thousands of
20 employees under preservation must take away from
21 other productive tasks. It doesn't address the
22 costs spent to settle cases, cases that are often
23 without merit, simply in an effort to avoid the
24 preservation and discovery burdens I have
25 described.

1 And let me be clear: We have overpaid in
2 cases to settle, to avoid the burden and expensive
3 discovery. In other cases, we've decided to fight
4 even though, frankly, on a pure cost benefit
5 analysis, we should settle.
6 In terms of actual preservation data, in
7 2013, we preserved over 1.3 million pages per
8 custodian. That's a 425 percent increase since we
9 first began measuring this type of information in
10 2010.
11 Today, at Microsoft, we're preserving over
12 261 terabytes of employee data alone. That comes
13 to about 11.5 billion pages.
14 So there's a problem. And we believe that
15 the proposed amendments are an important step in
16 addressing that problem.
17 Proposed Rule 37(e) has the greatest
18 potential to reduce over preservation in the short
19 term. I say this with one proviso. The rule must
20 make clear that spoliation sanctions are only
21 appropriate on a finding of culpable intent.
22 Using a word like "willfulness," which the
23 Supreme Court has already recognized in a couple
24 of cases is one particularly susceptible of many
25 different meanings, injects the type of

1 uncertainty this proposed rule is trying to
2 remedy.
3 In a world in which we face significant
4 spoliation sanctions, even where we take
5 reasonable steps to preserve relevant material, we
6 have no choice but to over preserve, to go well
7 beyond the list of employees reasonably likely to
8 have relevant information. We will often put
9 those employees' management chains and all of
10 their direct reports under a litigation hold as
11 well.
12 We don't do this because we believe that
13 that expanded circle has unique or important
14 information. We fear that if we don't, the
15 requesting party will argue that the hold was too
16 narrow and the data was likely lost.
17 Rule 37(e) should reduce the need to over
18 preserve as a form of insurance policy. At the
19 same time, I don't think that the proposed rule
20 will lead to the loss of relevant data through
21 sloppy practices. It is in Microsoft's best
22 interest to locate and preserve key sources of
23 information. They are just as likely to hold data
24 relevant to our own claims of defenses as those of
25 our adversaries.

1 What we are trying to avoid is preserving
2 dozens of hay stacks just to avoid the risk of
3 later being accused of missing a needle that may
4 or may not have been there in the first place.
5 There are many causes for the costs and
6 efficiencies in our current system and there are
7 other steps that we can collectively take to
8 address some of these issues. Educating the bench
9 and bar, technological changes in information
10 management improvements will all help, but the
11 problem won't be solved without fundamental rule
12 reform.
13 Our rules remain rooted in a paradigm from
14 an earlier era, a paradigm that incentivizes
15 overbroad discovery and over preservation. To
16 really solve the problem, the rules need to change
17 in a way that moves us toward merit-based
18 discovery.
19 Again, I would like to commend this
20 Committee for the work that it's doing and for
21 moving us in the right direction.
22 Thank you.
23 JUDGE CAMPBELL: All right. Thank you.
24 Judge Grimm.
25 JUDGE GRIMM: Just one quick question on

1 the issue of willfulness. And we've heard that
2 there are a number of alternatives that people
3 have identified, willful and bad faith or get rid
4 of willful.
5 Is there a definition of "willful" among
6 the many that have been articulated in different
7 contexts by the courts that if we were looking for
8 a definition to try to address the uncertainty
9 that you fear that an undefined version would have
10 that you would put for us to consider?
11 MR. HOWARD: I think that the definition
12 put forward by the Sedona Conference of specific
13 intent is a good one. I think it's -- it's rooted
14 in the law. If you look at the Ratzlaff case in
15 the Supreme Court for instance, I think it
16 essentially adopts that same definition in another
17 context. So I would propose that that's the right
18 way to go.
19 JUDGE GRIMM: Thanks.
20 JUDGE CAMPBELL: Judge Pratter and then
21 Judge Matheson.
22 JUDGE PRATTER: Mr. Howard, I would first
23 like to say when I was in practice I paid David a
24 lot of money to do a lot of discovery, so I know a
25 little bit how he counts.

1 But I would like to know what's the
2 definition of the average case that you've used
3 when you gave us the standard?
4 MR. HOWARD: Well, it's based on aggregate
5 statistics. And obviously we handle everything,
6 you know, from employment cases --
7 JUDGE PRATTER: It's not a dollar amount
8 or a type of case?
9 MR. HOWARD: Yeah, it's not a dollar
10 amount or type of case. I mean, we have huge
11 patent cases and antitrust cases. And we have
12 much smaller employment cases. So it's an average
13 based upon the number of custodians on an average
14 basis.
15 JUDGE CAMPBELL: Judge Matheson?
16 JUDGE MATHESON: That was my question as
17 well.
18 JUDGE CAMPBELL: All right. Rick.
19 PROFESSOR COOPER: Mr. Howard, I think you
20 said something like you preserved more or less
21 670,000 documents for every one that was used at
22 trial, some number like that?
23 MR. HOWARD: Right.
24 PROFESSOR COOPER: Can you tell me how,
25 back at the time you become aware of a possible

1 litigation or you are sued you would go about
2 identifying those and preserving only them?
3 MR. HOWARD: Preserving --
4 PROFESSOR COOPER: Instead of a much
5 larger number.
6 MR. HOWARD: In other words, if the rule
7 is amended as proposed, how would we go about it
8 differently than we go about it now?
9 PROFESSOR COOPER: I guess in addition to
10 that, just how one would, from that information
11 base back when the lawsuit is filed, foresee what
12 will turn out to be important when the trial
13 arrives.
14 MR. HOWARD: Well, I mean I think that the
15 process that we go through is relatively simple
16 now in terms of trying to overpreserve. And it
17 will become even simpler, you know, if the rule is
18 amended.
19 I mean, we look at the employees who are
20 likely to have relevant information. We
21 look -- obviously look at the claims and the
22 potential defenses in the case. We look at
23 the -- the not only what might be important to the
24 plaintiff, but what might be important to us as
25 well.

1 If the rule is amended, our goal would be
2 to preserve the information that we believe is
3 potentially relevant to those claims and defenses.
4 What we do now, however, requires us to go
5 well beyond that. And to over preserve and be as
6 conservative as possible in order to avoid the
7 possibility that somebody could later accuse us of
8 hiding the ball.
9 JUDGE CAMPBELL: All right. Thank you
10 very much, Mr. Howard.
11 We are going to take a break. We will
12 resume promptly at eleven o'clock with
13 Mr. Stoffelmayr.
14 (A recess was taken.)
15 JUDGE CAMPBELL: All right. Let me
16 mention one scheduling matter. We are running
17 about ten minutes behind schedule. The members of
18 the standing committee who are with us, and we
19 appreciate them being here, need to leave right at
20 noon, so you all should feel free to stand up and
21 walk out. We won't be offended. They need to be
22 on a bus by noon, because they have a busy
23 schedule this afternoon.
24 And as a reminder to us on the Committee,
25 we need to keep our questions short and to the

1 point so that we give folks maximum opportunity to
2 speak.
3 It means we will probably run into the
4 noon hour by about ten minutes, but we will do our
5 best to stay on that schedule.
6 All right, Mr. Stoffelmayr.
7 MR. STOFFELMAYR: Thank you very much. My
8 name is Kaspar Stoffelmayr. It is a real honor to
9 be here. I'm the vice president and associate
10 general counsel at Bayer. I serve as the head of
11 the litigation function there.
12 And before coming to Bayer, I had a broad
13 civil litigation practice primarily in the federal
14 courts representing both plaintiffs and
15 defendants.
16 Just a little bit about Bayer. It is a
17 truly global operation. Here in the
18 United States, we have about 12,000 employees.
19 And we are active in fields ranging from
20 pharmaceuticals to agricultural chemicals to
21 plastics and films and materials of that nature.
22 As someone who has devoted my entire
23 career to litigating cases in the U.S. courts, it
24 has really been striking and disappointing to me
25 from my experience at Bayer in representing other

1 international companies in private practice, that
2 I think if you were to take a poll of general
3 counsels of foreign companies and ask them where
4 would they prefer to have a major legal dispute
5 resolved, either as a plaintiff or a defendant,
6 virtually none of them would say the American
7 courts, probably wouldn't be on their top three in
8 most cases.
9 And I thought a lot about why that is.
10 And it's not because our courts don't do a great
11 job deciding cases on the merits. I think we
12 probably have the world's premier system, our
13 system of jury trials for resolving disputed cases
14 on the merits.
15 The reason is the extraordinary cost of
16 getting to a decision on the merits in the
17 American courts. And that takes us, I think,
18 directly to the cost of discovery.
19 In the typical large case, virtually
20 nothing will occur that requires any resources
21 other than discovery. There may be some motion
22 practice, may be expert work. But the cost of
23 that will not approach the cost of discovery in
24 the average case.
25 And with that background, I want to focus

1 on the proportionality issue that has been
2 discussed in some detail this morning but maybe
3 with a slightly different perspective.
4 I know people disagree sometimes strongly
5 about what the right conclusions are to draw from
6 the Federal Judicial Center closed cases survey.
7 But one thing I think it clearly shows is that
8 there is a large group of cases, exactly how large
9 people might disagree about, but a large group of
10 cases where the stakes are relatively speaking
11 low, the disputed facts are relatively simple, and
12 not a lot of discovery occurs.
13 No change to the rules on proportionality
14 is going to have any effect on those cases. The
15 discovery going on in those cases already is
16 proportional. There's not much discovery going
17 on.
18 But there's also a very important group of
19 large cases where the situation is very, very
20 different, and there is a real need for reform.
21 And in talking about that, I want to focus
22 on the part of the proportionality rule that has
23 been referred to tangentially, but I don't think
24 has been a focus of the discussion, and that is
25 that discovery has to be proportional not just to

1 the amount in controversy, not just to the
2 resources of the party, but even in the biggest
3 cases where both parties may have tremendous
4 resources, and where the amount in controversy may
5 be very high, has to be proportional to the
6 importance of the discovery in resolving the
7 issues in the case.
8 Sometimes as practicing lawyers we act as
9 if discovery is an end in itself. Sometimes it
10 certainly feels like it is an end in itself. But,
11 of course, it's not. The whole point of discovery
12 is to develop the evidence that will be useful to
13 the trier of fact in deciding disputed issues,
14 disputed factual issues. That's why we are doing
15 discovery in the first place. And if the burdens
16 of discovery are not proportional to that purpose,
17 we are doing something wrong.
18 To try to get a sense of how far out of
19 whack things have become, we looked at our last
20 trial of a large case, that is other than a single
21 plaintiff employment case, and compared what we
22 did in discovery to what was actually used by the
23 trier of fact in deciding the case.
24 We thought this would be a relatively
25 conservative example in the sense that the

1 discovery record was, relatively speaking, modest.
2 We produced just over 2 million pages, 2.1 million
3 pages. For us that is a relatively small document
4 production. And it was a long trial. It was an
5 eight-week jury trial.
6 And even then, only four/one-hundredths of
7 one percent of discovery documents were used as
8 exhibits at trial and played any role in the
9 jury's determination of the facts. I think the
10 ratio would be worse in other cases where you had
11 a shorter trial, maybe a one or two-week trial and
12 a larger document production.
13 And I know my time is up in a moment, but
14 what I -- what I think we can take from that is
15 surely we can do better. You know, clearly in our
16 system discovery is going to go well beyond the
17 trial record. The discovery record may be 10
18 times, 100 times, even 200 times the trial record.
19 And that would be completely proper.
20 But where we've gotten to a system where
21 the discovery record exceeds the evidence actually
22 used at trial by a factor of two, three, five
23 thousand times, things are out of whack. And
24 surely we can do better than that without closing
25 the courthouse doors to anybody.

1 JUDGE CAMPBELL: All right, thank you.
2 Questions? Judge Oliver?
3 JUDGE OLIVER: Yes. Mr. Stoffelmayr, I
4 just wanted to go back to something you talked
5 about when you started out. And you said that
6 major companies or major -- general counsel of
7 major corporations would -- foreign corporations
8 would prefer not to have -- prefer other places,
9 other venues to litigate their cases rather than
10 litigating them here in the U.S.
11 And I guess my question is: Do you have
12 examples from those other countries as to how they
13 effectively and fairly handle the kinds of issues
14 that we are dealing with here? Because it's not
15 just a question of what you prefer so much by
16 itself, but it's also a question of fairness as
17 relates to all litigants. And so are you
18 satisfied that those systems are fair and how do
19 they handle the complex issues that we are talking
20 about?
21 MR. STOFFELMAYR: Sure. Obviously every
22 system is different and handles things
23 differently. Some systems are terribly unfair and
24 nobody would ever say I want to have my disputed
25 litigated there unless you thought you were going

1 to be the beneficiary of the unfairness, I
2 suppose.
3 But certainly there are examples that you
4 couldn't easily import to our system. For
5 example, in civil law countries where the fact
6 finding is done by a judge and done through a sort
7 of piecemeal process where the judge
8 takes -- takes complete control of the fact
9 finding and the evidence gathering in sort of an
10 ongoing way over the life of the case. I think it
11 would be very hard to import something like that
12 into the U.S. system, because we use jury trials.
13 And that's one of the great strengths of our
14 system.
15 But at the same time, there's systems like
16 the British system where they do have single-event
17 trials the way we do and manage to conduct it with
18 far, far less discovery. Many companies obviously
19 in forum selection clauses will seek arbitrations
20 before the ICC. And in those proceedings
21 typically discovery is very limited.
22 I don't think it's a limiting scope of
23 discovery in the way we are talking about really
24 raises a fairness concern, because I'm not talking
25 about depriving anybody on either side

1 of -- depriving them of access to those documents
2 that really make their case, and the additional
3 set of documents that might help them find those.
4 It's the other 80 or 90 percent of documents that
5 we tend to request and tend to produce that don't
6 benefit anybody.
7 And I think a telling example, too, from
8 our own system, how we know this can work, is if
9 you consider disputes between large corporate
10 parties where they tend to have -- in a case where
11 they have similar resources and where the nature
12 of the case means the discovery burdens will be
13 symmetrical, they tend to get by with far less
14 discovery than you see in cases where the disputes
15 are asymmetrical.
16 I think of patent cases I have been
17 involved in where the stakes were as high as any
18 case, in the many hundreds of millions of dollars.
19 And the parties had no trouble getting by with
20 five to ten depositions, and document productions
21 of a couple million pages.
22 JUDGE CAMPBELL: All right. We've got a
23 little less than a minute. Any other questions?
24 No? John, quick question, please.
25 MR. BARKETT: Just wondering whether in

1 the example that you gave, the 400 something
2 percent example, whether you went back and looked
3 at the request for production to figure out
4 whether the actual trial exhibits that were used
5 related only to a small subset of the request such
6 that your 2.1 million pages would have been a half
7 a million pages had you focused the discovery on
8 areas that -- that related to what was actually
9 used at trial.
10 MR. STOFFELMAYR: No, we haven't done
11 that, but that's a very interesting question and
12 I'm going to do that.
13 JUDGE CAMPBELL: All right, thanks so
14 much, Mr. Stoffelmayr.
15 Mr. Saenz.
16 MR. SAENZ: Good morning, honorable
17 Committee members. My name is Thomas Saenz. I am
18 the president and general counsel of MALDEF, the
19 Mexican American Legal Defense and Educational
20 Fund. MALDEF is now a 46-year-old national civil
21 rights organization whose mission is to use the
22 legal system to promote and protect the civil
23 rights of all Latinos living in the United States.
24 As you might imagine, much of our work is
25 in federal court litigation. Indeed, at any given

1 point in time, we maintain a docket nationwide of
2 between 25 and 35 active cases, the vast majority
3 of which are in the federal courts.
4 Our cases fall in four issue areas:
5 Education; employment; immigrant rights; and
6 voting rights. And as a result of those
7 particular issue areas, with the exception of
8 education, most of our cases are in fact federal
9 question litigation in the district courts of the
10 United States.
11 My comments this morning relate to the
12 presumptive limits, the changes in presumptive
13 limits on discovery and the creation of a
14 presumptive limit on requests for admission as
15 well as to the elevating of the proportionality
16 requirement.
17 As I mentioned, our education cases, as a
18 result of a Supreme Court decision some 30 years
19 ago -- some 40 years ago, tend to be in state
20 court these days. But our other cases in
21 employment, immigrant rights, and voting rights
22 are in federal court.
23 But you've already heard much testimony I
24 believe about employment, so this morning I want
25 to concentrate on two elements that are increasing

in proportion of our docket in voting rights and immigrant rights.

There are two things that characterize both sets of cases that I think you should be aware of. First, both involve government defendants, government defendants in a highly politicized litigation context. That means that these are hotly contested cases. And indeed in some cases, it means that while lawyers may want to approach discovery and other disputes in a particular way, they may be pushed by their client, elected officials, to act in a less cooperative and more contentious manner.

Second, these are cases that involve significant differentials in access to relevant evidence. Because although they are not denominated as class actions, basically in both the voting rights and immigrant rights context we are talking about plaintiffs who are stepping forward and representing larger classes in challenging government actions, government structures, in which cases the government itself has ready access to the evidence that's needed.

To be more specific, in the voting rights context, our cases are under Section 2 of the

1 Voting Rights Act of 1965. Section 2 under a
2 Supreme Court decision some 30 years ago is
3 governed by a totality of the circumstances test.
4 You can imagine with a totality of the
5 circumstances test how much evidence is
6 potentially relevant and necessary to successfully
7 prosecute these cases.
8 In these cases, because of the breadth and
9 type of evidence that can be presented, and how
10 long these cases take to try, often requests for
11 admissions in particular play a significant role
12 in streamlining the pursuit of these cases.
13 Let me note finally that these cases will
14 increase in magnitude as a result of the decision
15 last year by the Supreme Court in Shelby County
16 versus Holder, which took away Section 5, a
17 protection against changes that will now have to
18 be challenged to this very contentious Section 2
19 litigation.
20 With respect to immigrant rights, our
21 cases tend to challenge state and local statutes
22 and ordinances that seek to regulate immigration.
23 And we generally contend that they are preempted
24 because of the exclusive federal right to regulate
25 immigration in this country.

1 Even though these are often facial
2 challenges, we have found ourselves having to
3 engage in contentious discovery around the intent
4 behind these laws, particularly if an equal
5 protection claim is alleged along with preemption
6 claim.
7 And we have often found as a result of the
8 Supreme Court's decision two years ago in Arizona
9 versus United States, that what may have started
10 as a facial challenge becomes an as-applied
11 challenge looking at the specific practices and
12 policies that would be followed to implement
13 statutes and ordinances that on their face have a
14 lack of clarity around them.
15 These immigrant rights cases and these
16 voting rights cases create an increasing
17 proportion of MALDEF's docket. As I mentioned,
18 our total docket is between 25 and 35 cases. At
19 least half of that today is comprised of these
20 complex, highly contested cases under voting
21 rights and immigrant rights.
22 Because of the characteristics that I
23 described earlier, a differential in access to
24 evidence and the highly contested, indeed very
25 public nature of these cases, setting presumptive

1 limits at a lower level for discovery will hamper
2 the ability of plaintiffs across this country to
3 engage in this type of critically important
4 federal court litigation. I therefore urge the
5 Committee to reconsider its reduction in
6 presumptive limits on discovery, and indeed to
7 reconsider its creation of a presumptive limit on
8 requests for admissions and to reconsider its
9 elevation of the proportionality requirement with
10 respect to discovery across the board.
11 Thank you.
12 JUDGE CAMPBELL: Thank you, Mr. Saenz.
13 Dean Klonoff.
14 DEAN KLONOFF: Sir, some of our witnesses
15 have been more concerned about the proportionality
16 piece, others have been more concerned about the
17 discovery limitations. In fact, the EEOC
18 generally supported the proportionality.
19 As between the two bundles of issues,
20 which is of more concern to you?
21 MR. SAENZ: Well, on its face, the
22 presumptive limits would have a more immediate
23 impact. I think there are questions about how the
24 elevation of the proportionality requirement into
25 Rule 26, what its effects would be. I do,

1 therefore, have concerns about how that might in
2 practice be implemented.
3 In the highly contested cases that we are
4 involved in, there is resistance. As I indicated
5 previously, sometimes that resistance is not
6 driven by the lawyers. Indeed you have the strong
7 sense that they would wish to be more cooperative.
8 But because these are political cases, they are
9 being pushed by their clients to be much more
10 contentious.
11 In that context, I am concerned that the
12 proportionality requirement being elevated could
13 give them another tool to engage in resistance to
14 legitimate discovery requests.
15 In every case, at least publicly, the
16 defendants are claiming that the claims against
17 them, the lawsuits against them are not
18 significant, are not important, should never have
19 been filed. That's the context in which these
20 cases are litigated.
21 JUDGE CAMPBELL: Other questions?
22 Mr. Saenz, I have one if I could ask it.
23 I'm assuming that in a number of these
24 high profile voting rights or immigration rights
25 cases, the discovery exceeds the current

1 presumptive limits of 10 depositions and 25
2 interrogatories.
3 MR. SAENZ: That's certainly the case in
4 voting rights, yes.
5 JUDGE CAMPBELL: Have you had trouble
6 getting judges to agree to exceed those
7 presumptive limits?
8 MR. SAENZ: I think it's been a mixed bag.
9 Some judges are more familiar with Section 2. And
10 in some cases you have defendants who are familiar
11 with Section 2 and have been involved in it often
12 with the same plaintiffs' lawyers multiple times
13 before. In those cases, generally you can reach
14 an agreement or you can convince a court to give
15 you additional discovery.
16 In other cases, it's a lot of education.
17 It's a lot of argumentation that's required, and I
18 would just note that these are already cases that
19 are quite resource intensive and long running.
20 And adding additional motions, additional debates,
21 additional practice before the court on discovery
22 simply takes cases that are already in my view
23 quite costly and quite time consuming and makes
24 them even more so.
25 In a context where quick resolution may be

1 critically important, particularly in voting
2 rights you may be looking to get a resolution
3 prior to an election or more importantly prior to
4 filing deadlines for an upcoming election, so
5 streamlining is really important.
6 JUDGE CAMPBELL: All right. Thank you
7 very much for those comments.
8 Mr. Arkfeld?
9 MR. ARKFELD: Your Honor, I want to say
10 may it please the Court since I had the
11 opportunity to practice here for many years. My
12 name is Michael Arkfeld. I do not represent any
13 groups today of any type, whether plaintiff or
14 defendants, requesting or producing parties.
15 I think I -- the question I want to
16 address today is different, I think, to some
17 extent, is whether these proposed rule changes
18 will increase or enhance access to our justice
19 system. If these rules decrease meaningful access
20 to our system because of proportionality or some
21 of the other issues or proposed changes, should
22 they be adopted.
23 I think I bring a rather unique
24 perspective here today. I'm -- I was, am a trial
25 attorney. I was -- I represent plaintiffs for

1 five years, was a prosecutor for 12 years, and the
2 last 20 years served as an Assistant U.S. Attorney
3 for the District of Arizona representing the
4 United States in civil actions, multimillion
5 dollar medical malpractice, a variety of civil
6 actions.
7 For the past 14 years I've written
8 extensively, instructed extensively in the area of
9 electronic discovery. I have the privilege of
10 reading every eDiscovery opinion so I can update
11 my treatise twice a year. I find it very
12 fascinating in terms of the history of what we've
13 moved through through the last 14 years.
14 However, I would like to make one
15 preliminary comment, one that concerns me greatly
16 from the comments I've heard before is I do not
17 hear about a lot of the technological changes or
18 advancements we've made concerning electronically
19 discovered information.
20 I've maintained for the last 13 years when
21 I first saw e-mail, text messages,
22 chat -- SnapChat, a variety of other things that
23 we are seeing today that what technology has
24 created in terms of a problem, can be solved by
25 technology. And we've seen that, especially this

1 last couple of years.

2 Some of us have thrown around the term of

3 predictive coding. Some very respective jurists

4 throughout the country are saying that has reduced

5 the cost of discovery one/fiftieth to what it was

6 before. So a hundred thousand dollar cost of

7 eDiscovery has now been reduced to $2,000 if you

8 look at it from that perspective.

9 We are going to see more advancements in

10 that area. It is a moving target, there's no

11 question about it.

12 I've heard today testimony about a million

13 documents, two million, six million, 600 million,

14 and yet when we talk about that, we need to talk

15 about the technological issues with that also.

16 How fast can we search a million

17 documents? A matter of seconds.

18 How can we cull, produce, use hash,

19 algorithms, duplicate, how do we use 502(d) of our

20 rules to reduce that information and to protect

21 all parties in access to the court system? Those

22 are the things I hope we focus on in terms of the

23 access to justice.

24 There's an agenda for a justice statement

25 by the ABA. I won't go into it entirely. But

1 first any change to the justice system should be
2 based on desire to protect, enhance ability of all
3 persons to use the justice system.
4 There's a Georgia study that came out in
5 2009 that said essentially between 70 to 80
6 percent of all Americans from low to moderate
7 income do not have meaningful access to the
8 justice system.
9 Now there's a variety of reasons for that.
10 They don't know their rights, complexity of the
11 case, cost of the system. But we don't really
12 have a system that's available to most Americans
13 today.
14 That's a whole different issue. Obviously
15 we are very much invested in the system that we
16 have today.
17 For background purposes and one of the
18 issues about access to justice, I've had the
19 opportunity to talk to two businessmen over the
20 last two months on airplane flights. Since I
21 teach like twice a month at either government
22 agencies or law firms across the country, very
23 intensive eDiscovery discussions about technology
24 and legal issues.
25 And these two businessmen I said to them:

1 How much money has to be in dispute before you
2 would take a case to federal court? And both of
3 them said, without hesitation, $75,000 or they are
4 not going to take it. It would just be a wash if
5 it was $75,000.
6 I said what would you do with any disputes
7 under that? They say we just write them off,
8 generally speaking.
9 I think we have a system that we need to
10 reverse. We need to make more meaningful access
11 to it. For example, with proportionality, what
12 concerns me about taking that rule out of the back
13 and moving it to the front is this: When I was an
14 advocate for the United States Government, if I
15 had that rule, one of the first things I would do
16 is I would go to my client, and I would start
17 talking to their IT department and I would say to
18 them: What kind of servers do you have, legacy
19 systems, unallocated space on your hard drives,
20 application and system meta data, BYOD devices,
21 and a myriad of other ESI media sources, types,
22 locations?
23 And they would say to me: Mike, we have
24 all of this information.
25 I say: You need to give me a cost of what

1 it's going to cost to acquire all of that
2 information, put it together.
3 They would give that to me, I would go to
4 the plaintiff, whoever filed the lawsuit and say,
5 well, this is expensive. And you need to get
6 information, you need to get experts and other
7 people to refute what I'm saying here.
8 And that little interaction with moving
9 proportionality to the front of that rule is going
10 to costs tens of thousands of dollars in e-motion
11 costs. I mean in the motion cost.
12 As an advocate for the United States it
13 would be something that I would utilize if the
14 facts presented that.
15 And so what I'm urging, you know, this
16 Committee here today is if you're going to move
17 that or any of these rules, look at it from an
18 access to justice. Are we taking our justice
19 system where we make it easier to access or are we
20 increasing the eDiscovery cost as we put these
21 rules into effect?
22 Unfortunately, I think we are limited in
23 time when there's very little meaningful access to
24 our justice system, just complexity, costs and now
25 eDiscovery.

1 With eDiscovery, when we look at it, we
2 look at a system that started developing in 1985
3 when we first got desktop computers. I started
4 using them in '87 for the Department of Justice,
5 putting all my information on it because I knew it
6 would level the playing field.
7 But in the last 30 years approximately we
8 have not kept up with technology. We just saw the
9 ABA in 2012, September, first pass some comments
10 regarding competency of lawyers in technology.
11 They called it the bewildering rate of change in
12 technology.
13 I don't think there is a bewildering rate
14 of change. I don't think we are going to see a
15 lot more change. We are going to see different
16 locations, access, more advancements. But in
17 terms of technology, full text databases, that
18 will remain constant and current.
19 Though a digital paradigm shift has
20 occurred for the rest of the world, I would
21 maintain that the courts and legal profession, we
22 have not kept up with it. We've seen some real
23 important movement in that area, one of them is to
24 reinvent the law, how the University of Michigan,
25 State University College of Law by Dan Katz and

1 some of the things going on there. I would urge
2 you to start looking at that in terms of accessing
3 our justice system.
4 But I urge the Court here today, I mean
5 the Court or the Committee, to start looking at
6 the technological advancements that are occurring
7 around us all the time now. They have a profound
8 influence on these proportionality rules, on the
9 37(e) and the rest of them.
10 And so if you have any comments, I'm here
11 for that.
12 JUDGE CAMPBELL: All right. Thank you.
13 Are there questions? John?
14 MR. ARKFELD: Yes, John.
15 MR. BARKETT: In your example that you
16 gave of having all these various storage media, if
17 there was no rule change made, how would you
18 handle that same issue?
19 MR. ARKFELD: If there's no rule change in
20 terms of --
21 MR. BARKETT: I heard you describe that
22 there were four or five, six, seven, eight, nine,
23 ten different sources of electronic storage media
24 and if the rule change were made, you would go to
25 the requesting party and say: This is going to be

1 very expensive, how are you going to deal with it.
2 But if no rule change is made, how would
3 you deal with that same set of facts? What would
4 you be doing?
5 MR. ARKFELD: First, I don't think there's
6 seven or eight different sources. I think there's
7 probably 40 or 50 different --
8 MR. BARKETT: 40 or 50 sources. What
9 would you be doing under the current rules?
10 MR. ARKFELD: What I would be doing is,
11 number one, I would go to my agency and I would
12 say to them, hopefully before litigation occurs,
13 let's put our house in order in terms of
14 electronic information. We need to put it in a
15 methodology where we can take --
16 MR. BARKETT: I accept that, but your
17 example was that you had a lawsuit, there were
18 these various storage devices, and it was going to
19 be very expensive. I'm just trying to understand
20 under the current rules how you would handle that.
21 MR. ARKFELD: Under the current rules I
22 would go to my agency and figure out the cost, go
23 to the other side and sit down with them, meet and
24 confer and try to figure out with them whether we
25 can reduce the scope, the number of custodians and

1 a variety of other issues.

2 If we are unable to do that, then I'm sure

3 there would be a motion to compel of some sort or

4 I would file a motion asking the court to issue a

5 protective order for a possible proportionality.

6 JUDGE CAMPBELL: So I think the question

7 is how do you think that would be different if we

8 adopted the proportionality change that's been

9 proposed?

10 MR. ARKFELD: From my experience if I was

11 still an Assistant U.S. Attorney, I would look at

12 that rule and immediately go to my client and

13 start talking with the other side about

14 proportionality and bring it to the forefront in

15 terms of cost and that. And before, I think I

16 probably, to some extent, you would try to work

17 that out.

18 Proportionality, under the federal rules

19 is, I don't want to say it's not at the forefront,

20 it's behind. And the cases I've read, there's

21 very few cases that even discuss proportionality.

22 And I think part of the reason for that litigants

23 don't realize it is there for them.

24 If you are going to move it to the front,

25 I think what you are going to have is you are

1 going to have a lot more litigation on
2 proportionality. It's going to decrease the
3 access to the courts, because I sincerely believe
4 it's going to cost tens of thousands of dollars to
5 bring it up.
6 But I, you know, when you work for the
7 Department of Justice, we are there to seek
8 access, you know, to seek justice. And so as part
9 of what I was doing was always trying to ensure
10 that they had the correct electronically stored
11 information from the perspective of custodians and
12 sources and media types and that type of thing.
13 So for me, I would not -- I mean, I would bring it
14 into the meet and confer, that type of thing.
15 I think if you move it to the front, I
16 think you're going to get a lot more litigation.
17 JUDGE CAMPBELL: All right. Thank you
18 very much, Mr. Arkfeld.
19 Professor Coleman?
20 PROFESSOR COLEMAN: Thank you to the
21 Committee. I was fortunate enough to clerk for
22 Judge David F. Levy when he was chair of the
23 standing committee, and so I have great admiration
24 for the work that you all do as committee members
25 as well as a deep admiration of the rule-making

1 process itself.

2 And it's that admiration for this process

3 that brings me to you all today to discuss the

4 proposed abrogation of Rule 84 in the official

5 forms and how I would argue that that proposal

6 violates the Rules Enabling Act.

7 In short, the rules and the forms are one

8 in the same. In order to understand what the rule

9 means, you have to look at the form. This means

10 that in order to change the rule, you must

11 consider or to change the form, you have to

12 consider the rule and the form together.

13 This is because a change to the form

14 necessarily changes the rule to which it

15 corresponds, meaning that in order to comply with

16 the Rules Enabling Act process, you have to take

17 both that form and the rule through the process,

18 through consideration, and through publication.

19 Here, the abrogation of Rule 84 in the

20 forms is being done without reference to the rules

21 to which they correspond. And that I argue

22 violates the Rules Enabling Act.

23 I have three quick points to support this

24 argument. First, looking at the history of

25 Rule 84 itself, the -- when the original rules

1 were adopted in 1938, Rule 84 was there. It was
2 amended in 1946, however, to make clear to parties
3 and courts that the forms were not there as some
4 kind of passive indication of what the rules
5 meant. They were there as an active illustration
6 of what the rules meant. And that rule change was
7 made because courts were not using the forms as
8 sufficient under the rules.
9 So the changes in the wording tell us that
10 now the forms are demonstrative and sufficient.
11 But I also think that the amendment in and of
12 itself shows us how the rules and the forms have
13 to be considered together.
14 Second, if we look at the way the forms
15 have been changed over time, this is really
16 helpful in seeing how the rules and the forms are
17 linked. In almost every occasion where meaningful
18 change has been made to the form, it has been done
19 in concert with a change to the rule that that
20 form corresponds to.
21 So, for example, when Rule 4 was amended
22 to add the waiver of service of process provision,
23 Form 18(a) was abrogated and forms 1(a) and 1(b),
24 now 5 and 6, were added.
25 If you look historically at every time the

1 forms have been amended, this is the pattern. The
2 forms are amended and they're amended in concert
3 with the rule.
4 Now, there are exceptions. Sometimes
5 federal statutory changes mean that the forms have
6 to be changed as well. So when Congress changed
7 the amount in controversy requirements in 1993,
8 the forms had to be amended in order to reflect
9 those requirements.
10 But there again, the change was not done
11 in isolation, it was done in concert with the
12 change to federal statutory law.
13 In my research, looking at all the times
14 the forms have been changed, the only time the
15 forms have been changed without reference to a
16 rule or federal statutory law has been
17 administerial or administrative change. So a
18 change -- the date indication from 1900 to 2000,
19 the two -- that kind of thing is done without
20 reference to the rules.
21 But what this shows us is that if we look
22 at it historically, changing the rule or changing
23 the forms without reference to the rules or
24 without reference to federal statutory law is
25 incredibly atypical.

1 Third, we have a ready example of how this
2 abrogation is going to be problematic. And I know
3 the Committee may not want to hear about this but
4 Twombly and Iqbal, as you all know, has caused a
5 lot of consternation with respect to Form 11.
6 The court in Twombly, of course, cited
7 Form 11 approvingly, but we haven't heard anything
8 from the court since. And the rules committees
9 have done an excellent job discussing this
10 confusion that the -- that those cases have
11 created, both with respect to the form and
12 specifically with respect to Form 11.
13 But I would argue that discussion that
14 you're having kind of proves the point. The form
15 and the rule are connected to one another. And
16 that while we don't have to necessarily agree, and
17 I think we can agree to disagree about whether or
18 not we need to use Form 11 to any great degree to
19 figure out what Rule 8 means. The fact that we
20 are having this discussion shows us that they are
21 connected. And that is because a change to Form
22 11 necessarily changes the rule.
23 And here's where I argue we have the
24 Enabling Act process violation. That rule change,
25 that change to Rule 8 has not been vetted by the

1 Committee and has not been taken through the Rules
2 Enabling Act process, through publication and
3 otherwise. And because those two things have not
4 been considered together, I argue that this is a
5 violation of the act.
6 So between the history of the rule itself,
7 the history of the way the forms have been
8 amended, and this example of how Form 11 and Rule
9 8 go together, I think it shows that the rule and
10 the forms are kind of inextricably linked.
11 And my hope would be if the Committee
12 seeks to continue to undertake the abrogation of
13 the forms, it would do so by looking at the forms
14 and the rules in concert and taking those rules
15 and forms through the process, through the
16 Enabling Act process anew, and hopefully when you
17 go back to deliberate you will consider this
18 option.
19 Thank you.
20 JUDGE CAMPBELL: Thank you.
21 Questions? I do have a question for you.
22 PROFESSOR COLEMAN: Sure.
23 JUDGE CAMPBELL: The motivation on the
24 part of the Committee, if I can dare to try to
25 characterize what we are all thinking, but I think

1 it's accurate, is to get us out of the forms
2 business. In part because many of the forms are
3 outdated. We don't do a good job, and, in fact,
4 it would be very difficult to do a good job of
5 keeping them current through the full Rules
6 Enabling Act process.
7 Not all of the rules committees, as you
8 know, run their forms through the Enabling Act
9 process. And our thought has been it's going to
10 be virtually impossible to stay on top of that.
11 We haven't done a good job. They are outdated.
12 Nobody uses them. Let's just get out of the forms
13 business and leave it to other entities to propose
14 forms.
15 If that's the objective, I guess the
16 question I have is: If that's the stated
17 objective, that's the published objective, we are
18 proposing it in that way, why is it necessary,
19 then, to go form by form and, as I understand it,
20 have a public discussion of whether we should
21 eliminate this form under this rule, or why is it
22 necessary to publish every rule that relates to
23 the forms we are trying to just get rid of?
24 PROFESSOR COLEMAN: Well, I think that
25 goes back to my point that I think the forms and

1 the rules are inextricably linked and I don't
2 think that you can change the form without
3 changing the rule.
4 And I understand the Committee's point
5 about the time that it would take to update these
6 forms. I mean, first of all, I would say that the
7 Committee is well -- well -- is -- you do an
8 excellent job of keeping on top of the forms.
9 It's shown that it can do large projects and do
10 its other tasks.
11 But putting that to the side, if the
12 Committee is interested in getting out of the
13 business of the forms, I think the answer is to
14 publish all the forms with the rules that they
15 correspond to, offering that you're abrogating
16 those forms.
17 The reason I think this is important is
18 because that's the Rule Enabling Act process. It
19 may be the case that the response from the bench
20 and the bar is that they will welcome this, and
21 that they don't see that this is a major change to
22 the rules. But that is -- that's what that
23 process is supposed to do. And I think the
24 default should always be to make sure that that
25 process is being heeded to.

1 And so it could be that at the end of the
2 day we end up abrogating the forms and that's
3 fine. But I would like to see the Committee go
4 through the process of making sure that the bench
5 and the bar have a chance to respond to what I
6 argue is a change to the rules by eliminating some
7 of these forms.
8 And you can see from the level of comments
9 that you're getting that I'm one of the sole
10 testifiers on this, that this is not something
11 that has really caught the attention of the bench
12 and the bar.
13 JUDGE CAMPBELL: Judge Pratter?
14 JUDGE PRATTER: I'm having trouble
15 understanding why you think that the process is
16 part of the Enabling Act. Because I thought the
17 process really came from Section 2073(a)(1), which
18 is a judicial conference --
19 PROFESSOR COLEMAN: Sure.
20 JUDGE PRATTER: -- which could be changed.
21 PROFESSOR COLEMAN: Sure.
22 JUDGE PRATTER: That doesn't mean it's
23 part of the act.
24 PROFESSOR COLEMAN: Well, I think that we
25 consider it to be part of the Enabling Act

1 process. So maybe I'm not being fair in stating
2 it as the Enabling Act, but I consider that to be
3 part of the Enabling Act process. And, sure, it
4 could be changed but it hasn't.
5 And I think there's something, I mean, we
6 are civil procedure people. We are about process.
7 This is what we specialize in. And I think in
8 this particular case, a process that has been
9 followed time and time again is that when a rule
10 is changed, it's put through the committee
11 process. It is published for comment. Those
12 comments are responded to, the committee goes back
13 and considers those comments.
14 Here I argue you have a change that is
15 happening to the rules that's underlying this
16 abrogation of the forms, and yet that hasn't been
17 vetted by the Committee either. I mean, that
18 hasn't been discussed to a great degree. It's
19 been kicked around a little bit. But it also
20 hasn't made it through the process of having the
21 bench and bar respond.
22 JUDGE PRATTER: Again I'm going to keep
23 asking you for help.
24 PROFESSOR COLEMAN: Sure.
25 JUDGE PRATTER: Because I'm having trouble

1 seeing a link between a particular rule and an
2 illustration, which the forms are identified as
3 illustrative.
4 PROFESSOR COLEMAN: Yes, they are also
5 identified as sufficient under Rule 84. And again
6 that was the change that was made in 1946.
7 JUDGE PRATTER: But where does it say in a
8 rule that here is a form to live by this rule?
9 PROFESSOR COLEMAN: Now if you abrogate
10 Rule 84, you are getting rid of that. Rule 84
11 says that the forms apply and they are sufficient
12 and demonstrate the rules.
13 JUDGE PRATTER: I'm not asking my question
14 clearly. Where in any given rule does it relate
15 to one of the forms that are currently available
16 as an illustration? They are not exclusive
17 illustrations, by the way.
18 PROFESSOR COLEMAN: No. And, in fact, the
19 opening of the appendix says that they are not
20 exclusive illustrations. And now the amendment
21 that you all are proposing specifically
22 incorporates some of the forms into Rule 4.
23 But you're right that none of the rules
24 right now incorporate the form specifically by
25 reference. But that's what Rule 84 was meant to

1 do from the beginning and as amended in 1946.

2 JUDGE CAMPBELL: Thank you.

3 PROFESSOR COLEMAN: Thank you very much.

4 Appreciate it.

5 JUDGE CAMPBELL: Ms. Larkin.

6 MS. LARKIN: Good morning, my name is

7 Jocelyn Larkin. I am the executive director of

8 the Impact Fund, a legal nonprofit which supports

9 impact litigation to further civil and human

10 rights, combat poverty, and ensure environmental

11 justice. We do this through small grants to pay

12 litigation costs through training and consultation

13 with lawyers involved in these cases. We also

14 have our own caseload of impact litigation.

15 I was an invited speaker at the Duke

16 conference and also participated at the Dallas

17 mini conference. We have submitted comments and

18 we plan to supplement those.

19 I want to focus my comments on the

20 perspective of litigants who are using the federal

21 courts to seek systemic institutional reform.

22 Those cases share certain distinct characteristics

23 that I think are relevant to the proposed changes.

24 These are cases that are not about money.

25 They seek injunctive relief to change governmental

1 or corporate conduct. They are cases that are
2 frequently brought on behalf of vulnerable groups
3 without personal resources or the capacity to
4 essentially assist in the litigation. And to make
5 that more concrete, I'm talking about children who
6 are in an inadequate foster care system, persons
7 with developmental disabilities who are
8 inappropriately warehoused in institutional
9 settings, prisoners who are denied medical care.
10 The third characteristic are these cases
11 are very difficult. Plaintiffs are required to
12 meet very challenging burdens of proof.
13 I think Mr. Saenz talked a bit about this.
14 Systemic deficiencies we have to show, deliberate
15 indifference, a pattern and practice of
16 discrimination. We need to establish motive or
17 state of mind rather of an entity rather than an
18 individual. And we have to marshal a range of
19 circumstantial evidence to meet our burden, not
20 just to show liability, but also to get the class
21 certified.
22 The discovery in these cases is entirely
23 asymmetrical. We have to understand a very
24 complex organization or bureaucracy with many
25 players and multiple levels of decision making.

1 The cases, fifth, are brought often by
2 nonprofit legal organizations with limited
3 resources. These lawyers and thus these cases are
4 uniquely vulnerable to a defense strategy of
5 obstruction and delay.
6 I think that these cases also in social
7 terms are among the most important and meaningful
8 work of the federal courts, and a testament to our
9 legal system and to our democracy.
10 The proposed rules will adversely affect
11 these cases I believe in three ways, or at least
12 raise three concerns for me.
13 The five depositions are insufficient to
14 obtain the discovery needed to meet these very
15 heavy burdens of proof. I think it's been raised
16 that there is an ability to get agreement on the
17 other side. I think the problem with lowering the
18 limit is that you create essentially a new
19 strategy -- a new first line of defense for the
20 defense.
21 So in other words, they say to us: No,
22 you can -- you can have the five deposition limit.
23 Go to court to get anything in addition. It's a
24 no-risk strategy for them, because if we end up
25 getting maybe eight or ten because we aren't going

1 to get 15, but if we get eight or ten, the defense
2 will automatically get that same number.
3 So whether or not we are successful in
4 getting more depositions, we -- we've gone through
5 the transaction costs, which in these cases,
6 again, I said are very important.
7 I think also in terms of thinking about
8 it, when you don't know at the outset how many
9 depositions you are going to get, it's much more
10 difficult to effectively plan your discovery. Do
11 I need to do everything in five depositions, or am
12 I going to be able to count on the fact that the
13 judge will give me an additional three or five or
14 maybe the ten that I actually need?
15 I think that making a complex five-part
16 proportionality requirement part of the definition
17 of discoverable information will also burden that
18 process.
19 When you look at the factors again, these
20 are cases that are not about money. So the amount
21 in controversy calculus, which I know has raised a
22 lot of discussion, actually isn't relevant in
23 these cases.
24 That brings you to the importance of the
25 issues that are at stake. And, of course, that,

1 to some extent is a subjective judgment and it can
2 be in the eye of the beholder.
3 Just to give you a really simple example,
4 a couple of years ago we helped fund a case to
5 challenge the sex offender registration law in
6 Michigan. Those are not popular people, certainly
7 not with me. But the question is should a judge
8 be passing on whether this is an important issue
9 at the outset of the litigation.
10 It's often only in hindsight that we as a
11 society recognize the severe injustice that these
12 kinds of cases challenge. You know, when you
13 think about marriage equality, prison condition
14 cases, racially discriminatory police practices,
15 at the outset, the cases are thought to be
16 frivolous. At the end, we say: How did we ever
17 let it happen.
18 And while there's no one else here to
19 speak for them, I just want to remind everyone
20 that when we add this complexity to the discovery
21 standard, we need to keep in mind the pro se
22 litigants who need to deal with that issue.
23 I also finally join Professor Miller in
24 expressing concern about eliminating the Court's
25 discretion to allow discovery relevant to the

1 subject matter upon a showing of good cause. I
2 think this is a really important safety valve.
3 And just to give you a really simple
4 example, I do discrimination cases. If I have a
5 gender discrimination case, ordinarily our
6 discovery is limited to issues around gender
7 discrimination and probably the particular
8 practice that I'm challenging, say promotion.
9 But there are certain cases where if the
10 woman is the only person there, discovery might be
11 appropriate into issues concerning race
12 discrimination or perhaps there are circumstances
13 where sexual harassment might be relevant to that
14 promotion discrimination case. I don't have a
15 claim for race discrimination in my case, but in
16 unique cases, that safety valve would allow the
17 District Court to go beyond my claims and
18 defenses.
19 And I'm happy to take any questions.
20 JUDGE CAMPBELL: Questions?
21 A question on that last illustration you
22 gave.
23 MR. LARKIN: Um-hmmm.
24 JUDGE CAMPBELL: Why couldn't you argue in
25 that case that because there are no other gender

1 promotion issues in the company, it is relevant to
2 inquire into race discrimination practices or
3 sexual harassment?
4 MS. LARKIN: I certainly would be arguing
5 that, but it is not one of my claims. And the
6 defenses will say you haven't made that separate
7 claim.
8 I think another example, Judge Campbell,
9 might be in a circumstance where I have one or two
10 people who are challenging an inadequate foster
11 care system. Those children might have one or two
12 specific kinds of claims, but if we get into
13 discovery and we realize that there is a systemic
14 deficiency going on as opposed to just they made a
15 mistake on one or two people. It may be important
16 to go beyond what those two children's claims are
17 to get a sense of that larger systemic deficiency.
18 JUDGE CAMPBELL: If I could just follow up
19 on that. It seems to me that in that example as
20 well, if you take the relatively lenient
21 definition of relevancy, does it have any
22 likelihood of making a fact in dispute any more or
23 less likely?
24 You can make a strong argument that
25 looking at these other instances of improper

1 conduct is very relevant to proving that
2 misconduct occurred in your claim.
3 One of the things I think we discussed on
4 the Committee in eliminating the subject matter
5 reference was that nobody on the Committee, as I
6 recalled when we discussed it, lawyer or judge,
7 had ever heard anybody request a good cause
8 extension to subject matter. Everything was
9 focused on relevancy. And that seemed to be the
10 arena in which all of the discovery decisions were
11 made.
12 So I guess the question is, is two part:
13 Do you really think the argument you would be
14 making is not a relevancy argument? But secondly,
15 has it been your experience in your cases that you
16 do go to that subject matter provision of
17 Rule 26(b)(1) and argue that to courts?
18 MS. LARKIN: Your Honor, I haven't
19 necessarily and certainly my -- my focus is always
20 going to be on relevance, but you are making a
21 change to the rule and you are intentionally
22 taking that language out.
23 And so the argument from the defense will
24 be that that was intended to narrow the scope of
25 discovery. And then that question of what is

1 relevant may become a different calculus than it
2 has been in the past.
3 JUDGE KOELTL: Is it really an appealing
4 argument to the court that you would say I can't
5 argue to you that this is relevant to any claim or
6 defense in this case, but it's relevant?
7 MS. LARKIN: Well, because there are
8 circumstances in which we have an individual
9 plaintiff who may present only a certain narrow
10 set of circumstances about what happened to him or
11 her. But we are looking at systemic institutional
12 reform. And in that case, it may go beyond the
13 specific facts of that person. So it could go
14 beyond an individual facility to a broader point.
15 JUDGE CAMPBELL: Any other questions?
16 All right, thank you very much,
17 Ms. Larkin.
18 I'm going to mispronounce your name,
19 Mr. Urquhart.
20 MR. URQUHART: Urquhart. Yes, Judge
21 Campbell, thank you very much.
22 Again, my name is Quentin Urquhart, and
23 I'm here as a partner from the law firm of Irwin,
24 Fritchie, Urquhart & Moore in New Orleans.
25 I'm also appearing here today in two

1 capacities: First as a lawyer in private
2 practice, who tries cases and routinely advises
3 clients on the scope of their obligations to
4 provide information that is discoverable under the
5 federal rules.
6 Second, and probably most importantly
7 today I appear in my capacity as immediate past
8 president of the International Association of
9 Defense Counsel, the IADC. The IADC is an
10 association of approximately 2500 peer reviewed
11 corporate and insurance attorneys for the
12 United States and around the globe whose practice
13 is concentrated solely on the defense of civil
14 litigation. IADC members are partners in large
15 and small law firms. They are senior counsel in
16 corporate law departments. They are insurance
17 executives.
18 Our members and firms represent the
19 largest corporations around the world, but also
20 thousands of small and midsized companies who are
21 faced with the challenge today of completing in
22 our global economy. And the cost of discovery
23 plays a role every single day with those companies
24 when they are a litigant in a lawsuit.
25 The IADC sponsors over 20 substantive law

1 committees covering virtually every area of civil
2 practice from products liability to employment
3 law, construction law to corporate work, from
4 insurance law to white collar defense and trial
5 tactics. Our lawyers are on the front lines each
6 and every day litigating and trying these cases.
7 Our lawyers care deeply about the process
8 of civil litigation. Our organization is one of
9 the cofounders of Lawyers For Civil Justice, LCJ.
10 We, in sum, support a justice system in
11 which plaintiffs are compensated fairly for
12 genuine injuries, that responsible defendants are
13 held liable for appropriate damages, and that
14 nonresponsible defendants are exonerated without
15 unreasonable costs.
16 We are involved in advising clients every
17 single day about what they do with a particular
18 matter that is before them. We want to base the
19 advice to them as to whether they should settle a
20 matter or bring it to trial based on the legal
21 merits of the claim.
22 While transaction costs, meaning
23 attorneys' fees and discovery costs, should play
24 some role in that calculus, they should never be a
25 primary driver of the decisions that are made by

1 litigants. Unfortunately today, in many cases the
2 cost of discovery is playing too large of a role
3 in determining whether a client will choose to
4 stand up for its rights or simply give in. This
5 needs to be corrected.

6 The IADC wants to commend this Committee
7 for its excellent work in putting forth some
8 common-sense proposals that will improve the
9 administration of civil justice.

10 When the proposed rules changes were first
11 published, we circulated them to all of our
12 members and specifically asked for comment. We
13 specifically sent the rules changes to all of our
14 chairs of our substantive law committees and asked
15 them to respond.

16 The response has been uniform support for
17 the proposed rule changes and the IADC has now
18 submitted a formal white paper to this Committee
19 setting forth our positions.

20 The balance of my testimony will simply
21 serve to highlight those specific provisions that
22 are set forth in our white paper.

23 First, the scope of discovery. The
24 advisory committee's proposed amendment to
25 Rule 26(b)(1) we believe is a significant

1 improvement to the overbroad scope of discovery
2 allowed under the current rule.
3 Presently, many courts allow discovery of
4 almost any matter so long as it, quote, appears
5 reasonably calculated to lead to the discovery of
6 admissible evidence. This "lead to" language is
7 now really the tail that is wagging the dog. It
8 was really meant as a clarification on the scope
9 of discovery, but it has really swallowed the
10 entire rule.
11 The scope of discovery should not be
12 driven by a fishing expedition where the
13 responding party is required to spend considerable
14 resources to locate, review, and produce millions
15 of pages of information based on the hope that
16 this search might, quote, lead to, closed quote,
17 some other type of information that might be
18 admissible at trial.
19 The proposed amendment properly refocuses
20 the parties on evidence that is relevant to claim
21 or defense. Whether that evidence is ultimately
22 admissible at trial is a question for another day
23 and does not need to be an explicit part of these
24 rules.
25 Second, proportionality, we believe that

1 the advisory committee's proposal to include an
2 express reference to proportionality in
3 Rule 26(b)(1) will further bring a needed degree
4 of pragmatism to the scope of discovery. While we
5 know the standard is implicit currently in the
6 rule, we believe that moving it up and actually
7 using the phrase, "proportional to the needs of
8 the case," will make it clear to the parties and
9 the courts that the scope of discovery must be
10 linked to the needs of that particular case.
11 That linkage doesn't ever get talked about
12 in many circumstances. Instead, the parties serve
13 discovery requests and the response is, well, they
14 are abusive or it's going to be unreasonable for
15 us to respond. The word "proportional" never gets
16 brought up.
17 This Committee should be commended for
18 bringing that word into prominence. That ought to
19 be a discussion that takes place between lawyers
20 when we are deciding about the scope of discovery.
21 And proportional isn't just dollars. I
22 agree with the comments made by members from the
23 other side of the V that in cases where dollars
24 aren't at play, the importance of those issues
25 should play a significant role in determining

1 proportionality.

2 Finally, I want to again endorse the

3 presumptive numerical limits in the categories of

4 discovery that the Committee has proposed. Those

5 limits will help to send a firm message to

6 plaintiffs and defendants, so my own clients, I'll

7 now be forced to have a heart-to-heart talk with

8 them about the number of depositions, the number

9 of discovery requests that are to be propounded.

10 In cases that truly require more than

11 five, we have those discussions and there has

12 never been any issue about expanding it. But I

13 think it sends a strong message to parties that

14 they should try to reduce the overall amount of

15 work that is being done to get a case to trial on

16 the merits.

17 In sum, the IADC believes that parties to

18 litigation should be given a fair opportunity to

19 really discovery the facts that are relevant to

20 their claims or defenses and then make a rational

21 decision on the merits of the case and whether it

22 should be settled or whether it should be tried.

23 If the parties never get to that point, they never

24 get to that decision point because the costs of

25 discovery are too high, then justice is being

1 denied.

2 The IADC again commends this Committee for

3 its important efforts and thanks the Committee for

4 the opportunity of presenting this testimony here

5 today.

6 Thank you.

7 JUDGE CAMPBELL: Thank you, Mr. Urquhart.

8 Dean?

9 DEAN KLONOFF: You mentioned that you

10 would have to have a heart-to-heart discussion

11 with your client about the discovery limitations,

12 but would you agree with the sentiment here and in

13 the written submissions that ordinarily the

14 defendants like these limitations?

15 MR. URQUHART: As far as what, on the

16 number?

17 DEAN KLONOFF: Yeah.

18 MR. URQUHART: That's a really good

19 question and we've had a number of discussions

20 about it. In certain cases, Dean, I know I'm

21 going to need to take more than five depositions,

22 and the other side knows it as well. I think it's

23 more atmospheric. I think that the five limit is

24 more atmospheric. It sets a tone for the parties

25 to have discussions with their clients about do we

1 really need all of this? Do we really need to go
2 that far?
3 So that's why I think and why we support
4 that change, because we think it sends the right
5 overall message.
6 JUDGE CAMPBELL: Other questions?
7 Elizabeth?
8 MS. CABRASER: Yes, I was intrigued by
9 your equation of proportionality and pragmatism.
10 I wonder though if front loading that discussion
11 about the needs of the case in a qualitative way
12 to determine the scope of discovery also front
13 loads a merits discussion and perhaps a merits
14 decision before that's even informed by the
15 discovery that hasn't occurred. Does that -- does
16 that bother you from a defense perspective?
17 MR. URQUHART: Well, I mean, it's not that
18 it bothers me from a defense perspective. I don't
19 think believe that should be an appropriate
20 discussion at that point of the litigation, the
21 actual who's right and who's wrong ultimately
22 about it.
23 I think lawyers are certainly capable of
24 having a rational discussion about the importance
25 of a civil rights case or the importance of an

1 economic case where simple dollars are being
2 sought and say, look, this is what we are arguing
3 about here today. This is the ultimate exposure,
4 perhaps, in the case today.
5 What should be the rational amount of
6 discovery, both from the plaintiff's side and the
7 defense side, that we need to get to trial.
8 And I think having the word
9 "proportionality" in there fosters those sorts of
10 real-world talks and discussions between counsel.
11 JUDGE CAMPBELL: All right. Thank you
12 very much, Mr. Urquhart.
13 We will go ahead and we will excuse the
14 standing committee folks who need to leave at this
15 time. Thank you very much for being with us. We
16 will give them just a minute, Mr. Butterfield, to
17 step out before you make your comments.
18 All right, Mr. Butterfield.
19 MR. BUTTERFIELD: Good afternoon. My name
20 is William Butterfield. I testify to you today
21 from three perspectives. One is as a partner of
22 Hausfeld, LLP, in Washington, D.C. where my firm
23 primarily conducts complex litigation on the
24 plaintiff's side, but sometimes on the defense
25 side.

1 Second, as an adjunct professor of law at
2 American University where I teach a class in
3 eDiscovery.
4 And third as vice chair of the Sedona
5 working group on eDiscovery. But I do want to
6 make it clear that my comments today are personal
7 to me and do not necessarily reflect those of
8 Sedona.
9 I wish to make a few points, and I do
10 appreciate the opportunity to testify and I do
11 intend to submit written testimony.
12 The first point is if the reason for these
13 rule changes is truly to reduce discovery costs,
14 the proposals, in my opinion, omit two changes
15 that would do more than anything else to curb
16 excessive discovery costs.
17 First, to adopt a cooperation regime with
18 real teeth. And I understand that Rule 1 has been
19 tweaked to mention cooperation, but it provides no
20 mechanism to require it. Meaningful cooperation
21 as set forth in various local rules and pilot
22 programs would, in my opinion, do more than
23 anything else to curb discovery expenses.
24 The second means of curbing discovery
25 expenses in my opinion, and rather than reducing

1 presumptive limits on various discovery devices,
2 the second way is to take a different approach and
3 adopt in a real way a phased discovery mechanism.
4 And under the current rules, and
5 particularly in many local rules, parties get only
6 one shot in discovery. So that while some judges
7 have promoted phase discovery, one of them is in
8 this room, many other judges and local rules do
9 not allow time for that approach to be realistic.
10 So the result, and the reality is parties
11 only get one shot to do discovery and necessarily
12 they have to be broad from the get-go.
13 So if there was a real phase discovery
14 regime, parties could be targeted initially. They
15 could take their time and assess what they have,
16 take a deep breath and figure out whether they
17 need to go further or whether there's good cause
18 to go further.
19 That in my opinion would actually answer
20 some of the proportionality, the vexing
21 proportionality problems that you were discussing
22 with Mr. Garrison. And he has problems with
23 proportionality and my friend, Paul Weiner,
24 defends those cases. He has problems with
25 proportionality. And I understand those problems.

1 If there was a phase discovery approach, I
2 think that would go a real way in helping both of
3 those gentlemen and all of us in the field.
4 Next I want to turn to Rule 37. I think
5 the proposal needs some tweaking. I agree with my
6 Sedona colleagues that the term "willful" is
7 problematic. I think, as with my Sedona
8 colleagues, I think there should be a clear
9 separation between what is considered a remedial
10 measure and what is considered a sanction.
11 So I would suggest either taking Sedona's
12 approach or some very minor wordsmithing to your
13 current proposal, which would be to revise the
14 language of proposed Rule 37(e)(1)(A) to, quote,
15 permit nonsanctioned based curative measures such
16 as additional discovery, ordering the party to pay
17 reasonable expenses, including attorney fees
18 caused by the failure. I think that would help
19 clarify that those things are curative measures.
20 And I do recognize what you put in the Committee
21 note, but I think this would go further in
22 clarifying it.
23 Next under Rule 37, I'm troubled because
24 my reading of the rule seems to indicate that
25 there's a requirement that there must be a showing

1 that information is lost before even imposing
2 curative measures.
3 Often additional discovery is necessary
4 before determining whether information has been
5 lost; for example, whether that information can be
6 obtained through other sources, whether there are
7 duplicate copies. So I am troubled by that.
8 And next, I think it would be helpful if
9 the Committee notes give some examples of conduct
10 that it considers to be in bad faith. So I'm
11 concerned about the party that doesn't initiate
12 any particular action to destroy relevant
13 information but fails to issue any litigation hold
14 and simply allows its auto delete tools and
15 routine destruction mechanisms to continue in the
16 face of a known preservation obligation.
17 To me, that's bad faith, I would
18 appreciate clarity on that from the Committee and
19 the rules.
20 Finally, I think I agree with Judge
21 Scheindlin. It's very difficult to show the
22 relevancy of information that no longer exists.
23 So I would propose some burden shifting here.
24 So once the moving party or the party
25 moving for sanction proves that information has

1 been lost, and proves the requisite level of
2 culpability, I would support a rule change to
3 clarify that the spoliating party, in order to
4 avoid sanctions, must demonstrate that there has
5 been no substantial prejudice to the innocent
6 party caused by the loss of the information or
7 that the information lost was not relevant.
8 I see my time -- it's not quite up. It is
9 up.
10 JUDGE CAMPBELL: Yeah, the number is going
11 up, actually.
12 MR. BUTTERFIELD: Yes, sorry.
13 JUDGE CAMPBELL: Mr. Butterfield, are you
14 going to put these specific suggestions in your
15 written comments?
16 MR. BUTTERFIELD: I will. I haven't even
17 begun to get through everything I would like to
18 say. But, yes, I will put those suggestions in.
19 JUDGE CAMPBELL: Questions?
20 JUDGE KOELTL: Mr. Butterfield, the issue
21 of phased discovery, the judges have the power to
22 do that now, right? And in the employment area
23 there is the employment protocols that
24 Mr. Garrison worked on as well as defense counsel
25 which effectively does phase discovery.

1 It would be very difficult in terms of a
2 national rule, with all kinds of different cases,
3 to establish any form of phased discovery for all
4 cases on a national level. Judges have the power
5 to do that as part of case management.
6 The question is whether we should do
7 anything else to encourage that in the national
8 rule.
9 And the second question I would just ask
10 is my understanding, and you can correct me if I'm
11 wrong, from the Sedona materials, is that so far,
12 what we've heard from the various inputs from
13 Sedona is that Sedona agrees with the amendment to
14 26(b)(1) with respect to proportionality. So two
15 issues.
16 MR. BUTTERFIELD: Judge Koeltl, as to
17 phased discovery I understand and agree that
18 judges have that power now. In reality, however,
19 a lot of times the local rules really don't let
20 them do it.
21 And I can give you an example. I
22 litigated a case in Florida. And the District
23 Court there had a rule that once the clock started
24 running on discovery, so once you, I think, had
25 your 26(f) conference, all discovery, and this was

1 a complex case, you know, lots of things at stake,
2 lots of parties. All discovery had to be
3 completed in one year.
4 In reality, that does not permit phase
5 discovery, even though the judge might have the
6 power to order it.
7 So I don't have the legislative answer for
8 you, but it's a new way of thinking, I think, and
9 it's an alternative to further reductions of
10 presumptive limits which frankly in my world, I
11 look at the rules for guidance, and they give no
12 guidance in my world. When I have 40 parties in a
13 case and when it says I can take five depositions,
14 that is not a meaningful rule anymore. And the
15 rules in my opinion ought to be meaningful.
16 As to what Sedona said, as I said, I don't
17 agree with everything personally. You know, it's
18 important to note that the way Sedona approaches
19 this, number one, this came from the steering
20 committee, not the working group, all right. And
21 the steering -- and the steering committee members
22 made it clear that they were not to be bound by
23 positions taken as a whole and in order to reach
24 consensus as a whole, and in some cases, they had
25 very real differences with the positions taken on

1 a consensus view.

2 JUDGE CAMPBELL: Other questions?

3 All right, thank you very much,

4 Mr. Butterfield.

5 We will resume at five minutes past one.

6 For those of you looking for lunch, Washington,

7 which is the street just north of the building, if

8 you go east on Washington Street, so go out the

9 doors of the courthouse and keep going, there's a

10 lunch shop across the street at the first

11 intersection.

12 If you want to walk ten minutes down to

13 Central and Washington there's a bunch of lunch

14 places.

15 If you're dying for a Big Mac, there's a

16 McDonald's up 7th Avenue to the north.

17 We will see you at five minutes past the

18 hour. Thank you very much.

19 (The noon recess was taken.)

20 JUDGE CAMPBELL: All right, I think we are

21 ready to resume. Welcome for all of you who just

22 arrived. We've been at this a bit this morning,

23 but we are happy to have you here and look forward

24 to hearing your comments.

25 As mentioned earlier, we are busy enough

1 with folks to speak to us today, that we have to
2 hold folks to a total of ten minutes. So there is
3 a light on the lectern that goes on after three
4 minute have passed, and a red light after five
5 minutes. The idea being if you keep your comments
6 to five minutes there will be time for questions.
7 But don't feel you have to stop midsentence when
8 that red light comes on.
9 So we are going to begin and go in the
10 order that the witness list has been published so
11 the next speaker will be Ms. Sanguinetti.
12 MS. SANGUINETTI: Thank you. Good
13 afternoon. I want to first of all thank this
14 panel for allowing me to come speak. My name is
15 Elise Sanguinetti. I practice in Oakland,
16 California. I'm a partner at Khorrami, Boucher,
17 Sumner and Sanguinetti. One hundred percent of my
18 practice is focused on representing individuals in
19 wrongful death and catastrophic injury cases.
20 When I am in federal Court, I am
21 representing people who are individuals that are
22 taking on usually large corporations for the
23 wrongful death of a family member or a very
24 serious injury to themselves.
25 My perspective, I've been listening to all

1 of the people speaking today. And I wanted to
2 give you the perspective of the individuals who
3 would be affected by these rules changes.
4 The people that I represent I represent on
5 contingent fee basis because none of my clients
6 could afford to pursue litigation on their own.
7 And this is the only way that they can -- they can
8 pursue justice for the wrongful act of others.
9 One example I want to give you of a recent
10 case that I had in federal court was a family that
11 brought an action on behalf of the husband of the
12 family that passed away in a scuba diving
13 accident. He -- there was a problem with the
14 swivel joint on a pressure gauge, it
15 malfunctioned. And when the case came to us, we
16 knew that there was a potential problem, but we
17 didn't know what the problem was.
18 And we were tasked with representing these
19 individuals, coming into federal court, and asking
20 for information. And what I wanted to talk to you
21 about today to start off were the limitations on
22 the depositions and restricting the Rule 30,
23 moving the deposition number from ten to five.
24 In that particular case, there were issues
25 involving not only manufacturing defects, but also

1 design defects of the valve, causation, and
2 disputes regarding damages.
3 In that case, we -- the defendant had very
4 critical information that wasn't produced to us in
5 the initial disclosures, and we had to spend
6 significant time tailoring our discovery, which we
7 did do. It was still necessary. We had over five
8 witnesses that were witnesses to the actual
9 incident that we needed to depose, and we also had
10 to depose -- we deposed five witnesses on the
11 technical information. We were very, very
12 tailored to what we needed to do.
13 If this rule change went into place, we
14 would make an attempt to work with the other side,
15 but I've run across roadblocks many, many times in
16 trying to negotiate above the number of the amount
17 that's allowed by the rule.
18 So what this would do is it knocks down in
19 half the amount of depositions that we are able to
20 take. And from a plaintiff's perspective, a
21 single plaintiff -- a lawyer representing single
22 plaintiffs, we are very, very conscious of not
23 wanting to overtake depositions, because in the
24 end, I'm having to explain to the clients the
25 costs that I had to spend on their case and why

1 that reduced their recovery.

2 So I'm very, very careful and so are my

3 partners and my colleagues in making sure that we

4 are tailoring our depositions to the depositions

5 that we really need.

6 But our cases oftentimes, especially when

7 it's a product liability case and we are taking on

8 a large corporation, it becomes necessary that we

9 need to take depositions on many different areas.

10 And we have to take more than five.

11 With regard to interrogatories, reducing

12 the number from 25 to 15 is very dramatic. For us

13 trying to figure out what was wrong in this

14 particular case, on both a manufacturing

15 perspective and a design perspective, we did spend

16 specific time tailoring our interrogatories. But

17 moving that number to 15, I can't see how that

18 would be plausible just to be able to come up with

19 the amount of questions that we need to get

20 answered, to avoid, hopefully, taking additional

21 depositions, or asking for documents that aren't

22 relevant.

23 Interrogatories are such an inexpensive

24 way for us to be able to obtain information. And

25 in a single-plaintiff circumstance, they are

1 really critical for us to be able to keep costs
2 down.
3 With regard to the requests for
4 admissions, they are tools that we use often.
5 I -- I -- the number itself is not a specific
6 number that concerns me. Aside from the fact that
7 anytime there's a limitation on us being able to
8 narrow down the issues that are ultimately going
9 to be at issue at trial, that is what concerns me.
10 It's rare that I'm going to be asking more than 25
11 requests for admissions. But if it were necessary
12 in a case to be able to tailor exactly the
13 information that I'm trying to know what the
14 defense is going to raise at trial, I want to be
15 able to do that, because it's going to save my
16 client money and it's judicial efficiency, because
17 we will be able to make the case shorter.
18 And lastly, and most importantly,
19 actually, is the proportionality. That is, you
20 know, I heard earlier today that it's not a
21 radical change. But then yet in the same breath,
22 they said that the change of moving
23 proportionality up to the front was -- was not a
24 big deal, but it has been living in obscurity.
25 Well, it is a radical change. It has

1 been, if they want to say it's been living in
2 obscurity, they are showing that by moving it up
3 front, it's a radical change.
4 It's very concerning to plaintiffs. And I
5 want to just make sure the factors is specifically
6 with the amount of -- amount in controversy is a
7 major problem for cases such as mine where I'm
8 representing individual plaintiffs. And maybe the
9 amount of a wrongful death lawsuit is a minimal
10 amount of what we would be able to recover or a
11 catastrophic injury case in comparison to what I
12 need to find out or the burdens on the defendant
13 to find out what happened to this product that
14 caused my client's death.
15 But if I am not able to get to the bottom
16 of that, if they are considering the amount of
17 controversy, I have to be able to obtain that
18 information. They are the ones in control of it.
19 So I know I'm past my time and I don't
20 want to run too far past. But I appreciate very
21 much you giving me the opportunity to speak today.
22 And I would be happy to answer any questions.
23 JUDGE CAMPBELL: Questions?
24 Rick?
25 PROFESSOR MARCUS: Could I get you to say

1 a little bit more about the concern you have with
2 proportionality. Because my reaction is unlike
3 other kinds of cases we've heard about, I would
4 expect often your prayer for damages looks like a
5 fairly large number. So maybe proportionality
6 would cut in favor of broad discovery in your
7 case.
8 MS. SANGUINETTI: I would be doubtful of
9 that. My concern right now is that the way that
10 the rules work is that we don't have to sit down
11 with the other side and say: Let's go through
12 these factors. Generally speaking, we are able to
13 come to agreements with -- with defense counsel on
14 discovery that we need.
15 In this case, what I see what's going to
16 happen is that we are going to hear -- we already
17 hear that things are burdensome but we are usually
18 able to come up to an agreement. I think what
19 will result is we are going to hear from the other
20 side: We can't give you all this information you
21 need because it's stored in a difficult way, it's
22 going to be very expensive, and, therefore, you
23 can take it to a judge. That's what I'm concerned
24 about.
25 And so every single time I have to go in

1 and file a motion, and I think this is going to
2 create a lot of law and motion work that wouldn't
3 otherwise be necessary. That would be my big
4 concern.
5 I think that with these factors, it's not
6 only amount in controversy alone, I think it is
7 significant, because they aren't always
8 high-dollar amounts. Sometimes these injury cases
9 that end up in federal court are not very
10 high-dollar-amount injury cases. They just make
11 the minimums of the court, but we've got diversity
12 jurisdiction so we are going to be in federal
13 court. And it doesn't always justify -- it
14 wouldn't necessarily in and of itself show that
15 we've -- that the amount in controversy exceeds
16 amount of discovery that we are looking for.
17 And I think the same is true for the
18 importance, the factor, let's see, the importance
19 of the issue at stake in the action, and the
20 burden of expense versus benefit. The problem
21 with those two factors is that it's oftentimes so
22 early in discovery for us to be able to prove what
23 benefit we are going to get from the discovery we
24 are asking is very, very challenging for
25 single-plaintiff cases.

1 JUDGE CAMPBELL: Other questions?
2 Art?
3 JUDGE HARRIS: To the extent that you have
4 a choice between federal and state forums, does
5 the discovery and limitations and federal
6 procedures have any effect in your choice?
7 MS. SANGUINETTI: Yes. Yes. Very much
8 so. In California, our rules follow the rule that
9 we've been talking about earlier, which it's broad
10 discovery. In fact, it's interpreted very, very
11 broadly in California. Every judge will always
12 err on the side of allowing discovery.
13 And so that's a very important factor for
14 us. We are always in a position of trying to
15 obtain information that we otherwise wouldn't
16 know.
17 It's not a two-sided situation in
18 plaintiffs' cases such as the ones I represent.
19 Because the only thing the defense is usually
20 interested in is damages. And we are very
21 forthcoming with those. But the burden is on us
22 to prove that there's a product defect either in
23 design or manufacturing in product cases, and we
24 have to get that information from the defendants.
25 I would prefer a California court because

1 I'm unlimited in my access to obtain that
2 information. But in federal court, I do have
3 limits. At least within the limits that exist
4 right now, I'm able to obtain the information.
5 I'm very concerned about what's going to happen in
6 the future.
7 JUDGE CAMPBELL: All right. Thank you
8 very much, Ms. Sanguinetti.
9 Ms. Dickson?
10 MS. DICKSON: Thank you, Your Honor. I'm
11 Kathryn Dickson. I've been a board member of NELA
12 and the California Employment Lawyers Association
13 for a number of years. In a more bipartisan role,
14 I'm a member of the governing council of the ABA
15 labor and employment law section.
16 I've practiced law since 1976. And I
17 represent plaintiffs in employment discrimination,
18 wrongful termination, whistle-blower, and
19 harassment cases. I come from a very tiny firm,
20 three lawyers. And I want to tell you what it's
21 like.
22 And I try cases in state court, federal
23 court, and increasingly, it won't surprise you, in
24 arbitration. And I want to talk to you about what
25 it's like to be a lawyer practicing in a tiny firm

1 representing individuals under the discovery
2 regime that exists and the one that's being
3 proposed here.
4 I also want to say that I love eDiscovery.
5 I think in the 35 years I've practiced, it was the
6 single most important development to level the
7 playing field for me in my cases. The single
8 worst development has been Rule 56 and the
9 interpretation of Rule 56. That's the 800-pound
10 gorilla in this room, and that's what's driving
11 cost.
12 The first 15 years of my practice I never
13 had a summary judgment motion filed because I
14 choose my cases carefully and develop them well.
15 Then in the '90s, they started coming and
16 in the last ten years, in every single employment
17 case I have, there's a summary judgment motion.
18 That's where the cost is.
19 I also read all 351 pages of what you
20 heard in D.C., so I am going to try to address
21 what it seemed like you wanted to hear.
22 I need discovery for three purposes. I
23 need discovery to assess the case for settlement.
24 I need discovery to oppose the inevitable summary
25 judgment motion. And I need discovery to put on a

1 good trial to win that case for my client.

2 The changes that are being proposed here

3 are only sufficient for the first purpose,

4 assessing the case for settlement. In fact, they

5 are almost identical to the agreement that I

6 arrive at with most defense counsel to look at the

7 case to prepare it for an early mediation. They

8 will take the plaintiff, maybe half of the

9 plaintiff's depositions or the whole thing. I'll

10 take the decision maker, an HR person, maybe an

11 important coworker or some other witness. And

12 then we can try to mediate the case.

13 If these rules were set up so that in

14 that -- I agreed with Mr. Butterfield, if they

15 were set up so that that was stage one, and that

16 would take care of many, many, many cases because

17 a lot of them settle.

18 But we don't stop there. Next we have to

19 move on to summary judgment and trial. So the

20 proposed changes on the number of depositions and

21 the length of depositions, is that a radical

22 change people ask.

23 Okay, I'm a trial lawyer. I am fairly

24 analytical. So what those changes do, you've gone

25 from ten depositions of seven hours to five

1 depositions of six hours. You have gone from 70
2 hours of deposition preparation for trial to 30.
3 You have slashed our depositions more than in
4 half. And they are the most important thing there
5 is for preparing for trial.
6 So the restrictions don't provide enough
7 discovery in most employment cases for us to
8 prepare.
9 I believe in Irving Younger's Ten
10 Commandments for Cross-Examination. I believe
11 what I was taught by judges and law professors.
12 How do you do a trial? Preparation, preparation,
13 preparation.
14 I have never seen an employment trial
15 where the defense put on five or fewer witnesses.
16 So I'm standing there and there are these
17 beautifully scripted defense witnesses. I have
18 nothing to impeach them with, nothing to shake
19 their credibility.
20 In my last case, with the coworkers who
21 said my client was a problem, certain coworkers
22 said that I wouldn't have known that one's husband
23 had just been hired by the company before her
24 deposition. That another coworker, he had just
25 been promoted right before his deposition.

1 So we wouldn't have the evidence that we
2 need to really have the jury understand whether
3 these people are credible or not or what their
4 biases are.
5 And do judges want to see -- do you all
6 want to see focused cross-examination, nice, sharp
7 examinations at trial? There's a lot of complaint
8 about the lack of trial advocacy quality now. If
9 you limit discovery, that will not improve trial
10 advocacy in your courts. And it's not good for
11 you and it's not good for the juries.
12 I looked at my most recent trials, because
13 I saw that you were interested in statistics. And
14 these are the past five years or so. The number
15 of combined depositions before trial was in the
16 range of 22 to 28 for those cases that went all
17 the way through a trial or plenary hearings in the
18 deposition -- in the arbitration.
19 The defendants proposed trial witnesses in
20 their last pretrial statements were typically in
21 the range of 18 to 38. So they are proposing 38
22 witnesses for trial and I've had five depositions.
23 They, of course, put on fewer than their 38. That
24 inevitably happens. But they always put on
25 somewhere between 10 and 15.

1 That's in the cases that I've done in the
2 last several years. And these were individual
3 employment cases.
4 So plaintiffs almost always need more than
5 five depositions. The categories, you've heard
6 what the categories include, harasser,
7 perpetrator, decision maker, human resources,
8 supervisors, both current and former, higher
9 ranking people if you're going to be able to make
10 a case for punitive damages, comparators, and any
11 investigators.
12 No one has talked about the importance of
13 videotaped depositions as the actual testimony
14 that is shown at the trial. So if witnesses are
15 going to be put on at trial, we use videotaped
16 depositions. Both sides do. So that's how we get
17 the trial testimony. It's not just discovery.
18 I can give you more statistics if any of
19 you are interested. I took one of my cases and
20 just analyzed exactly how many witnesses there
21 were.
22 And I just want to say two other brief
23 things. One is I read in the materials and it
24 sort of disturbed me. Somewhere it said that NELA
25 members thought discovery was overly costly and

1 abusive.

2 I would ask that you look at page 11 of
3 the NELA report on the survey results. Because
4 more than 90 percent of NELA members talk about
5 how very important deposition and document
6 requests and interrogatories are.

7 What the plaintiffs were complaining about
8 is the endless meet and confers, the number of
9 times we have to go in on motions to compel, the
10 number of times we have to move to quash overbroad
11 subpoenas for every employer your client's ever
12 worked for, for every medical record since they
13 were born. Those things cost us money and time.
14 That's what the plaintiffs were complaining about,
15 not that there are -- there's too much discovery.

16 And then in terms of proportionality, one
17 last quick thing. I think in my cases when the
18 amount in controversy is the lowest, because I
19 represent female farm workers who are sexually
20 assaulted in the fields, all the way up to
21 corporate executives.

22 My corporate executives know a lot and can
23 give me informal discovery. They know the names
24 of people. They know how things are organized.
25 My farm workers generally don't know the last name

1 of their supervisor. He's the mayordomo. He's
2 Jose, you know. They don't know anything about
3 the structure of the company.
4 So it's the people at the bottom sometimes
5 who need the most discovery. So that's just one
6 more different comment on proportionality.
7 JUDGE CAMPBELL: Thank you, Ms. Dickson.
8 Paul?
9 JUDGE GRIMM: Just a quick question,
10 Ms. Dickson. In the current limitations in the
11 rules of ten.
12 MS. DICKSON: Right.
13 JUDGE GRIMM: It sounds like you would
14 need more than the ten in a number of the cases
15 that you have.
16 MS. DICKSON: I analyzed it. It's between
17 10 and 15 in each case, occasionally even a little
18 bit more than 15 depending on what the defendant
19 says, and what their -- what the pretext fight is
20 about.
21 JUDGE GRIMM: How difficult do you find it
22 in your practice to get more than ten in the cases
23 that you have? Because it sounds like probably
24 you have more experience on a consistent basis
25 with cases that need more than the limit, whether

1 it would be five or ten. I just am curious about
2 your experience.
3 I think I got a flavor of how you might
4 get reactions from opposing counsel. But what
5 about with the court? How much difficulty is it
6 from the court when you make the comments like
7 you've made to us to convince them over the
8 objections of your adversary that you need 15?
9 MS. DICKSON: I have been denied ten. In
10 fact, including within the last year. I asked for
11 ten. I said I really need more than ten, but I
12 will try to limit it ten, and I was given seven.
13 Opposing counsel and I agreed before we
14 went in for our case management conference that we
15 both thought that it was appropriate to have 10 to
16 15. And the trial judge said no. With a
17 stipulation, and he said no.
18 JUDGE GRIMM: That was in federal court?
19 MS. DICKSON: Yes. It was a federal
20 judge.
21 Yes?
22 JUDGE KOELTL: Have you used the
23 employment discovery protocols in California?
24 MS. DICKSON: I was involved in helping to
25 develop them, and I like them very much and have

1 tried to prod our judges to use them. And I know
2 that Judge Gonzalez Rogers is using them. And I
3 think some of our other judges are considering
4 them.
5 I think they are excellent, they are truly
6 what initial disclosures are supposed to be. They
7 would be very helpful. They haven't come up in my
8 particular cases. I -- I like them. And I think
9 they are very good.
10 Also, I'll recommend the Northern District
11 ESI guidelines. I worked on those. I was on the
12 committee to put those together. And if the word
13 "cooperation" is in there once, it's in there 15
14 or 20 times. And if we could have legislated
15 cooperation in those, we would have. And if we
16 could have imposed sanctions for lack of
17 cooperation, we would have.
18 And I as a mother know that serious
19 sanctions can actually change behavior.
20 JUDGE CAMPBELL: All right. Thank you
21 very much, Ms. Dickson.
22 Mr. Coben.
23 MR. COBEN: Thank you. My name is Larry
24 Coben. And I practice law both here in Arizona
25 and Philadelphia and around the country. I'm here

1 today speaking as a civil litigator but I'm also
2 here today in a representative capacity. I serve
3 as, and have for the last decade, the chief legal
4 officer for what is called the Attorneys
5 Information Exchange Group.
6 The AIEG is a litigation sub group of AAJ
7 but actually has its own independent board. We
8 are a group of approximately 700 civil litigators
9 across the United States. And have since the
10 late, around mid 1970s to late 1970s, represented
11 consumers and almost always involved in litigation
12 against motor vehicle manufacturers.
13 Our clients are in the tens of thousands.
14 And have been over these years representing people
15 who have been the victims of Ford Pintos, Ford
16 Explorers, GM pickup trucks, Toyota sudden
17 acceleration vehicles, et cetera, et cetera.
18 Our members probably litigate more complex
19 products liability cases than any other
20 organizational membership in the country. And so
21 I'm here today to try to explain to you the issue
22 only related to proportionality and the idea of
23 launching or moving the question of
24 proportionality from an objective standpoint to
25 what appears to be a burden of proof standpoint.

1 And I thought that the best way to do this
2 was to kind of take you back to an earlier time,
3 and that is when I first had my first Ford Pinto
4 fire case. And I wanted to let you see the
5 application of what I perceived these rule changes
6 will do to determining what information would be
7 available in the ordinary discovery practice.
8 And the reason I think that's important,
9 and I have a little board I'm going to go over
10 with you in a minute, is that it's not just
11 representing an individual. Because there were
12 many folks who suffered minor as well as
13 catastrophic injuries from that product. But it's
14 also the societal benefit that was ultimately
15 obtained by the discovery that was acquired in
16 that case and how it literally changed the design
17 of motor vehicle fuel systems for every vehicle in
18 this country.
19 But that was predicated upon the fact that
20 we were able, after years of fighting, to break
21 down the doors and get broad discovery, broad
22 discovery which I submit to you if we were to have
23 a new Pinto case today for the first time, we
24 would never see.
25 So, let me show you. I don't think you

1 will all be able to read this.

2 JUDGE CAMPBELL: Could you please try to

3 speak into the mic as you do that?

4 MR. COBEN: I will, I will.

5 I just want you to assume that we had a

6 case involving a 1978 Ford Pinto. And the

7 question in discovery is the design process and

8 the testing process for this vehicle to gauge its

9 safety through the manufacturer. It doesn't have

10 to be a Ford Pinto, but since I'm familiar with it

11 and many of us are, I thought this would be

12 appropriate.

13 Now, ordinarily under the ordinary rules

14 of discovery, we would be able to obtain discovery

15 of prior similar models, that is the design of the

16 forerunner to the Pinto, to find out through its

17 design analysis within the company how they went

18 about studying the safety of the fuel system. We

19 would be able to look at testing. We would then

20 be able to look at the development of the Ford

21 Pinto through its various iterations, through

22 design committee work, through testing work, to

23 see its performance.

24 We would then be able to also look at

25 equivalent type vehicles made by the same

1 manufacturer, same size vehicles with
2 alternatively designed fuel systems that could
3 provide different levels of protection under the
4 same circumstances.
5 Now that's a very broad -- I'm making a
6 very broad statement, but I can tell you that
7 typically, that would be the scope without any
8 difficulty. There would be some complaints, there
9 would be some arguments about it's too many pages
10 of material, et cetera, et cetera. But that would
11 be worked out. But that would be the general
12 scope.
13 Now, that's based upon not knowing what we
14 are going to find. And that's important. Because
15 now when we look at proportionality and what you
16 are asking to make changes, now the burden is on
17 the plaintiff to prove what we don't know.
18 So, the first question is going to be, or
19 at least that I would ask if I was the defense, is
20 why do you need information about other model
21 vehicles? We are talking about a 1978 Ford Pinto.
22 Why do you even need it for the 1974 model? Why
23 do you need it for other types of products that we
24 design, other types of vehicles? Think of the
25 expense.

1 Well, if your client, for instance, has
2 suffered minor burn injuries, let's talk about
3 that issue. If we are going to talk about the
4 cost to the defense of producing all of these
5 materials, hundreds of thousands of dollars
6 perhaps. And if you're talking about someone who
7 does not have catastrophic injuries but yet is
8 burned because of a design flaw, where is the line
9 going to be drawn? How is the plaintiff to draw
10 that line?
11 Under these circumstances, with your
12 various different elements of proportionality, let
13 me show you a document that would never have been
14 obtained.
15 This is a 1978 memorandum that is no
16 longer confidential from Ford Motor Company. This
17 memorandum is a generic memorandum developed by
18 the Ford engineers to discuss fuel system design,
19 integrity and safety. It was revealed in the
20 discovery in the Pinto litigation.
21 I submit to you that because it doesn't
22 involve specifically a Pinto, this has to do with
23 fuel system integrity, generally, and the
24 recommendations about how to design to prevent the
25 leakage of fires and the -- leakage of fuel and

1 fires.

2 There is no way under the -- at least the
3 verbiage of proportionality that one could even
4 know that this exists, let alone argue for its
5 relevancy. It's not related to the Pinto. It's
6 not related specifically to fire in small
7 vehicles. It simply relates generically to how
8 motor vehicle manufacturers, this one, determined
9 they should design their products. And yet the
10 evidence in the Pinto cases demonstrated that that
11 design philosophy was not followed.

12 The point of all this is I think real
13 simple. And that is not so much the verbiage of
14 any part of the proportionality testing that you
15 are suggesting, but rather how it's going to be
16 proven.

17 How are litigants, and how is a court
18 going to accept the responsibility to determine
19 the accuracy of information which either asks for
20 broad discovery or asks to restrict broad
21 discovery? The problem being not every case is
22 the 100th Ford Pinto trial. There's going to be a
23 first. And people are not going to know,
24 litigants will not know, at least the plaintiffs'
25 bar will not know what documents, what information

1 is available.

2 How will the court be able to judge

3 without looking at the documents? How would any

4 court know that this document existed, that this

5 document would be relevant to challenging the

6 design of a Ford Pinto if in fact proportionality

7 requires that you narrow scope and not make more

8 work than is necessary.

9 And that's a real hard problem, because

10 you don't know. And when you place the burden on

11 the plaintiff, as opposed to the defendant, it

12 turns it upside down.

13 In every case now, a defendant can come in

14 and say: We object, we think your scope is too

15 great. Here's an affidavit from an engineer

16 explaining why the Ford Comet isn't relevant to

17 the Ford Pinto, even though they are similar in

18 sizes. There are all differences.

19 And then once we've seen documents to

20 explain that legitimizes to some extent an

21 objection, then the plaintiff can come forward

22 with their own expert. But what you are doing is

23 you are putting the cart before the horse.

24 By changing where proportionality is

25 studied, you're placing a burden on plaintiffs

1 that they are not going to be able to meet. And
2 you are challenging judges to make decisions,
3 factual decisions about the scope of discovery
4 without knowing what exists.
5 And those things will make it very, very
6 difficult, if not impossible, to be able to prove
7 what we needed to prove in the Ford Pinto and in
8 other product cases.
9 JUDGE CAMPBELL: All right. Thank you
10 very much for your comments, Mr. Coben. We are
11 past ten minutes, so I think we need to move on to
12 the next speaker.
13 Mr. Weiner.
14 MR. WEINER: Good afternoon. My name is
15 Paul Weiner. I'm a shareholder and National
16 eDiscovery Counsel at Littler Mendelson.
17 I want to open by commending the Committee
18 on the outstanding work that it has done with its
19 rules proposals. I know firsthand how challenging
20 and at times polarizing these issues can be from
21 my work as a steering committee member of working
22 group one of the Sedona organization as well as
23 being a cochair of the advisory board of the
24 Georgetown Law Advance eDiscovery Institute. And
25 the Committee has done a masterful job of

1 synthesizing the issues and proposing solutions.
2 My law firm is the largest management side
3 labor and employment law firm in the world. We
4 have over 1,000 lawyers practicing in 60 offices
5 across the globe. From a litigation standpoint,
6 we handle cases in every district and every state
7 in the country from administrative charges to bet
8 the company class and collective actions. In the
9 last five years, Littler has handled more than
10 1,000 class and collective styled matters.
11 My primary goal today is to underscore the
12 crushing eDiscovery burdens facing employers in
13 today's digital world that cry out for a need to
14 amend the rules along the lines the Committee has
15 proposed. Moreover, in asymmetrical cases, and we
16 mostly deal with asymmetrical cases, eDiscovery
17 oftentimes morphs into improper gotcha tactics
18 instead of a legitimate advancement of the merits
19 of the parties' claims and defenses. The proposed
20 rules remedy this as well.
21 To illustrate the crushing burdens facing
22 employers in modern litigation I would like to use
23 a concrete example from a series of publicly
24 recorded decisions in the case of Pippins versus
25 KPMG. This was a hybrid FLSA collective action

1 and Rule 23 class action that was filed in the
2 Southern District of New York.
3 I need to note my firm had no involvement
4 in this case, so by talking about it, I am not
5 revealing any confidences or attorney/client
6 material. However, as I noted, given our
7 experience, we face similar factual scenarios
8 every day.
9 FLSA collective actions are opt-in cases.
10 If a specific individual does not affirmatively
11 opt into the case, they have no right to relief
12 and are never a party in the case. This is
13 important because experience demonstrates that
14 opt-in rates are oftentimes less than 30 percent.
15 More often than not, that means that 70 percent of
16 the potential collective action members never
17 choose to participate in the case.
18 The complaint in Pippins essentially
19 alleged that salaried audit associates working for
20 a Big Four accounting firm were misclassified as
21 exempt under the Fair Labor Standard Act and thus
22 were entitled to overtime pay. When the complaint
23 was filed, three named plaintiffs were listed.
24 The magistrate judge and then the district
25 judge held that on day one of the lawsuit, before

1 any type of class was certified, when there were
2 three named plaintiffs, the duty to preserve
3 extended to all putative collective action members
4 nationwide, which included at the time an
5 estimated 7500 current and former employees.
6 In support of a motion for a protective
7 order, the defendant presented an affidavit that
8 stated it would cost over $1.5 million to comply
9 with this very broad preservation burden to
10 essentially preserve hard drives of the party
11 employees. The courts denied that motion citing a
12 lack of information as to the contents of the hard
13 drive.
14 Fast forward to later in the case. The
15 defendant files a motion for summary judgment and
16 wins. The case is dismissed, subject to an
17 appeal.
18 In response to language that suggested it
19 could do so from the original preservation
20 opinion, the defendant asked the court to transfer
21 the cost of preservation to the plaintiffs during
22 any appeal, presenting an affidavit detailing that
23 its cost for preservation as of the date of
24 summary judgment, when the case was dismissed, now
25 exceeded $2.36 million and those costs would

1 continue during the appeal. That motion was
2 denied.
3 We also need to -- the record also
4 demonstrates that at the time summary judgment was
5 granted, notice had been given to about 8800
6 potential putative collective action members, yet
7 only about 1300 of those had opted into the case.
8 So remember I said opt-in rates were low. Here it
9 was 15 percent.
10 We also need to factor into the equation
11 that there's an ongoing debate among circuits
12 about whether eDiscovery costs are recoverable as
13 a taxable cost to the prevailing party pursuant to
14 28 U.S.C. Section 1920. The leading case that
15 says they are not is Race Tires America from the
16 Third Circuit.
17 So let's look at the situation. A
18 defendant is required to expend over $1.5 million
19 on day one of a lawsuit that involves three named
20 plaintiffs to preserve nationwide for potential
21 collective action involving in excess of 8,000
22 putative collective action members before any type
23 of class is certified. In fact, only 15 percent
24 of the potential people actually participated in
25 the case. The defendant wins on summary judgment

1 and the case is dismissed.

2 After it's dismissed, the defendant again

3 approaches the court, based upon express language,

4 asking to have the preservation burden shifted to

5 the other side, which have now exceeded $2

6 million, and that is denied. And under Race Tires

7 and its progeny, even when a defendant ultimately

8 wins a case like this on its merits, eDiscovery

9 costs are not recoverable by the prevailing party.

10 This is the example par excellence of the

11 crippling burdens employers face every day in U.S.

12 litigation. Now, like any case, Pippins has

13 unique factual circumstances and it's certainly

14 unique from a procedural standpoint, yet the

15 crushing eDiscovery burdens faced by employers are

16 not unique. I see this every day in our practice

17 from state to state and district to district in

18 cases large and small.

19 Just to quickly illustrate an example of

20 gotcha tactics, I only need to point to the

21 widespread use of overly broad, cut and paste

22 preservation demands that normally include in

23 serial fashion an omnibus list of data and

24 electronic media that are wholly untethered from

25 the facts and issues in any particular case.

1 At best such demands are served in a to
2 sand fashion without consideration of cost or
3 burden to the responding party. At worst they are
4 used as a transparent gotcha tactic. Or as one
5 court put it, and this is a quote, "to sandbag a
6 party" in the event materials were not preserved.
7 For this reason, I have a concern about
8 the encouragement of preservation demands and
9 proposed Rule 37(e)(2)(C); however, I also have a
10 proposed solution.
11 So that all of this leads to the question
12 of how will the proposed new rules help. I
13 briefly submit in three ways.
14 First, the rules must be amended to
15 provide consistency across circuits. Proposed
16 Rule 37(e) as establishment of a national
17 culpability standard does this, and I fully
18 support its enactment. I also support defining
19 the term "willful" as Sedona has proposed with
20 that language.
21 Second, the rule should reaffirm that
22 proportionality in all aspects of litigation,
23 including preservation, is a bedrock principle of
24 any contemporary system of justice operating in
25 today's digital world.

1 For those reasons, I fully support the
2 proposed amendment to move the proportionality
3 factors into Rule 26(b)(1); however, I would also
4 encourage the Committee to go further and
5 specifically reference the word "preservation" in
6 the preamble to Rule 26(b)(2)(C) as well as in
7 Rule 26(b)(2)(C)(1) and (3) and Sedona has also
8 commented on that in proposed language.
9 Finally, I would encourage the Committee
10 to incorporate the mandates of Rule 26(g)(1)(B)(3)
11 and to proposed Rule 37(e)(2)(C). This could be
12 accomplished by a cross-reference to that rule in
13 the text of Rule 37(e)(2) or in the Committee
14 note. While the current language provides that a
15 preservation request must be clear and reasonable,
16 I believe there's a need to go further.
17 As Judge Grimm noted in Mancia versus
18 Mayflower, 26(g)(1)(B)(3) imposes an obligation on
19 counsel to certify that a discovery request is
20 proportional to the amount in controversy and the
21 needs of the case. I submit that such reasoning
22 applies just as strongly in the preservation
23 context.
24 This addition would also make clear that
25 knee jerk, overly broad, cut-and-paste

1 preservation demands that have no bearing on the
2 claims and defenses in a case do not advance the
3 just, expedient, and inexpensive resolution of
4 cases and should not be considered as part of a
5 sanctions analysis.
6 In closing, I again commend the Committee
7 for their work on these issues, reaffirm the dire
8 need for the rule amendments with the slight
9 modifications I have discussed, and stand ready to
10 answer any questions.
11 Thank you.
12 JUDGE CAMPBELL: We have about one minute.
13 Any questions? Rick?
14 PROFESSOR MARCUS: I believe you wrote an
15 article in the National Law Journal around
16 December of 2011 about the preservation duties of
17 employment litigation plaintiffs.
18 MR. WEINER: I did.
19 PROFESSOR MARCUS: I wonder if you could
20 think out loud for us about whether there may be
21 some impact on them of Rule 37(e).
22 MR. WEINER: I certainly believe that
23 plaintiffs have preservation burdens just like the
24 defendants do. And at the time I wrote the
25 article, that was not a popular view. It

1 certainly, with cases like Honeybaked Ham, EEOC
2 versus Honeybaked Ham, it's getting more
3 widespread acceptance.
4 I do think that ultimately the factors not
5 only on proportionality, but with respect to
6 the -- the sanctions will help both parties. I do
7 think they are very fair and balanced including in
8 the proposed comment, there is a reference that
9 specifically helps plaintiff types, the
10 individuals that says, you should consider that
11 they are a single plaintiff. So I do think it is
12 very fair and balanced.
13 PROFESSOR MARCUS: You mean the
14 sophistication and preservation?
15 MR. WEINER: Correct.
16 PROFESSOR MARCUS: You think that should
17 remain?
18 MR. WEINER: I don't love the language,
19 but I do point out in response to your question
20 that there is now a specific consideration that is
21 more beneficial to the type of plaintiffs and
22 their preservation obligations than to the large
23 producing defendants.
24 JUDGE CAMPBELL: All right. Thank you
25 very much for your comments, Mr. Weiner.

1 MR. WEINER: Thank you.

2 JUDGE CAMPBELL: Ms. Adams?

3 MS. ADAMS: Good afternoon. My name is
4 Janell Adams. I'm a partner at the Phoenix office
5 of Bowman and Brooke. We represent a large number
6 of defendants, primarily defendants and numerous
7 product manufacturers.

8 My personal practice is a significant
9 focus on discovery issues in civil cases. I
10 personally am on a day-to-day basis preparing
11 responses to discovery. I am personally gathering
12 documents, producing them, negotiating with
13 plaintiffs if there is a concern, and dealing with
14 any motion practice that results. So I am not
15 here as a part of a cerebral exercise. This is
16 going to affect my day-to-day practice if the
17 rules are enacted.

18 Along with the Lawyers For Civil Justice,
19 I do commend the Committee on these very
20 well-drafted rules. I particularly foresee that
21 the changes to Rule 26 by removing the subject
22 matter language and removing the reasonably
23 calculated to lead to the discovery of admissible
24 evidence language will result in plaintiffs and
25 defendants agreeing to come to the table to figure

1 out how best to determine what needs to be
2 produced in a particular case rather than the
3 current situation where plaintiffs know that they
4 are entitled to very broad discovery and all they
5 need to do is ask for it. I believe that judges,
6 well meaning, feel that their hands are tied by
7 the current body of case law that requires them to
8 give every deference to the requesting party.
9 The proposed rules will make clear that
10 everyone has an obligation to determine what is
11 necessary for the particular case.
12 There's been some discussion in prior
13 comments to this committee that some parties have
14 been unwilling to use TAR, or technology assisted
15 review, or predictive coding because they do not
16 need to do so. And I think that these rules will
17 foster the use of those tools, which I think we
18 need to do, given the explosion of data that
19 is -- we know is going to be a problem in current
20 big litigation.
21 Although we certainly -- I certainly do
22 support the rules and I appreciate the
23 well-drafted rules as they are, I do have one
24 concern with regard to the proposed change to
25 34(b)(2)(C), which perhaps not coincidently is the

1 only provision supported by the AHA which requires
2 the producing party to explain whether materials
3 were withheld based on objections. And it is
4 particularly relating to the use of TAR or
5 predictive coding which in my practice we use on a
6 regular basis.
7 You do not know if you have withheld a
8 responsive document if you have not identified it
9 or found it because you used TAR or predictive
10 coding. And I think that the rules for
11 proportionality that are contemplated can
12 incorporate that and it will make it clear that
13 they were not withheld intentionally, which the
14 word "withheld" concerns me. It suggests that you
15 already located it and are keeping it. Similar to
16 a privilege analysis as opposed to where the
17 objection at issue was overly broad or unduly
18 burdensome.
19 If the objection was that it was unduly
20 burdensome, you have not conducted the search and,
21 therefore, you do not know whether you have
22 withheld the responsive information.
23 So I do have that concern about the
24 implication of that rule.
25 I note that these rules would particularly

1 help the smaller case because even small cases, if
2 the corporate defendant is a big one, can have a
3 large number of relevant documents. So we will
4 need to use TAR or predictive coding to get to
5 even the smallest cases going forward.
6 And I think that proportionality will
7 evolve just -- and I think it is ripe. I think
8 there was some suggestion today that these rules
9 are not yet ripe because technology will advance
10 and we won't need them as we all learn to, you
11 know, more accurately use our data. But I think
12 they are ripe now, because proportionality by
13 definition will evolve once the technology does.
14 Thank you.
15 JUDGE CAMPBELL: All right, thank you,
16 Ms. Adams.
17 Paul?
18 JUDGE GRIMM: Just one quick question on
19 the -- by using technology assisted review at
20 present. If the change to Rule 34 were to go into
21 effect that you made reference to, would you be
22 concerned that if you were to answer the Rule 34
23 request that we have used technology assisted
24 review in order to achieve that cost savings and
25 more quickly produce the information that you have

1 requested that is responsive, this by definition
2 does not involve an evaluation of every single
3 document. And so we can tell you that there are
4 documents that we did not produce because they
5 were rejected by the technology assisted review as
6 being irrelevant or being beyond the scope because
7 of privilege or protection, but we cannot tell you
8 that there are documents that are responsive that
9 we did not produce because we haven't looked at
10 the -- at what that is.
11 Do you believe that you would be
12 vulnerable under the -- the new language of the
13 rule if you had an answer that was as candid as
14 that in telling how you used -- how you responded
15 to the request?
16 MS. ADAMS: I have some concerns about
17 revealing my entire process because to some extent
18 how you have gathered documents is to some extent
19 work product.
20 JUDGE GRIMM: That's different. That's
21 not giving a 400-page discussion of how you picked
22 your sample group to educate the machine to do the
23 algorithm learning. That's just simply saying we
24 used this process. Inherent to that process is
25 the fact that cost achieve -- cost savings are

1 being affected by not having to review each one.

2 If you were to say that, do you feel that

3 you would be vulnerable under that rule?

4 MS. ADAMS: I think that if you have under

5 this rule as proposed it uses the word "withheld."

6 So if you then tell the requesting party: I have

7 withheld documents, yes, I think they will say,

8 what documents have you withheld? And I will not

9 be able to identify what documents I have

10 withheld.

11 JUDGE GRIMM: Thank you.

12 JUDGE CAMPBELL: Other questions?

13 John?

14 MR. BARKETT: What is your practice now in

15 disclosing the use of technology assisted review

16 to support your production? I'm a little puzzled

17 by what you are telling your opponents now.

18 MS. ADAMS: It is entirely cooperative at

19 this point. You really must have the other side's

20 agreement really to have effective use of it.

21 Now, I don't necessarily, when I am -- the

22 difficulty is like when you are responding to a

23 request for production which has -- you cannot

24 really use predictive coding currently for.

25 Predictive coding is good for relevance or not

1 relevance, but not good for assessing
2 responsiveness to a particular RFP.
3 So I may, in a variety of different ways,
4 determine which documents are responsive to a
5 particular request for production, and that --
6 MR. BARKETT: So you will know you are
7 withholding something?
8 MS. ADAMS: No, because I won't have found
9 it.
10 MR. BARKETT: I'm puzzled. I'm sorry.
11 How does your -- if your opponent is agreeing with
12 you on the use of the technology there is
13 presumably some agreement on a cutoff point and
14 there is some number of documents that your
15 opponent knows you are not going to look at.
16 MS. ADAMS: The opponent knows on
17 relevance versus not relevance, but they won't
18 necessarily know how you determined -- okay,
19 you've then taken the pool of relevant documents
20 and determined which ones are responsive to which
21 particular RFP which the rule requires. You
22 haven't gotten to the process of determining which
23 of those documents and explained to them how you
24 found those, which word searches, which particular
25 methodologies, analytics, whatever you've used.

1 MR. BARKETT: It would take too much time
2 to continue this discussion.
3 JUDGE CAMPBELL: All right. Thank you
4 very much, Ms. Adams.
5 Mr. Howard?
6 MR. HOWARD: Good afternoon. My name is
7 Tom Howard. I am also with the law firm of Bowman
8 and Brooke. And I want to thank the Committee for
9 allowing me the opportunity to address you today.
10 I'm relatively new to this process here,
11 and I've learned a lot over the last couple of
12 months. I know you've been invested in this for
13 years. And I also want to thank the Committee for
14 proposals to amend the discovery rules that solve
15 problems that those of us in the trenches see
16 every day with disproportionate discovery and
17 costs associated with excessive preservation
18 efforts.
19 But I intend today just to talk about the
20 rules amendments for Rule 37(e). And the theme I
21 want to follow as it relates to my practice is
22 making sure that the rules as amended continue to
23 be predictable and consistently applied.
24 My practice for almost 30 years has been
25 representing product manufacturers in lawsuits

1 where there has been an allegation of a defect in
2 the product.
3 A significant part of my practice has been
4 involved in discovery. I have coordinated
5 discovery projects for product lines, for
6 particular types of practice or patent litigation,
7 particular defect claims in coordinated federal
8 actions, state actions, and even local coordinated
9 actions as well as individual cases throughout the
10 United States.
11 The goal in any of this -- any of those
12 projects is to provide legitimate discovery, to
13 frankly avoid motion practice, to avoid the
14 uncertainty of motion practice, to get the
15 parties, the plaintiff information that they need
16 to resolve the case on its merits.
17 The discovery we are providing, frankly,
18 also is needed to defend our products. In typical
19 trials, most of the defense documents are admitted
20 by the defendant. It's very rare, not very often
21 do plaintiffs admit many defense documents.
22 Toward this end, it's important
23 that -- that there be predictability in the way
24 that we approach preservation. And the particular
25 situation I might face in coordinating discovery

1 is I could have a client that might produce tens
2 of thousands or perhaps hundreds of thousands of
3 particular, we will call them widgets. And those
4 widgets may have components that are similar
5 across the entire product line such that I have to
6 be making sure that the discovery is consistent
7 and the approach to discovery is consistent.
8 And that often means making sure that the
9 practices that I engage in in any particular one
10 lawsuit meets the most stringent standards for, in
11 the case of preservation, preservation, because
12 there is committee notes in these rules
13 amendments, there are some different standards in
14 the -- as Rule 37(e) is currently applied with
15 respect to preservation obligations. And where
16 the conduct in one particular circuit may be
17 acceptable, it might not meet the standards of
18 preservation in another circuit. And the purpose
19 of these rules is to avoid some of that problem,
20 expressly to avoid that problem.
21 Toward that end, there is not only current
22 preservation standards at least took some time to
23 develop, if there are uncertainties in or
24 potential uncertainties and inconsistencies in the
25 way that the current -- the proposed Rule 37 is

1 implemented, it will then lead to further problems
2 where you have different cases pending on
3 different time frames and different jurisdictions,
4 because if there's an earlier suit with a
5 common -- with a particular allegation in which
6 you are following what might be acceptable conduct
7 or practices in a particular circuit, and then
8 later another suit is filed in another circuit
9 that takes a different interpretation, your
10 standard might, for evaluating conduct, is going
11 to be inconsistent and -- with respect to document
12 preservation obligations.
13 Toward that end, I would like to talk
14 specifically about Rule 37 and the questions you
15 asked and add another point to that. Should the
16 rule be limited to sanctions only for loss of ESI?
17 I would propose that from the perspective of
18 someone in the trenches dealing with discovery, I
19 think it ought to apply across all types of
20 discovery -- of evidence.
21 Should 37(e)(1)(B)(2) be retained in the
22 rule? A particular concern I have is that there's
23 a problem with that rule as it relates to ESI, but
24 I think if it's limited to tangible items, the
25 Silvestri decision, and those type of cases will

1 still hold. And so I think that ought to be
2 limited to tangible items.
3 Should there be an added definition of
4 willfulness, I think the fact that there's a
5 potential for an inconsistent definition of
6 willfulness across different circuits or in
7 different district courts, I would submit the
8 court should follow -- or the rules should
9 implement the definition of willfulness and
10 propose the Sedona group's definition be used
11 because that has the -- speaks in terms of
12 culpable and conduct.
13 And finally, although not asking the
14 questions, I'm concerned about the factors in
15 37(e)(2) and the potential again across different
16 jurisdictions where the same product may be the
17 subject of a different lawsuit, that there might
18 be an inconsistent application of those factors
19 because they are in the rules.
20 If they are moved to the comments, I think
21 not unlike the illustrations of curative measures
22 that are also provided in the comments, I think it
23 would satisfy the needs of -- or go a long way
24 toward reducing the potential for inconsistencies.
25 And with that, I would yield back the

1 balance of my -- actually, I'm over my time, I'm
2 sorry.
3 JUDGE CAMPBELL: All right, questions?
4 Rick?
5 PROFESSOR MARCUS: One reaction I have on
6 which I would like you to expand is that my
7 reaction is if we took out 37(e)(2) factors, and
8 left them out entirely or said something in the
9 note that might not really be moored to the rule,
10 how would that increase consistency in handling of
11 these issues as compared to having those in the
12 rule?
13 MR. HOWARD: Well, as the rules are
14 implemented and interpreted, it's possible, for
15 example, that some of those factors may be
16 interpreted to be given greater weight in certain
17 decisions. While the list is clearly provided now
18 as an illustrative list of factors, it's possible
19 that one or more of them might receive more
20 attention and then become a stronger factor, if
21 you will, in evaluating conduct.
22 PROFESSOR MARCUS: So you are worried
23 about consistency?
24 MR. HOWARD: I'm worried about
25 consistency.

PROFESSOR MARCUS: And you don't want it?

MR. HOWARD: I don't want it. I'm sorry, but yeah.

JUDGE CAMPBELL: Other questions?

All right. Thank you very much, Mr. Howard.

Mr. Hunter.

MR. HUNTER: Thank you. I'm Rob Hunter. I'm senior vice president and general counsel of Altec, Inc., a privately held holding company from Birmingham, Alabama. Our largest subsidiary is Altec Industries, which is the world's largest manufacturer of mobile hydraulic utility equipment, the kind of equipment your electric utility and telecommunications industry, the tree care industry uses to work off the ground, bucket trucks and that kind of stuff. That's what we make.

As a businessman, I applaud your proposals to amend Rule 26 because I believe that efforts to reasonably reduce the scope of discovery will result in a reduction in the cost of discovery. The cost of discovery is important to us. It's the single largest external legal spend that I have.

1 I spend more money on discovery than any
2 other thing in my legal budget externally. In
3 fact, I spend more money on discovery than I spend
4 in settling claims or paying judgments.
5 Over the last five years, I've paid to
6 claimants through settlements or judgments 61
7 percent of the amount that I've spent on
8 discovery. And what you might call the most
9 efficient year, 2010, I spent 76 percent on
10 settling claims. In 2012, I spent twice as much
11 on discovery as I paid to claimants through
12 settlements or judgments.
13 What does this mean in an industry like
14 ours? Well, our market is finite, and it's low
15 five digits of new products annually. That means
16 I'm -- obviously you do the math, if you sell a
17 thousand products and your discovery cost is a
18 million dollars, either you have to raise the cost
19 of each product by an average of a thousand
20 dollars, or you have to impose on your
21 shareholders a reduced return on investment, which
22 discourages people from coming into the industry
23 or staying in the industry, which is exactly what
24 has happened.
25 In 1977, when Altec entered this industry

1 as a manufacturer, there were 28 competitors in
2 the market. 25 years later, there had been a 75
3 percent attrition rate and only seven of those
4 competitors remained. Today it's four.
5 In Europe, there's still over 20. They
6 are not faced with the discovery cost we face
7 here. We can't sell our products as a practical
8 matter in Europe, because our products cost too
9 much. The price is too high.
10 They don't bring their products to the
11 United States, because they are coming into a
12 finite market where they may sell three digits or
13 four digits if they are really good. If they add
14 to that the cost of discovery they will incur by
15 coming here, the return on investment is such that
16 they simply, it would not be a good business
17 decision for them to come to the U.S. and so they
18 don't.
19 I also applaud your efforts to revise
20 Rule 37(e), although I don't think you solve the
21 problem. The reason I applaud your efforts is
22 because you will now include tangible evidence
23 along with ESI. But the problem I have now is the
24 risk of being sanctioned for innocent conduct.
25 While I'm speaking to you today in over

1 200 locations throughout this country, an Altec
2 employee is servicing or repairing a product we
3 manufactured. Yes, if that employee has reason to
4 believe that there's been an incident that might
5 lead to litigation, that employee has a duty to
6 preserve whatever components he's taking off that
7 unit, whatever fracture surfaces there might be.
8 But, that employee will ask the service
9 manager or the fleet manager who has requested the
10 service: Has there been some incident? Has
11 somebody been hurt? And he has to rely on that
12 answer, which often is no, or, I don't know. And
13 I think our employee should be entitled to rely on
14 the answer given.
15 Years from now, in hindsight, we may look
16 back at what the employee is doing right now as
17 I'm talking to you in throwing away components or
18 welding over fracture surfaces and say what that
19 person did is willful. It was intentional. He
20 intended to throw those parts away. He did so
21 without any idea there might someday be a claim,
22 without any idea that he was impacting anyone's
23 ability to pursue or defend a lawsuit. Yet, we
24 might be subject to sanctions as it's written now
25 where it's willful or, and where willful is not

1 defined. What our man does is intentional.

2 Similarly, what he's done is irreparably

3 deprive everybody, plaintiff and defendant, of the

4 ability to see the component he threw away or the

5 fracture surface he welded over. But he did so

6 innocently.

7 And so I would encourage you while

8 amending 37(e), yes, it should include things

9 other than electronic discovery. Please protect

10 those who act innocently.

11 JUDGE CAMPBELL: Questions?

12 Yes, sir.

13 JUDGE KOELTL: How would you define

14 willful?

15 MR. HUNTER: I would require some

16 knowledge that what is being done is going to

17 impact a claim.

18 JUDGE KOELTL: A claim or some other

19 obligation, some known duty to preserve?

20 MR. HUNTER: Right.

21 JUDGE CAMPBELL: Other questions?

22 PROFESSOR MARCUS: Can I speak?

23 JUDGE CAMPBELL: Yeah.

24 PROFESSOR MARCUS: Can I ask a

25 clarification question if I followed correctly.

1 What I followed was that you said in some period
2 you checked that the amount you spent to settle
3 cases was 61 percent of the amount you spent on
4 discovery in litigation?
5 MR. HUNTER: That's correct.
6 PROFESSOR MARCUS: Is that because you win
7 most of your cases and so you pay nothing in
8 settlement of those cases, or is that because you
9 generally spend a lot more on discovery than to
10 settle a case?
11 MR. HUNTER: I guess it's a combination of
12 everything. We do have a good success in
13 defending our lawsuits.
14 JUDGE CAMPBELL: All right. Thank you
15 very much for your comments, Mr. Hunter.
16 Judge Pullan.
17 JUDGE PULLAN: Good afternoon. My name is
18 Judge Derek Pullan. I am a state district court
19 Judge in Utah and a member of the Utah Supreme
20 Court Civil Rules Committee. I'm sorry to say
21 this, 23 years ago Judge Campbell was my civil
22 procedure teacher in --
23 JUDGE CAMPBELL: I'm sorrier than you are
24 to say that.
25 JUDGE PULLAN: I'm sorry I have to say it

1 was 23 years ago. But it's great our paths have
2 crossed again.
3 This Committee has proposed comprehensive
4 amendments aimed at civil discovery reform and I'd
5 like to limit my comments just to the issue of
6 proportionality.
7 As you know, proportionality is not new to
8 the Rules of Civil Procedure. Rule 1 has long
9 sought the speedy and just and inexpensive
10 determination of every cause.
11 Since 1983, the rules have permitted
12 parties and the court to limit discovery that has
13 been unreasonably burdensome. Sadly, that
14 provision, very deep in the middle of Rule 26, was
15 never enforced with the vigor contemplated. A
16 later effort to give proportionality teeth in 2000
17 was largely ineffective.
18 In the end, proportionality limitations
19 could never counterbalance the broad reasonably
20 calculated language which has been interpreted to
21 define permitted discovery. The proposed
22 amendments considering -- that the Committee is
23 considering would change that.
24 Parties would be permitted to discover any
25 matter relevant to a claim or defense and

1 proportional to the needs of the case in light of

2 certain express considerations. And I would add

3 none of which are primary.

4 In making this proposal, the Committee is

5 not inventing the wheel. And that's what I'm here

6 to testify about.

7 For more than two years, Utah Rule 26 has

8 allowed litigants to discover relevant material

9 but only if the discovery satisfies the standards

10 of proportionality. Discovery in Utah is

11 proportional, and you'll find this familiar, if

12 reasonable, considering the needs of the case, the

13 amount in controversy, the complexity of the case,

14 the parties' resources, the importance of the

15 issues, and the importance of the discovery in

16 resolving those issues.

17 But what about cases in which one side has

18 access to all relevant materials, such as

19 employment cases, or cases in which nonmonetary

20 relief is the critical question? As here, some

21 Utah attorneys express concern that in these

22 cases, a proportionality standard would unfairly

23 curtail discovery.

24 To address this concern, Utah placed in

25 the definition of proportionality a requirement

1 that courts consider a litigant's, quote,
2 opportunity to obtain the information, taking into
3 account the parties' relative access to the
4 information.
5 Under new rule -- Utah Rule 26, the party
6 seeking discovery always has the burden of showing
7 proportionality and relevance. Before this time,
8 the burden was on the responding party to seek
9 protection from the court from unduly burdensome
10 requests.
11 I would submit that reversing that burden
12 is critical to managing discovery costs,
13 especially in light of the exponential growth of
14 retained data.
15 Further, to ensure proportionality, the
16 court in Utah may enter orders under Rule 37. And
17 those orders include a cost shifting for discovery
18 based on the -- as justice requires.
19 In a further effort to achieve
20 proportionality, Utah divided litigation into
21 three tiers based upon the amount in controversy.
22 We imposed, as you are considering, presumptive
23 limits on deposition hours, interrogatories,
24 requests for production and requests for
25 admission. These presumptive limits are by rule

1 deemed proportional. Unless the parties agree or
2 one party moves for more discovery. And we call
3 that in Utah extraordinary discovery.
4 The days to complete standard discovery
5 are limited, parties must disclose more about
6 their case in chief earlier so that discovery
7 requests shoot with a rifle, not a shotgun.
8 Failure to make timely initial disclosures
9 means you don't use the undisclosed document or
10 witness in your case in chief.
11 In the spirit of federalism, Utah is a
12 laboratory with more than two years of experience
13 testing the very proportionality framework under
14 consideration by this Committee. But Utah is not
15 alone. Federal circuit and district courts have
16 implemented pilot programs and local rules using
17 proportionality as the key to managing litigation
18 costs. 21 other states today have either adopted
19 or are in the process of considering extensive
20 civil discovery reform.
21 This is a critical time. It's an ideal
22 time for federal rule makers to provide a
23 proportionality based framework and bring
24 uniformity to these grass roots efforts.
25 Having noted earlier notwithstanding the

1 grand vision of Rule 1, few in the United States
2 would describe civil litigation as speedy and
3 inexpensive. Burgeoning discovery costs openly
4 undermine equal justice under the rule of law.
5 Parties with meritorious claims but modest means
6 are denied access to the courts. Specious claims
7 settle to avoid the discovery bill.
8 Requiring the discovery costs to be
9 proportional to what is at stake in the litigation
10 restores balance to a system which aspires to the
11 just and the speedy and the inexpensive
12 determination of every cause for all people.
13 I will submit my opening statement into
14 the record together with a law review article that
15 I coauthored with Philip Favro called New Utah
16 Rule 26, a Blueprint for Proportionality Under the
17 Federal Rules.
18 And I will take your questions at this
19 time.
20 JUDGE KOELTL: Two questions. First, do
21 you have any information about how the Utah
22 revised rule is working out?
23 And the second question is you said it was
24 important that the party seeking discovery have
25 the burden of showing proportionality. And I'm

1 not sure I really understand that.

2 There's no specific burden in the -- in

3 the federal rules. The federal rules give, even

4 the proposed rule gives a series of factors to be

5 considered, one of which is the burden or expense

6 of the proposed discovery, whether it outweighs

7 the likely benefit.

8 The only source of the information for the

9 burden or expense of the discovery is the person

10 producing it. So that's where you're going to

11 need that information.

12 And ultimately, when we talk about burdens

13 of proof, we all know the burden of proof only has

14 an effect if everything is in equipoise, which it

15 seldom is. So the judge is going to have to

16 consider all of these factors and make a

17 determination if there's a motion to allow or not

18 allow or limit or expand the discovery.

19 So it's not clear to me why you say the

20 burden of -- of showing proportionality is so

21 important.

22 So two questions.

23 JUDGE PULLAN: With respect to what

24 information do I have about Utah's experience, the

25 Institute for the Advancement of the American

1 Legal System in Denver is helping us track
2 changes. And we are two years into that. It's
3 included right now surveys of attorneys who have
4 practiced with cases under the new rules. Sadly,
5 response rates aren't what we would like them to
6 be, but they are fairly significant.
7 And what we are finding is you have
8 generally the younger class of the bar really
9 likes the changes. We have, consistent with our
10 collective personalities, many who are reserving
11 judgment. That's probably what attorneys do most.
12 And then we have some who stand on the dock
13 complaining about the ship that has sailed.
14 And so I think -- but certainly a high
15 percentage of attorneys have not realized their
16 fears. They have found them to be -- in fact, I
17 spoke with an attorney who practices in the
18 federal courts in Utah yesterday. And he says I
19 actually prefer the rules and under the state
20 courts and we are more and more advising our
21 clients to file in the state court rather than
22 federal court because discovery costs are more
23 predictable.
24 With respect to equalizing the factors, my
25 sense is that with respect to many of the factors,

1 the requesting party is in the best position to be
2 able to advise the court early on in litigation
3 about those factors. Certainly some fall into
4 the -- where the responding party would have more
5 information. But we've heard today that, you
6 know, costs of -- or the -- one of them is more
7 weighty than another. Certainly Utah's rules
8 doesn't read that way and federal rules don't read
9 that way.
10 JUDGE KOELTL: Why is there any issue with
11 respect to burden of proof?
12 JUDGE PULLAN: It's the language of the
13 rule, and we will be experiencing that in Utah.
14 JUDGE KOELTL: But there is no language of
15 the burden of proof in the federal rule.
16 JUDGE PULLAN: There is not. There is in
17 the Utah rule. I have quoted the Utah rule
18 directly where we do have a burden of proof.
19 JUDGE CAMPBELL: Peter, do you have a
20 question?
21 MR. KEISLER: That's what I was also
22 trying to understand. As I heard your
23 description, Judge, there is a burden on the
24 propounder of the discovery. And it sounds much
25 more explicitly so than anything that would be in

1 the rule change we are talking about.

2 But you also said there's some proviso

3 that says but if a propounder has not yet gotten

4 access to the kind of information that would be

5 needed to support such a burden, there will be

6 certain presumptions in that party's favor, which

7 sort of sounds to me in the end like what it might

8 shake out to is like what one of the witnesses

9 said this morning which is that, you know, federal

10 judges in discovery disputes aren't really

11 focusing on, you know, you had the burden of

12 showing something, you haven't, you get more.

13 Okay, what's reasonable on these different factors

14 of relevance and burden and things like that.

15 And I'm wondering if in practice that's

16 how it works in your court or if there really is a

17 kind of rigorous you had the obligation to make a

18 showing, there's nothing here. I don't have to

19 worry whether it's rebutted. I mean, the kind of

20 thing that happens more on the merits of the case.

21 JUDGE PULLAN: I would say it's burden of

22 proof soft. What you say is exactly true. And

23 Utah's rule has other factors other than what

24 you've proposed to determine proportionality. And

25 I mentioned one of those.

1 THE COURT: Gene?

2 JUDGE PRATTER: First thank you very much

3 for coming and giving us the benefit of all of

4 this.

5 My question has to do with whether or not

6 there was anything you did in Utah to educate the

7 bench as you -- as you initiated Rule 26, or are

8 the judges so quick there, that they are learning

9 on a case-by-case basis?

10 JUDGE PULLAN: I preach the gospel of

11 proportional discovery to our bench. It is

12 consistently a subject of judicial education at

13 every conference. And it is -- proportional

14 discovery will represent a cultural shift on how

15 we look at civil litigation. And that cultural

16 change has to happen within the judiciary as well.

17 And any change of this nature, there has to be a

18 committed education effort to the bench.

19 JUDGE PRATTER: Thank you.

20 JUDGE CAMPBELL: Sol?

21 JUDGE OLIVER: You talked about burden of

22 production -- I'm sorry, burden of proof and

23 there's been some comment from Committee members

24 that there's no burden of proof in our rule.

25 But would you find it significant that

1 there was kind of a burden of production, for
2 example, on the civil rules, whether you move for
3 protective order or you're filing a motion to
4 compel makes a big difference in terms of where
5 you stand when you are before the court. So
6 whether you call it a burden of proof or not, the
7 question is who has to initiate, you know, the
8 proof or would that make a difference anyway?
9 JUDGE PULLAN: That's a good question.
10 And we dealt with that very issue. In Utah, the
11 rule says the party -- the requesting party always
12 has the burden of proof. Whether that -- and what
13 we interpret that to mean is, any time
14 proportionality becomes an issue in the case,
15 whether it's in a motion to compel, a motion to
16 quash, a motion for extraordinary discovery, if
17 proportionality is inserted into any of them, the
18 requesting party addresses it first.
19 JUDGE CAMPBELL: Paul.
20 JUDGE GRIMM: Just a quick question. You
21 mentioned that you've had, in addition to the work
22 that you've done on infusing proportionality, that
23 you've had some disclosure obligations that each
24 party has to disclose information to the other.
25 It was sort of an aspiration of 26(a)(1) changes

1 back in 1993 that got removed in 2000.

2 Have you had enough time with your new

3 rules to determine whether or not that

4 disclosure -- affirmative disclosure obligation,

5 separate and apart from any response to a

6 discovery request, whether that has helped in the

7 evaluation of proportionality because they have

8 actual information upon which they can make the

9 arguments not in the abstract but with what

10 they've already gotten?

11 And secondly, does the disclosure include

12 adverse information that's clearly relevant to

13 what the other side has asked for or only

14 information that would support what you intend to

15 prove?

16 JUDGE PULLAN: With respect to the last

17 question, it's only information that would be

18 supportive of your case in chief. And we did beef

19 up initial disclosures. You now have to

20 disclose -- you have to identify a witness with a

21 short summary of anticipated testimony as well as

22 a copy of all documents that would come in your

23 case in chief.

24 And I would add that if you fail to timely

25 do that, we have a sanction that says you don't

1 use it and it's not a Rule 37 sanction, it's a
2 Rule 26 sanction. So there's no willfulness
3 standard. Initial disclosures means something in
4 Utah now.
5 Have we had enough time to see what
6 effect? No, but anecdotally, or at least
7 theoretically what we anticipate is the more you
8 know earlier, the more focused discovery efforts
9 will be.
10 JUDGE GRIMM: And therefore, more
11 proportional?
12 JUDGE PULLAN: Yeah.
13 JUDGE CAMPBELL: Thank you very much,
14 Judge Pullan.
15 Mr. Hamilton?
16 MR. HAMILTON: Thank you very much. I'm
17 before the Committee today principally in my role
18 as an eDiscovery educator, both at Bryan
19 University where its principal office is located
20 here in Tempe university (sic) where we have
21 graduate and undergraduate eDiscovery programs,
22 and at the University of Florida Law School where
23 we have a robust eDiscovery education program and
24 project.
25 I view the rules as guidance as an

1 educational vehicle in many respects for the bar
2 and for aspiring attorneys and professionals in
3 the field. Yes, it sets the rules of the game.
4 I've been a litigator for 30 years, so I can
5 appreciate that aspects of it. But it's also
6 guidance in helping us to establish best practices
7 and raise the level of practice that we see out in
8 the field.
9 I also think that the core of the rules
10 since -- since December 1st, 2006, has been a
11 focus on Rule 26(f). That's, to my way of
12 thinking, the heart of what we are doing in
13 eDiscovery is early meaningful disclosure.
14 And I believe that's what the prior
15 witness was talking about. Because that makes
16 proportionality possible. It avoids downstream
17 train wrecks and disasters and allows early
18 judicial recollection. And I applaud this
19 Committee for all its work it's done in that
20 regard.
21 What I am concerned about is the impact
22 and every day I would like to talk to the
23 Committee about is the impact of the change and
24 really an absence of information in Rule 26(b)(1)
25 that's being proposed and how that may impact Rule

1 26(f).

2 Let's take a hypothetical example that we

3 probably think is beyond doubt at this stage of

4 the game, that in Rule 26(f) I'll sit down with

5 the other side and I'll say let's talk about your

6 e-mail systems, and the witnesses that

7 participated in those e-mail systems.

8 What kind of server do you have? Who's

9 the manufacturer? How does it deliver it?

10 Assuming it's perhaps a Microsoft system, do you

11 have IMAP, or do you have POP delivery? Is it

12 Internet-based mail system? Are PSDs created?

13 Are OSTs created? What's the backup rotation? Do

14 you have an archiving system that's put in place.

15 You would think that there would be an

16 immediate response by the opposition to that.

17 However, the state of eDiscovery practice is not

18 that high, regardless of what we would like to

19 hope. In fact, for the medium-size case, and I

20 speak to you as a litigator of some experience

21 handling not only significant cases, but many

22 medium-sized cases during my career, unfortunately

23 that is not so.

24 Often I will encounter objections such as:

25 That's my work product, you'll never get that

1 except over my dead body. We'll respond as we
2 deem appropriate.
3 Now, we all know that Rule 26(f) has
4 aspirational guides to it that the parties will
5 discuss this, that they will go over it together.
6 But in practice, there are huge obstacles.
7 That's why at Florida, at Bryan and at
8 Georgetown and Seventh Circuit, there's a
9 tremendous focus on how do you do the 26(f)
10 conference properly. It's a hurdle we have to get
11 over and the vast bulk of practitioners simply
12 aren't there.
13 So what do we do in practice? How do we
14 get them there? We get them there, one, by
15 turning to the rules. And there's a principle
16 provision in the rule that I found very effective
17 in dealing with the opposition, why they don't
18 want to go in front of the local district court
19 judge, because they know I'll win and they will be
20 embarrassed.
21 And that's the provision that's been
22 excluded by the Committee, which says that
23 discovery can be had including the existence,
24 description, nature, custody, condition and
25 location of any documents.

1 That is a powerful tool out in the field.
2 I would urge the Committee to reconsider its
3 exclusion of that provision.
4 When you go to the comments, you address
5 that. And you say -- and you cite that principle
6 that I just read. And then your conclusion is
7 discovery of such matters is so deeply entrenched
8 in practice that it is no longer necessary to
9 clutter the rule text with these examples.
10 I respectfully submit to the Committee
11 that you've overestimated the level of practice
12 for the vast majority of cases out in the field.
13 It overestimates the level of practitioners that I
14 deal with on a regular basis. It's not there. We
15 need the additional language in the rule.
16 Now, here's the worst part of it. By
17 removing that language, what happens is we give
18 the opposition that doesn't want to participate in
19 a Rule 26(f) conference more ammunition. Now it's
20 absent. And they, as we all know litigators that
21 don't want to participate, will point to that
22 absence and say: The Committee took it out
23 because of a reason.
24 Of course, if you go back and study the
25 report as we all have and there's a reason, you

1 realize that nothing is being changed. But the
2 point of the matter is, is when the new rules are
3 published and presumably adopted, and I applaud
4 them. You all have done wonderful work. When
5 they are published and the comment is published,
6 the reason for the exclusion is not going to be
7 there. It will cause mischief.
8 Much of your work that you have tried to
9 accomplish here in Rule 26(b)(1) is to take the
10 kernel of the rules that we thought we had and
11 emphasize things better, removing -- removing
12 26(b)(2)(C)(3) up to the front.
13 We are doing that because its impact was
14 missed. We are making some other changes with
15 respect to taking out "reasonably calculated"
16 because it missed relevance.
17 So what we are doing is -- you're doing is
18 tweaking the rule so that it makes sense and
19 brings home its original mission. We will take
20 out a provision that's going to allow for mischief
21 and perhaps undermine the very changes that you
22 wanted and something else that is very important.
23 So the solution is very simple. We don't
24 need to go back to the rule, just insert your
25 reason into the comment so we can point to people

1 and, no, see, the reason it's excluded is because
2 it's so darn obvious. And how can you be so silly
3 as to object to a discussion about it.
4 But absent the provision and the comments,
5 I guarantee you on the everyday medium-sized case,
6 we will be dealing with practitioner after
7 practitioner that misunderstands what happened
8 with the rules with respect to that provision.
9 Thank you very much.
10 JUDGE CAMPBELL: If I can ask a clarifying
11 point. I think you made this clear, but I just
12 want to make sure that I got it right.
13 You're saying that you're okay with us
14 taking that language out, provided we say in the
15 advisory committee note this stuff is still
16 discoverable?
17 MR. HAMILTON: Yes, sir.
18 JUDGE CAMPBELL: Other questions?
19 Thanks very much, Mr. Hamilton.
20 MR. HAMILTON: Thank you.
21 JUDGE CAMPBELL: All right. We are going
22 to go ahead and take a break. We will break until
23 ten minutes to the hour and we will resume at that
24 time.
25 Thank you.

1 (A recess was taken.)

2 JUDGE CAMPBELL: If you take your

3 seats, we will get started.

4 Our next speaker will be Mr. Avelar.

5 It doesn't appear he is here, so let's

6 move on to Mr. Canty.

7 MR. CANTY: Good afternoon. My name is

8 Dennis Canty. I am a partner with Kaiser Gornick

9 LLP, a San Francisco firm representing plaintiffs.

10 I practice primarily in the area of mass

11 torts involving pharmaceuticals and medical

12 devices. I serve on plaintiffs' leadership

13 committees in MDLs and state coordinated

14 proceedings nationwide.

15 One of my primary responsibilities is

16 the negotiation of scope of preservation and the

17 scope and format of production in those types of

18 cases.

19 Thank you for the opportunity to address you

20 today.

21 Currently, Rule 26 (b)(1) and Rule

22 26(b)(2)(C) dictate that the scope of the

23 discovery and preservation is relevance unless

24 and until the court makes a limiting

25 determination.

1 However, proposed changes to 26(b)(1) and
2 37(e) seem in effect to say keep what's relevant
3 unless you can make a case that it is too
4 expensive or burdensome. And even if you make a
5 bad call, you won't face sanctions later unless
6 your opponent can prove the content of what you
7 destroyed and your intent to destroy it.
8 It is apparent from the record of these
9 proceedings that these changes are driven by
10 claims of enormous and disproportional discovery
11 and preservation costs.
12 Also it seems apparent from the record
13 there's a lack of empirical data to support those
14 claims or to show that the preservation costs are
15 not simply high, but more importantly,
16 disproportionate to the stakes and the amount in
17 controversy.
18 There is a couple of examples. You heard
19 today from in-house counsel from Boston
20 Scientific. I want to take this example because
21 it is typical of what we are seeing.
22 Boston Scientific is a big fan of
23 proportionality and wants to see it in 26(b)(1),
24 and it came here with only half of the proportion.
25 It talked about millions of dollars in costs and

1 terabytes of data. But similar to the Lawyer for
2 Civil Justice Survey, it fails to provide this
3 Committee with any information about the stakes in
4 the litigation in which those costs are incurred.
5 Counsel didn't mention that four months
6 ago Boston Scientific subsidiaries paid $30
7 million to the Department of Justice to settle
8 allegations that it knowingly sold defective heart
9 devices to health care facilities, in 2008 that it
10 paid $240 million to the patients that were
11 injured with those defective products.
12 Those are settlement figures. Amounts in
13 controversy are multiples of that. One
14 litigation.
15 Microsoft. Microsoft put up a pretty
16 picture detailing the numbers of pages, not
17 documents, pages that it preserves and produces.
18 The Committee asked about Microsoft's
19 pretty picture. What types of cases do your data
20 pertain to? The response was the data is in the
21 aggregate, all litigation, from large patent
22 claims to employment claims.
23 I encourage the Committee to ask Microsoft
24 the next question. And that is: What is the
25 aggregate amount in controversy of those cases?

1 How are your costs not just high, but
2 disproportional to the stakes?
3 Pfizer's counsel attended the last hearing
4 and bemoaned the cost of 36 point something
5 million dollars in the Prempro litigation. These
6 were incurred simply to buy and store some backup
7 tapes that were never accessed.
8 She said, quote, we never went back to
9 those backup tapes to retrieve a single document.
10 Not once, as the information on those tapes was
11 completely redundant.
12 What counsel did mention was that as of
13 June 2012, Pfizer had committed more than
14 $1.2 billion to resolving the claims of the women
15 that were injured because it put profits over
16 patient safety. Again, this --
17 PROFESSOR MARCUS: Counsel, I'm sorry,
18 could you -- this relates, I'm sorry to interrupt
19 you at that point. But this relates to something
20 I asked somebody earlier.
21 How do you think proportionality should
22 work in the kind of cases you talk about, which I
23 would assume often have billion-dollar
24 possibilities. What should it mean? Shouldn't it
25 mean very large preservation?

1 MR. CANTY: Absolutely it should.
2 Absolutely.
3 PROFESSOR MARCUS: So in those cases it
4 sort of helps you.
5 MR. CANTY: The idea that discovery should
6 be proportional, yes. Absolutely.
7 What I'm suggesting is that the premise
8 for the rules, the rule changes, which are
9 suggested, are that these preservation costs are
10 high, and the intent and he effect of the rules is
11 to limit that which is preserved. That's what
12 will happen. That's the intent.
13 And what I am saying is before we jump
14 into that, before we make a decision like that, we
15 ought to have some data to tell us that these
16 costs that -- the problem that we are trying to
17 fix exists. But the problem is there's a
18 disproportional amount of preservation costs.
19 That's not in this record that I can see.
20 When the -- but the Prempro example is
21 more important for another reason. And that's
22 because, and I didn't participate in the
23 litigation but I did go back and look at the
24 docket. I reviewed the court's order at docket
25 number 162.

1 The court, in its preservation order,
2 specifically provided that alternative to backup
3 tape preservation is to arrange for the
4 preservation of complete and accurate duplicates
5 of each material -- of such material. It also
6 provided the party may seek relief from
7 preservation obligations upon a showing of undue
8 cost, burden or overbreadth.
9 When this Committee is told that high
10 costs are disproportional and due to overbroad
11 discovery or preservation -- overbroad scope of
12 discovery, the Committee, I think, needs to
13 question that.
14 When this committee is told that the high
15 cost of -- that the concepts of proportionality
16 are not currently significant factors in
17 discovery, and so changes are needed, the
18 Committee needs to question that. And I think you
19 can't logically make those rule changes without
20 those answers.
21 Final comment. We heard reference to the
22 Pippins versus KPMG decision as a poster child for
23 overbroad discovery. This, I think, exemplifies
24 where the problem really exists.
25 The case isn't about that. The case is

1 about KPMG's failure to cooperate with plaintiffs.
2 I believe that the court's adjectives in
3 describing KPMG's conduct were unreasonable,
4 nonsense, inappropriate behavior, smacks of
5 chutzpah, and KPMG's ongoing burden is
6 self-inflicted because of its recalcitrance.
7 I'll echo the comments of others here
8 today. If you want to make changes to the rules
9 to reduce the costs of eDiscovery, add sanctions
10 for failure to cooperate.
11 Thanks for the opportunity to be here.
12 JUDGE CAMPBELL: Thank you, Mr. Canty.
13 Are there questions from members of the
14 Committee?
15 MR. BARKETT: Is your position that there
16 should be no changes to the Rules of Civil
17 Procedure beyond adding sanctions for failure to
18 cooperate? Is that -- I'm not sure where you're
19 coming down, that's what's confusing me.
20 MR. CANTY: What I'm saying is that the
21 effect of the proposed changes to the rules are to
22 limit and -- what is discoverable and what is
23 produced. When you do that, you run a risk, a
24 very substantial and real risk that relevant
25 evidence will be lost, irretrievably.

1 MR. BARKETT: So your suggestion is that
2 there should be no changes to Rule 26, to 30, to
3 33, to 36, 37?
4 MR. CANTY: Nothing to 26(b)(1), nothing
5 to 37(e).
6 JUDGE CAMPBELL: Any other questions?
7 All right. Thanks very much, Mr. Canty.
8 Attorney General Horne?
9 ATTORNEY GENERAL HORNE: Thank you,
10 Mr. Chairman and members. I'm Tom Horne, the
11 Arizona Attorney General, but I'm here not as the
12 Attorney General but in my individual capacity
13 based on my 30 years of experience in private
14 practice before I went into public service.
15 And I'm here in support of the changes to
16 Rule 26(b)(1), which would require that discovery
17 be for relevant and material matters. I have no
18 comments on the preservation issue.
19 But in 30 years of private practice, I saw
20 many, many cases where people were unable to seek
21 justice because they were told that a lawyer
22 giving honest advice that the other side had much
23 deeper pockets and they would run them into the
24 ground and the attorneys fees would exceed what
25 was in dispute, and it simply would not be worth

1 it.

2 And I think that limiting discovery to
3 material that is relevant and material would very
4 much help for people to be able to seek justice
5 where they are entitled to it, even if they don't
6 have as deep pockets as their adversary.

7 The -- there is a second consideration
8 which I don't think has appeared in the materials,
9 and that is sometimes if -- if discovery is very
10 broad ranging, a party can intimidate an opposing
11 party by threatening to get into discovery of
12 material that is really not relevant, but that may
13 be of embarrassment to the other party.

14 And that's an abuse of the discovery
15 process. But it's a real threat that can
16 discourage somebody seeking justice.

17 And I think that, again, limiting
18 discovery to material that is relevant and
19 material would help to -- would help to deal with
20 that.

21 And finally, I wanted to comment on the
22 proposal to reduce the time from the -- the number
23 and time of depositions. The -- under the Arizona
24 rules, in state court, depositions are limited to
25 four hours, and you're presumptively only entitled

1 to depose parties without permission of the court.
2 And I think that's a very good rule and would help
3 to make the discovery process more reasonable.
4 And that's all the comments that I have.
5 JUDGE CAMPBELL: All right. Thank you.
6 Are there questions from members of the
7 Committee?
8 JUDGE KOELTL: Do you have any experience
9 with whether people choose the state courts as
10 opposed to the federal courts based upon what are
11 the currently more restrictive Arizona discovery
12 rules?
13 ATTORNEY GENERAL HORNE: I don't have any
14 experience in that. When I was in private
15 practice, the state courts were quicker, so we
16 tended to choose the state courts if we were the
17 plaintiffs.
18 JUDGE CAMPBELL: John?
19 MR. BARKETT: What are the disclosure
20 obligations under the Arizona rules?
21 ATTORNEY GENERAL HORNE: A full disclosure
22 statement has to be filed.
23 MR. BARKETT: It's very different from
24 26(a)(1)?
25 ATTORNEY GENERAL HORNE: I don't remember

1 if it is different.

2 JUDGE CAMPBELL: It is. It is quite a bit

3 broader and it's not limited to information

4 supporting a party's position.

5 And I will say that it's not uncommon in

6 federal court here for me to have parties come in

7 and stipulate to four-hour depositions because

8 they've really grown to like them in state court,

9 without me raising it. It happens in maybe a

10 third of my civil cases.

11 ATTORNEY GENERAL HORNE: Well, it's a

12 particular problem if one party is trying to wear

13 out the other party because they have greater

14 economic resources. And I think the four-hour

15 limitation, the presumption of only the parties

16 and needing court approval for other depositions

17 and much stricter materiality rules I think would

18 help very much to make it possible for people to

19 get justice even if the opposing party has deeper

20 pockets.

21 JUDGE CAMPBELL: Are there other

22 questions?

23 All right. Thank you very much.

24 ATTORNEY GENERAL HORNE: Thank you.

25 JUDGE CAMPBELL: Mr. Sneath?

1 MR. SNEATH: Good afternoon, and thank you
2 for the opportunity to address you, and I commend
3 you for your hard work.
4 I'm a principal shareholder in a 15-lawyer
5 litigation boutique in Pittsburgh, Pennsylvania.
6 We handle primarily complex business litigation
7 matters, intellectual property, patent and
8 trademark litigation, and environmental toxic tort
9 suits and products liability work. Our commercial
10 work is both for plaintiffs and defendants for
11 corporations, big, medium, and small.
12 I also served as president of DRI, which
13 is the counterpart to AAJ on the defense side in
14 the year 2011 and '12. And I speak for that group
15 and its 22,000 members around the country.
16 I also serve on our local patent rules
17 committee in Pittsburgh, which is a set of rules
18 that have been enacted to try to do a lot of what
19 your proposals would do to build proportionality
20 into the patent cases by staging discovery and
21 doing things to make sure that claim construction
22 can occur early when many cases tend to be sort of
23 decided or settled. So I have some experience in
24 the rule-making process. And I respect what
25 you're doing.

1 I wanted to talk, because I'm late in the
2 day, I figured I would talk about a slightly
3 different perspective than I either read about in
4 the first set of hearings or now. And that is on
5 behalf of small businesses, small and medium-sized
6 businesses who are involved in
7 business-to-business litigation which, as I read
8 the statistics, is a pretty large percentage of
9 what's going on in the federal courts. And it's a
10 different dynamic than the traditional plaintiff
11 versus defendant that we've heard a lot about
12 today.
13 Small businesses may have to produce lots
14 and lots of documents unlike a personal injury
15 plaintiff. And so they run into the same problems
16 as Microsoft or the big corporations. In fact,
17 they might be being sued by a big corporation or
18 having to sue a big corporation.
19 So as somebody mentioned earlier, I like
20 to look at it as requester and responder versus
21 plaintiff and defendant. Because I think that's
22 sort of artificial, it's always plaintiff versus
23 defendant, doesn't really work in a lot of cases.
24 I support the rules changes almost
25 completely. A few things that I would suggest be

1 tweaked, and they've already been mentioned today.
2 So I really want to talk more thematically about
3 business-to-business cases.
4 We represent large corporations but many
5 times we get calls from start-ups. Pittsburgh is
6 a high-tech town these days, the Silicon Valley of
7 the east, so we have lots of start-ups and growing
8 and emerging companies. And they have
9 intellectual property issues, they have start-up
10 issues of one kind or another. And as defendants,
11 they can be crushed in litigation.
12 Many of them have no legal departments.
13 They don't have general counsels. They've never
14 been advised on preservation of documents. They
15 have no idea what litigation in the federal courts
16 entails. And so the first time they hear about it
17 is from me.
18 And so when I talk to them and explain
19 what can happen, both as a defendant or as a
20 plaintiff, that's when they begin to realize that
21 they've got to make some very serious decisions
22 about how to get justice.
23 We represented one corporation, for
24 example, that was defendant in the case
25 that -- and they were a fairly successful

1 medium-sized corporation who were spending about
2 50 to $60,000 a month to pay for database and
3 costs in the litigation to house millions of
4 documents that the parties had to exchange and
5 produce.
6 Despite efforts to limit search terms,
7 limit numbers of witnesses, and cull it back, it
8 still amounted to extraordinary expense both to
9 store and manage the database, to hire contract
10 lawyers to review the documents and code them, to
11 manage them and create layer upon layer of access
12 to the database so that experts could only see
13 certain documents, clients could only see certain
14 documents, lawyers certain documents, all of which
15 was governed by a five or six-page protective
16 order that was a small industry in itself to
17 figure out how to comply on an ongoing basis with
18 the protective order. And that becomes a huge
19 problem in litigation just in and of itself.
20 As plaintiffs, for example, I got a call
21 recently from a nonprofit, a business incubator in
22 Pittsburgh, whose job it is to provide seed money
23 to start-ups. They create jobs. And they
24 were -- there is a very wealthy Asian businessman
25 set up a website with the exact same name as their

1 company who wants to provide capital and funding
2 to companies in America. And they would like to
3 sue him for trademark infringement.
4 And when I began to -- they have no
5 in-house department, no legal counsel, no anything
6 in-house telling them how to do it. They've never
7 been involved in litigation. I sat down with them
8 and I explained, this is what you potentially
9 face. And here's what it might cost. And the
10 other side can turn around and try to
11 contend -- contest your mark, and then you would
12 have to go back and get documents from years ago
13 that discuss first use in commerce.
14 And their eyes glazed over and they looked
15 at the expense, and they said we don't have a
16 budget for that kind of thing. Our money is
17 restricted. We would have to find where we get it
18 to even able to be able use it. How do we get
19 justice because this guy is going to crush us?
20 I'm still waiting to hear back from them.
21 They have no idea what to do. And it really all
22 stems from, it's not an access to the courts
23 issue. You know, Iqbal, Twombly, the rules guide
24 us on how you get into court.
25 And it's what happens after you get into

1 court and that's where the problem is. And that's
2 what you are addressing. It's this false issue
3 and it's all about access to the courts. It's not
4 all about access to the courts, you can get in
5 there.
6 But it's about how you streamline the
7 practice to make people get back to the concept of
8 being efficient lawyers, ethical lawyers, and
9 doing their responsibility to produce documents
10 initially like they are supposed to.
11 And so I wanted to present that
12 perspective and say that there is a whole
13 constituency out there that we really haven't
14 talked about that I think are an emerging part of
15 the court docket. So thank you.
16 JUDGE CAMPBELL: Mr. Sneath, let me ask
17 you a question, if I can.
18 MR. SNEATH: Sure.
19 THE COURT: That I've had on my mind when
20 others have spoken and I've not asked it but we
21 did talk about it in a previous meeting we had.
22 Some portion of this enormous cost of
23 managing information is the result of the
24 explosion of information in the digital age. And
25 it will be there no matter what we do with the

1 rules or with litigation.

2 Some portion, we are told by credible

3 sources, is due to the preservation rules and the

4 discovery rules.

5 Do you have any sense for how we figure

6 out if trying to do something with the discovery

7 and preservation rules will reduce half the cost

8 or ten percent or five percent? In other words,

9 are we really going to help these people you

10 talked about, or is their problem the result of

11 fact that they've got more information than they

12 can effectively manage in any dispute, just

13 because of all of the information we are storing

14 these days?

15 MR. SNEATH: Well, the companies who have

16 been advised about preservation have done what

17 you've heard companies talk about here all day.

18 And they are the companies who have never even

19 heard that they have to do it or don't know that

20 they have to do it. So you have to decide a

21 starting point, particularly if they are going to

22 be a plaintiff. You know, and there's no lawsuit

23 against them.

24 So I do think that if you move the

25 goalpost closer, and force lawyers to have

1 discussions with those goalposts narrowed, that
2 lawyers will do -- the good lawyers, as you've
3 heard mention, will do what they are supposed to
4 do, and that is to work out an arrangement that
5 will be sensible to both sides.
6 There is pressure on every lawyer in this
7 room who works for a company to reduce costs. And
8 that's on both sides of these business-to-business
9 cases. So we all have pressure to talk. We all
10 have pressure to negotiate, to come up with
11 reasonable limits, to come up with reasonable
12 search terms.
13 And you're right, there's a ton of
14 information. But I think if you narrow the
15 goalposts as your proposals do in large part, that
16 you give the starting point for the discussion at
17 a much better place to allow the lawyers to serve
18 their client, particularly smaller and
19 medium-sized businesses.
20 JUDGE CAMPBELL: Other questions?
21 All right, thank you very much for your
22 comments, Mr. Sneath.
23 Mr. Twist?
24 MR. TWIST: Thank you, Mr. Chairman and
25 members of the Committee. First let me apologize

1 for my rather casual appearance. My left arm had
2 an unintended discovery experience with my garage
3 floor over the Christmas holiday, and I apologize.
4 My name is Steve Twist and I serve as
5 general counsel for Services Group of America,
6 which is a privately held corporation in the food
7 distribution sector of the economy. We provide
8 food service to our customers, tens of thousands
9 in 18 states around the country. And we do that
10 through over 4,000 associates who depend on the
11 health of our company and our economy for their
12 continued employment.
13 My background is set forth a little more
14 fully in the written comments that I've submitted
15 and will upload onto your website.
16 But in my current and past roles, I've had
17 significant experience currently with SGA and
18 formerly I was counsel for Dial Corp., which
19 became Viad, a publicly traded corporation. And
20 I've had enough experience over the almost 40
21 years of my practice to know that or conclude that
22 the current civil justice system is dysfunctional,
23 particularly when judged against its fundamental
24 purpose stated in Rule 1, which is to provide for
25 the just, speedy and inexpensive determination of

1 every action and proceeding.

2 The costs and burdens of discovery now

3 drive dispute resolution, rather than the merits

4 of cases. Such a system is neither just nor

5 speedy. And it most certainly is not inexpensive.

6 Let me explain briefly why I say this. My

7 company spends more money on preservation and

8 discovery than it does to pay claims. Our IT

9 department reasonably estimated for me that just

10 to maintain the preservation and search functions

11 that are required of us costs us more than a

12 quarter million dollars every year.

13 The leading factor in litigation strategy

14 is cost, not the merits of claims of defenses.

15 Every time I sit down with company executives to

16 talk about litigation that we are or may be

17 involved in, invariably the question is what will

18 be the costs. And invariably, that is a

19 significant factor in the decision about when or

20 how to proceed.

21 In the last year -- in the last two years

22 alone, we've been involved in litigation, and I'm

23 citing only three matters, in which attorneys'

24 fees and costs related to discovery alone have

25 exceeded well over $1 million. And in deference

1 to my -- or your earlier presenter, I can tell you
2 that the amounts at issue were less than that.
3 In none of these cases has there been a
4 finding of responsibility against the company.
5 Let me disclose, in fairness, that these
6 cases have been in state court, not in federal
7 courts, but I dare say that the costs would have
8 been higher. And more importantly, the power of
9 the changes in the federal rules that you're
10 contemplating will encourage similar improvements
11 by states around the country.
12 In addition to the IT costs, the energy in
13 preserving every conceivable record, every
14 iteration of every e-mail and every version of
15 every document places an enormous burden on any
16 party. Litigation takes unforeseen tolls beyond
17 simply the cost of attorneys. It robs company
18 employees of time. It eliminates our ability to
19 budget properly. It impedes our ability to grow,
20 to hire new employees. It has a definite effect
21 on the bottom line.
22 The triumph of cost over merit is a direct
23 result of the current rules and how they are
24 applied in practice. That's why I strongly
25 support the company's (sic) efforts and I thank

1 you for those.

2 Specifically the scope of discovery, as

3 defined in Rule 26(b)(1), promotes a litigation

4 strategy designed to bring opponents to their

5 knees rather than bring facts into light. The

6 Committee's proposal to redefine the scope of

7 discovery is a much needed and appropriate reform.

8 Much of the cost and burden of discovery

9 has been caused by the broad scope of discovery

10 defined in the terms "subject matter involved in

11 the action", and the notion of evidence that's

12 "reasonably calculated to" the discovery -- "lead

13 to the discovery of admissible evidence."

14 The proposal to move the proportionality

15 language would result in parties and judges paying

16 needed attention to the standard, being more

17 focused on the standard.

18 I'm aware that opponents have alleged that

19 moving the language will shift the burden of proof

20 and impose an inappropriate burden on plaintiffs.

21 I think that argument is incorrect.

22 First, changing the scope of discovery

23 does not change the legal burden.

24 Second, currently the burden of ensuring

25 proportionality falls upon both requesting and

1 responding parties. The committee's proposal does
2 not change that.
3 Third, if what the opponents mean by
4 shifting the burden is a possible increase in
5 motions to compel compared to motions for
6 protective orders, I don't see that as a major
7 factor.
8 Reforming the scope of discovery to ensure
9 proportionality is worth it. The current
10 proportionality rule has failed. The proposed new
11 Rule 37(e) is also a much needed reform. Although
12 the proposal holds great promise, two parts I
13 would commend to your attention before the rule
14 will have its intended effect.
15 First, the Committee should remove the
16 word "willful" making clear that the test is bad
17 faith. This is crucial because some courts
18 interpret "willful" to simply mean "intentional."
19 And under that definition it will remain
20 impossible for companies like ours to make
21 reasonable decisions about preservation.
22 The second needed repair is to eliminate
23 the exception for the loss of information
24 "irreparably deprives" a party of any ability to
25 present or defend a claim in the action. Although

1 the Committee intends this exception to apply in
2 only the very rarest of situations, it's likely
3 that courts would use the exception to avoid the
4 primary rule.
5 Mr. Chairman and members, thank you very
6 much for the opportunity to present to you.
7 JUDGE CAMPBELL: Thank you, Mr. Twist.
8 Questions?
9 Sol?
10 JUDGE OLIVER: I think you indicated that
11 someone in your company indicated that you had one
12 quarter of a million dollars that you use for
13 preservation costs. Is that what you said?
14 MR. TWIST: Yes, sir.
15 JUDGE OLIVER: What would you estimate the
16 cost would be if there was a rule change, 37(e)
17 was promulgated and became part of the rules? I
18 mean, how would you do things differently? How
19 much would you save?
20 MR. TWIST: Well, that's an excellent
21 question, and I haven't taken the time to sit down
22 with our IT people to figure that out, but I
23 certainly would and before the Committee's
24 deadline for public comment will submit something
25 on that point.

1 JUDGE CAMPBELL: Any other questions?
2 All right. Thank you. Thanks so much,
3 Mr. Twist.
4 I understand that Mr. Avelar has arrived;
5 is that right? Let's take you next, Mr. Avelar.
6 MR. AVELAR: Thank you, Your Honor. My
7 name is Paul Avelar. I am an attorney with the
8 Arizona Chapter of the Institute for Justice, a
9 nonprofit public interest law center dedicated to
10 protecting constitutional rights.
11 Thank you for the opportunity to testify
12 here today. And thank you to the advisory
13 committee for its extensive work in preparing
14 these reforms.
15 Although IJ welcomes the amendments
16 encouraging early and active judicial case
17 management, we are very concerned about the
18 proposals to narrow discovery and limit the use of
19 discovery devices. These measures will cause
20 serious problems in constitutional litigation and
21 contrary to their intent, will in most cases
22 profoundly increase the frequency and intensity of
23 discovery disputes as well as litigation costs.
24 Since 1991, IJ has represented
25 individuals, small businesses, and other groups in

1 federal courts across the country to enforce
2 constitutional rights. IJ represents both
3 plaintiffs and defendants to protect these
4 constitutional rights.
5 For example, IJ Arizona has represented
6 several individuals and groups in constitutional
7 challenges to Arizona campaign finance laws, and
8 at the same time, we have also represented parents
9 as intervenors to defend Arizona school choice
10 programs.
11 Most IJ cases are moderate in size.
12 Typically they are resolved on summary judgment,
13 but when required, IJ cases typically last between
14 one and five days of trial.
15 Whether representing plaintiffs or
16 defendants to protect constitutional rights, there
17 is an asymmetry in access to information with the
18 government in sole possession of the information
19 and facts generally needed to prove constitutional
20 violations. Based on this perspective, I offer
21 testimony opposing the proposals related to
22 discovery, the limitations on discovery.
23 First, the proposed proportionality
24 requirement you have heard quite a bit about
25 already. Our concern is that the proportionality

1 is dependent on five subjective and fact dependent
2 criteria. And a government defendant can simply
3 resist requests for information needed to prove a
4 constitutional claim on the grounds that it is not
5 proportional.
6 The amount in controversy in a
7 constitutional case may be low or even nonexistent
8 where the suit is primarily aimed at injunctive or
9 declaratory relief. How will that play into the
10 proportionality issue?
11 Moreover, as the advisory committee notes
12 make clear, the proposal shifts the burden from
13 defendants to proof that discovery requests are
14 disproportional to plaintiffs to prove
15 disproportionality.
16 Contrary to the intent of the amendments,
17 this requirement will increase litigation costs.
18 It is readily apparent that there will be a
19 barrage of motions to compel and the need for
20 judicial intervention to spring from this proposed
21 change.
22 Second, the proposals to reduce the
23 numerical limits on discovery devices are also
24 counterproductive to the goals espoused behind the
25 proposals. Constitutional litigation requires us

1 to navigate between Scylla and Charybdis. To
2 draft discovery requests narrow enough to draw a
3 meaningful response, broad enough to fully capture
4 the relevant information, but not so broad as to
5 be objectionable. This is especially true where a
6 case implicates government behavior across a
7 number of years, across a number of agencies.
8 Further limiting the number of requests
9 permitted will only encourage broader requests for
10 discovery and thus more objections.
11 Moreover, the limits to request for
12 admission are particularly troublesome. There has
13 been no problem with burdensome or abusive
14 requests for admission so far as I know. These
15 admissions -- these requests for admission are
16 very useful tools that decrease
17 judicial -- judicial time and decrease litigation
18 costs. Admissions narrow the issues in litigation
19 and they also facilitate proof with respect to
20 remaining issues.
21 This is particularly true in
22 constitutional cases such as we litigate, for
23 example cases subject to the rational basis
24 standard of review.
25 We find that carefully crafted requests

1 for admission can obviate the need for depositions
2 of some, restrict or limit the amount of
3 deposition needed of others or even prevent the
4 need for a trial at all by facilitating motions
5 for summary judgment.
6 In Nevada, for example, Nevada Federal
7 Court, IJ effectively used Rule 36 to obtain
8 numerous admissions to prove material facts about
9 the lack of any health or safety justification for
10 the restrictions that we were challenging. And we
11 did this after state witnesses did not clearly
12 admit to those facts in deposition. By filing
13 these requests for admission, we were able to move
14 for summary judgment, and that motion is at this
15 time still pending.
16 Our concern is thus that far from
17 fostering cooperation, limiting requests for
18 admission will encourage gamesmanship, which is
19 obviously not the point of the federal rules. The
20 fair administration of justice requires striking a
21 balance. Defendants should not fear harassing
22 litigation designed to extort settlements, but the
23 doors of justice must be opened wide enough to
24 hear meritorious cases.
25 Thank you very much for your time and

1 attention today. And if I can answer any
2 questions, I'm more than happy to.
3 JUDGE CAMPBELL: All right. Thank you.
4 Any questions?
5 John?
6 MR. BARKETT: I'm wondering, I was just
7 looking as you were talking and I pulled out Rule
8 26(g)(1)(B)(iii), and it says with respect to a
9 discovery request, response or objection, every
10 lawyer that issues a request for production has to
11 certify that those requests are neither
12 unreasonable nor unduly burdensome or expensive
13 considering the needs of the case prior discovery
14 in the case, the amount in controversy, and the
15 importance of the issues at stake in the action.
16 And the sanctions under 26 are mandatory, they are
17 not discretionary.
18 So I'm just a little puzzled by the
19 statement that you made about changes that would
20 occur. If you have to certify to this now before
21 you issue a discovery request, what's the problem
22 with what's been proposed? I didn't quite get
23 exactly what your point was given the existing
24 obligation.
25 MR. AVELAR: So the existing obligations

1 require the proponent of the discovery to say we
2 don't think that these are unduly burdensome. We
3 think that they are appropriate for the case. Not
4 surprisingly, the other side often disagrees with
5 that assessment.
6 The problem that we face is that coming
7 into the court as plaintiffs against the
8 government often times requiring or having a
9 burden of proof placed upon us is that we need the
10 information that is in the government's
11 possession. They are the only ones who have it.
12 So our need for it is quite a bit heightened,
13 maybe, than in an ordinary case.
14 So our concern is that if you switch the
15 burden of proof, if you say that it is now on the
16 plaintiffs to prove that their requests are
17 proportional as opposed to --
18 MR. BARKETT: What do you think 26(g) now
19 says?
20 MR. AVELAR: Your Honor, I do have --
21 MR. BARKETT: You are faced with the
22 potential for mandatory sanctions if that's not a
23 true statement.
24 MR. AVELAR: Yes, Your Honor. When we
25 file requests, as I think every good lawyer does,

1 we absolutely believe that they fall under that
2 requirement under 26(g), that we have met the
3 burden or we have -- we have made sure that we are
4 not sanctionable. But the other side invariably
5 disagrees that something that we have requested is
6 either overly broad or unduly burdensome. They
7 have a different perspective on how do we need the
8 information, how burdensome is it for them to
9 retrieve it.
10 MR. BARKETT: And that gets resolved by a
11 judge?
12 MR. AVELAR: Ideally, Your Honor, yes.
13 MR. BARKETT: Nothing changes. It will
14 still get resolved by a judge.
15 MR. AVELAR: Your Honor, I think the same
16 is, as with any burden of proof, the question is
17 who has the obligation to come forward and
18 affirmatively make their case first.
19 As with any burden of proof, the burden of
20 proof itself tends to affect who has the advantage
21 or who has -- who has the, I won't say advantage,
22 in the question to be answered just as a burden of
23 proof does in regular litigation.
24 JUDGE CAMPBELL: Judge Koeltl.
25 JUDGE KOELTL: You said that the advisory

1 committee notes shifts the burden. And I'm not
2 sure where in the advisory committee notes it says
3 that. If there's some specific language that's a
4 problem in the advisory committee notes, it would
5 be helpful to bring it to our attention.
6 MR. AVELAR: The -- the -- it is our
7 position that there is a -- that the advisory
8 committee notes do switch the burden by
9 increasing -- by saying -- I'm sorry, by saying it
10 is -- the burden is on the proponent of the
11 discovery.
12 JUDGE GRIMM: Where does it say that? Can
13 you point us to where that is?
14 MR. AVELAR: I'm sorry. I don't have the
15 language in front of me, Your Honor.
16 JUDGE CAMPBELL: If you could put it in
17 written comments, that would be helpful to us.
18 MR. AVELAR: Yes, Your Honor.
19 JUDGE CAMPBELL: We would be interested in
20 where you -- I don't know that we intended it, but
21 if it's being read that way we sure want to know
22 it. So that would be really valuable.
23 MR. AVELAR: Yes, sir.
24 JUDGE CAMPBELL: All right. Thanks very
25 much for your comments, Mr. Avelar.

1 MR. AVELAR: Thank you.

2 JUDGE CAMPBELL: Ms. McIntyre?

3 MS. McINTYRE: Good afternoon, I'm Jill
4 McIntyre. I am from Jackson Kelly based in
5 Charleston, West Virginia. And we are a
6 200-lawyer firm with 11 offices in five states and
7 the District of Columbia. We are a full service
8 firm providing services to basically corporate
9 parties.

10 I am the leader of our firm's electronic
11 discovery practice group and consult regularly
12 with other litigation practices in the firm. More
13 and more often I consult with businesses doing
14 business in West Virginia about data management.

15 My firm -- on behalf of my firm and my
16 firm's clients, I applaud the Committee for its
17 efforts to create a uniform standard for data
18 preservation and for spoliation sanctions which
19 results from an intersection of the Rule 26 and
20 Rule 37 proposals.

21 Deciding the scope of preservation is hard
22 because discovery often is too broad. In my
23 experience it's difficult to advise clients about
24 preservation obligations even in one jurisdiction,
25 particularly before a lawsuit is filed.

1 The "reasonably calculated" language is
2 used in our state to circumscribe permissible
3 discovery which leads to an ingrained expectation
4 of overly broad preservation. Those high
5 expectations can become particularly problematic
6 in a jurisdiction somewhat known for being a
7 proving ground for novel claims, and where one
8 prominent plaintiff's firm has advertised its
9 sanctions practice.
10 Removing the "reasonably calculated"
11 language from Rule 26 will, at the very least,
12 encourage lawyers to consider why the language was
13 ever there in the first place and perhaps to
14 reevaluate whether their beliefs about the scope
15 of discovery are founded.
16 Moreover, our state Supreme Court clearly
17 has a great respect for the federal rules and
18 intends to follow their interpretation, if not to
19 adopt the rules wholesale.
20 Clarifying the applicability of
21 proportionality to the scope of discoverable
22 information is an important step forward. With
23 the amendments, parties and potential parties can
24 be confident that what they need to preserve is
25 something less than all potentially relevant data.

1 Another point that I would like to make is
2 that the Rule 26(g) standards mentioned during the
3 last comment are powerful and perhaps underused.
4 One commenter during the Washington session
5 suggested that under a cost-benefit analysis,
6 sanctions are required to force companies to make
7 good faith disclosures of damaging evidence.
8 I don't buy that. Lawyers are and must be
9 held accountable as officers of the court to
10 convey and uphold their disclosure duties. We
11 certify that disclosures are complete and correct
12 to the best of our knowledge, information and
13 belief formed after a reasonable inquiry. And as
14 long as courts are taking seriously their
15 mandatory duty to sanction under Rule 26(g)(3), we
16 do not need a section in Rule 37 for anything
17 other than an intent to deprive.
18 My next point is that preservation itself
19 begins as an onerous prospect and that therefore
20 the substantial prejudice standard is the right
21 standard in Rule 37.
22 Drilling into a shelved set of data to
23 determine what part of that data is relevant to
24 claims or defenses is not cost effective. And by
25 in large, it is not done. Parsing archived data

1 and active data to determine what part of it might
2 be relevant to claims or defenses is only slightly
3 less difficult.
4 The cost of preservation arises not from
5 storage, but from the evaluative activity,
6 including interviewing, planning and organizing a
7 collection plan, creating an environment for the
8 data, careful transfer of that data into a review
9 tool, obtaining subject matter, expertise,
10 culling, conducting searches, teaching the
11 machine, et cetera.
12 No company is going to make a detailed
13 proportional preservation cut unless suit is
14 practically certain or warranted by some other
15 risk.
16 If a body of data -- as it stands now, if
17 a body of data might be the sole source of
18 relevant information, one simply considers the
19 value of that data to the potential case based on
20 a proportionality principles and the risk of not
21 preserving it.
22 If the risk of having a court agree that a
23 company destroyed something it should not have
24 destroyed, if that is the risk, the company is
25 going to keep that data. For this reason, the

1 substantial prejudice required by the proposed
2 rules assuages concerns about making a bad
3 decision and may allow companies -- should allow
4 companies to preserve less. More big chunks of
5 data, not looked at carefully, but big chunks of
6 data should pass that risk test.
7 What will be the effect? A commenter
8 during the Washington, D.C. -- maybe today, a
9 commenter today suggested that a reduced access to
10 documents equals or results in reduced access to
11 justice. And I don't believe that's necessarily
12 so.
13 Take the Microsoft data that was discussed
14 earlier today. My belief is that reducing what is
15 preserved is going to significantly bracket this
16 top level of the funnel. That's not going to
17 result in a huge cost savings, because this is
18 simply storage. Storage is cheap. The cost of
19 storage has fallen a hundred thousand times since
20 1990.
21 It is going to circumscribe these next
22 three layers: Collecting and processing,
23 reviewing -- next two layers, collecting and
24 processing and reviewing by some degree. This is
25 where the cost inures in preservation, the cost of

1 collecting and processing the data you've
2 preserved and the cost of reviewing the data
3 you've preserved. Once you've gotten to
4 producing, heck, how much does it cost to make a
5 dual layer DVD and stick it in the mail.
6 So the cost of preservation will fall
7 because of the changes in the rules, due to the
8 proportionality considerations that allow parties
9 to preserve less here and to deal with less here
10 in the middle section.
11 I would be happy to answer any questions.
12 JUDGE CAMPBELL: All right. Thank you.
13 Questions? Rick?
14 PROFESSOR MARCUS: I would just like to
15 follow up on something you mentioned. As I
16 understand it, what you're saying is the
17 substantial prejudice feature of 37(e) will enable
18 you to limit preservation in ways that you can't
19 do presently, in that it will do that either in
20 addition to or better than the culpability
21 provision which has been discussed a lot today.
22 Am I understanding you right and could you
23 elaborate on how that would work?
24 MS. McINTYRE: The culpability part of
25 37(e), of the revisions, is the part that allows

1 us to be confident in the reasonable decisions
2 that we make to preserve one item of potentially
3 relevant data and not preserve another item of
4 potentially relevant data.
5 Not preserving one item of potentially
6 relevant data based on a reasoned decision can be
7 argued to cause prejudice. You don't get to
8 discover everything. The discovery that your
9 opponent gets is not perfect.
10 Just because it's prejudice doesn't mean
11 it's substantial prejudice that affects that
12 opponent's case so seriously that he or she or it
13 cannot prevail. That is what I mean by having the
14 standard of substantial in there, because I think
15 that -- that you'll receive an argument that any
16 destruction of relevant evidence causes some
17 prejudice.
18 JUDGE CAMPBELL: Any other questions?
19 All right. Thanks very much,
20 Ms. McIntyre.
21 Mr. Paul?
22 MR. PAUL: Good afternoon. My name is
23 Patrick Paul. I am a partner with Snell & Wilmer
24 here in Phoenix. We are a full service law firm
25 with nine offices throughout the southwest. We

1 regularly represent businesses of all sizes in
2 litigation, primarily from the defense side. I'm
3 a past president of Arizona's Association of
4 Defense Counsel and a former board member of DRI.
5 I sincerely appreciate the opportunity to
6 testify here today. And I want to thank the
7 Committee for that opportunity and for the hard
8 work that has occurred and will continue to occur
9 in this process.
10 This process is one that is relatively new
11 to me, and I've come to learn a lot about it
12 recently and really tremendously appreciate what
13 you all have done and what the many interested
14 parties have contributed to date.
15 Last summer, I wrote a -- an op ed piece
16 for our local newspaper which talked favorably
17 about our judicial system and the public's faith
18 in it based upon some empirical data that I had
19 reviewed. And I believe it's processes like these
20 in which we take an introspective look and suggest
21 changes to improve and enhance our system that I
22 think allows all of us to continue to provide the
23 public with the confidence in our system.
24 I'm here this afternoon in my personal
25 capacity to urge the Committee to adopt the rules

1 with those modifications suggested by the Lawyers
2 For Civil Justice. My own practice involves
3 generally environmental, pollution, and
4 toxic-related claims, usually from the defense
5 side. I have represented small and large
6 businesses in state and federal courts primarily
7 in Arizona and California.
8 This afternoon I would like to focus my
9 testimony on the proposed changes to Rule 26,
10 while also briefly mentioning my support for the
11 suggested presumptive limits.
12 Like many others who have testified or
13 provided comments on these changes, I
14 enthusiastically endorse the goal of early case
15 management and more particularly a proportional
16 discovery.
17 As you have heard time again and as I will
18 further attest, increasingly the cost of discovery
19 is driving litigation decisions and not the legal
20 merits. Consequently, in many cases, prohibitive
21 discovery costs may result in a denial of justice.
22 The rapidly increasing cost of discovery,
23 in my opinion, should not be a reason for
24 compromise, settlement, or perhaps a decision not
25 to litigate a legitimate claim in the first place,

1 particularly when the vast majority of information
2 requested often is entirely unused during
3 litigation and trial of that matter.
4 For these reasons, I support eliminating
5 the phrase "appears reasonably calculated." I
6 agree with many prior witnesses that the
7 substantial time and money saved would ultimately
8 inure to the benefit of litigants on both sides of
9 the case.
10 Although the concept of proportionality
11 already exists in the rules, moving that language
12 as proposed certainly would seem to result in
13 reminding parties that the proportionality
14 principle applies to all discovery, and further
15 would seem to encourage litigants and judges to
16 adopt a pragmatic approach as to the scope of
17 discovery in each individual case.
18 As I read the proposed amendment, it does
19 not change any procedural burden related to the
20 scope of discovery. However, it amends the
21 substantial -- the substantive definition of that
22 scope.
23 Also, the proportionality concept itself
24 is unchanged by the proposal; only its location is
25 different. This change in location seems to me

1 should assist in limiting the problems of overly
2 broad discovery by heightening its visibility and
3 importance.
4 Here it seems the proportionality language
5 would allow advocates on both sides to benefit
6 earlier in the life span of a case and create
7 discovery requests that more truly reflect the
8 facts in dispute and the issues contained in the
9 pleadings themselves.
10 Although some have maintained that the
11 proposed amendments related to the inclusion of
12 proportionality in the definition will have a
13 burden shifting impact, I respectfully disagree.
14 The proposed amendment would not change any
15 procedural burden related to the scope of
16 discovery, but rather would simply amend the
17 substantive definition of that scope.
18 Again, the concept of proportionality
19 remains unchanged by the proposal. Ultimately any
20 burden relating to proportionality falls equally
21 upon both requesting and responding parties.
22 As Mr. Barkett recently noted, Rule 26(g)
23 specifically requires the attorney's signature on
24 the discovery request as itself a certification
25 that the document is consistent with the federal

1 rules and not otherwise for any improper purpose.
2 No changes to this rule or its related
3 requirements are suggested in the proposed
4 amendments. Ultimately the burden of establishing
5 the proportionality of a particular discovery
6 request will fall equally to both parties.
7 Similarly, the discovery process itself
8 will continue to require good faith on both
9 parties, and the proposed amendments will not
10 impact that reality. Counsel can and should
11 continue to work to achieve agreement under the
12 proposed revised scope of discovery just as they
13 do under existing requirements.
14 I similarly support the proposed
15 reductions in presumptive limits. The proposal
16 encourages efficiency in planning and execution of
17 deposition and related discovery without limiting
18 any party's access to greater inquiry when
19 appropriate.
20 Once again I sincerely appreciate the
21 opportunity to speak and the hard work of this
22 Committee. And I'm happy to answer any questions.
23 JUDGE CAMPBELL: Thank you, Mr. Paul.
24 Any questions?
25 All right, thank you so much for your

1 comments.

2 Ms. Anderson?

3 MS. ANDERSON: Good afternoon. I am
4 delighted to have the opportunity to address the
5 Committee and so I thank each of you for allowing
6 me a few minutes of your time.

7 My name is Jennie Lee Anderson, and I'm a
8 partner at the San Francisco law firm of Andrus
9 Anderson. We do 100 percent plaintiff's side
10 civil litigation, and about 80 percent of our
11 practice is class action litigation.

12 Last month I submitted on behalf of the
13 American Association of Justices class action
14 litigation group comments on many of the proposed
15 rules where we detail our position if the vast
16 majority of the proposed changes.

17 Today, however, I want to focus on the
18 proposed changes to Rule 26(b) and Rule 34,
19 because I think in many respects they go hand in
20 hand, and give you a few examples from my practice
21 that I hope will illustrate my concern that the
22 proposed changes to Rule 26(b), however
23 unintentional, may unfairly and negatively impact
24 Americans' access to the justice system and why
25 Rule 34, I believe, will increase efficiency and

1 reduce costs at the same time.

2 As you've probably gathered from the

3 comments to date, the plaintiffs' bar is almost

4 uniformly opposed to the proposed changes to

5 Rule 26(b) because we are concerned that it

6 unfairly shifts the burden to show that the

7 discovery is proportionate from the defendants to

8 the plaintiffs.

9 The reason for that concern is because

10 today in practice under the current rules, how it

11 works is I, under Rule 26(b)(1), show the court

12 that the discovery that I am seeking is relevant.

13 And then under Rule 26(b)(2), the burden shifts to

14 the defendant to articulate their objections with

15 specificity. And that would include any

16 objections as far as an undue burden is concerned.

17 So the concern -- because that's the way

18 the courts have been applying the rules for so

19 many years, the concern is by moving the

20 proportionality from part two to part one, that it

21 will be interpreted that that now becomes

22 plaintiff's burden because (b)(1) has frequently

23 been interpreted as setting forth what plaintiff

24 must show to justify their discovery.

25 I would like to give an example from my

1 practice of how devastating such an interpretation
2 of the proposed rule, if it were adopted, would be
3 to some of our cases.
4 For the last five or six years, my firm
5 and others have been litigating a series of cases
6 around so-called option arm loans. These are
7 loans where they advertised and promoted them as a
8 one percent loan and provided potential borrowers
9 with a three to five-year payment plan with low
10 payments.
11 What it didn't disclose is that by
12 following that payment plan, negative amortization
13 was sure to occur on the loan and ultimately when
14 the loan recasts, foreclosure was all but certain.
15 The defendant sold these loans directly,
16 but it also sold them through a series of 12,000
17 so-called correspondent lenders.
18 There was a fundamental disagreement on
19 the scope of the case which led to a fundamental
20 agreement about what discovery was proportionate.
21 Defendants took the position that, look, you are
22 only going to be able to certify a class on the
23 best day of the loans that were sold through the
24 one channel that your named plaintiff purchased
25 from. In California, that was about 2500 loans.

1 We took a different position. We took the
2 position that the loans were designed by the
3 defendants and they were exactly the same no
4 matter which correspondent lender sold the loan,
5 and so, therefore, we were entitled to receive
6 class certification and discovery for all of the
7 loans. In California, that was over 75,000 loans.
8 So we sought discovery on all of the loan
9 files. We proposed to defendants a reasonable
10 sampling, which was rejected, and we ultimately
11 moved to compel all loan files.
12 Now, I understand that the Committee is
13 very concerned that the proportionality concept is
14 not being honored or enforced adequately by the
15 courts today. That is not my experience. And in
16 this case -- my experience is that the judges are
17 very concerned about keeping discovery
18 proportionate. And the same is true in this case.
19 The judge was extremely concerned that there be
20 proportionality. But under the existing rules, he
21 correctly looked to the defendants for information
22 to assess that.
23 He asked the defendants to specify their
24 projected costs of responding to the discovery
25 with specificity. He asked defendants to accept

1 the random sampling that plaintiffs had proposed
2 and agreed that that random sampling would be
3 binding on both parties, not just the plaintiffs.
4 And defendants also had every opportunity
5 to show that the documents we were seeking would
6 not support our motion for class certification.
7 Despite the court's order, the defendant
8 failed or refused to meet any of these standards.
9 The judge didn't need to know anything else. The
10 loan documents were ordered produced, and we
11 certified a class of over 75,000 borrowers who all
12 got relief under a settlement.
13 So had the rule, the proposed rule been in
14 place and interpreted the way we fear, plaintiffs
15 would be left with nothing -- with no evidence to
16 show the court, and the court would be left to
17 make decisions regarding the merits of the entire
18 case without the benefit of any evidentiary
19 record.
20 I am not surprised that the defense bar
21 largely supports all of the proposed changes that
22 restrict discovery further. However, I do find it
23 ironic that they rely on the cost arguments to
24 support their position. Because in my personal
25 experience, many of the inflated discovery costs

1 are inflicted by the defendants on themselves.
2 And that brings me to Rule 34.
3 In almost every class action that I have
4 litigated, discovery works this way: I receive
5 the initial disclosures, which are virtually
6 meaningless. And I serve discovery. I get
7 responses back from the defendants which include
8 two to three pages of objections for each request,
9 two to three pages of objections, and not a single
10 document produced. Then I spent months, literally
11 months meeting and conferring with the defendants
12 begging them to please tell me what do you mean by
13 expensive? What is your estimated cost? How many
14 documents are you talking about?
15 Real-life examples are so absurd, you are
16 going to find them hard to believe. Recently in
17 an antitrust case we were disputing whether
18 certain hard copy documents need to be reviewed.
19 And I asked them to just tell me how many
20 documents are we talking about. Are you talking
21 about a Redweld, or are we talking about five
22 rooms of documents? The response to that query
23 was it's not a Redweld, it's more than a Redweld.
24 Not helpful.
25 In another case regarding electronic

1 discovery, we were seeking records in a database
2 from a car manufacturer on a defective product
3 thing, could not get information about how many
4 records relate to the automobile applying
5 plaintiff's search terms versus defendant's search
6 terms. Would not give us that information until
7 we moved to compel.
8 In each of these instances when we moved
9 to compel, in my experience the defendants are
10 almost always unable to articulate that the burden
11 that they face is truly undue in light of the
12 relevance of the documents that I am seeking. And
13 the discovery is ultimately ordered to be
14 produced.
15 However, that is not until the parties and
16 the court have expended enormous amounts of energy
17 and time and money on these disputes, and Rule 34
18 would vastly truncate and streamline that
19 procedure.
20 I have no more comments, and I'm happy to
21 address any questions that the Committee may have.
22 JUDGE CAMPBELL: All right. Thank you.
23 Judge Koeltl and then Peter.
24 JUDGE KOELTL: You said that now the
25 plaintiff only has to show relevance and that

1 under the proposed rule, the plaintiff would have
2 to show that what the defendant's costs are going
3 to be so that the judge can make the
4 proportionality determination.
5 Why do you -- why do you -- why do you
6 assume that? To take your example, if there's a
7 dispute with respect to discovery and production,
8 it has to come before the judge in some way.
9 There has to be a motion either to compel or to
10 strike or for a protective order. And the judge
11 will then have to look at all of the evidence
12 before the judge.
13 And if in your case the defendant has
14 refused to present any evidence of cost or burden,
15 there will be nothing before the judge to weigh
16 against the asserted value and importance of the
17 information that's sought.
18 It's not clear to me where you -- how you
19 interpret the rule to say that under those
20 circumstances, the judge has to presume that this
21 will be costly or burdensome if the defendant is
22 standing there and saying: We are not going to
23 present you with any evidence of cost or burden.
24 It's the plaintiff's obligation to show how costly
25 and burdensome it will be to us, the defendant.

1 Does that seem like a reasonable judge?

2 MS. ANDERSON: Well, let me answer your

3 question in multiple parts.

4 First of all, the concern is not just that

5 we would have to suddenly come up with numbers

6 that are defendant's cost, but the whole

7 proportionality standard is now suddenly in our

8 column, that being (b)(1), because that's

9 traditionally then how it's been interpreted.

10 JUDGE KOELTL: But why, I mean you have a

11 burden under (g)(3) to in good faith make sure

12 that your request is proportional. And if there's

13 a dispute then with respect to the scope of

14 your -- of your request under (b)(2)(C)(3), the

15 judge must impose a proportionality standard and

16 decide it.

17 So it is interesting that the judge in

18 your case really was on top of all of the rules.

19 There has been, you know, some have said that some

20 judges really don't apply the proportionality

21 standard. You say this judge did.

22 And it's not clear to me how then if the

23 judge is faithfully following the rules and

24 following proportionality, the result of putting

25 it in the first sentence would change anything in

1 your case.

2 MS. ANDERSON: Well, my concern is because
3 while this was a very engaged magistrate, that's
4 not always the case. And I have been in many
5 instances where -- I have been in many instances
6 where the defendant just throws undue burden out
7 there and they are never called to task on that.
8 So some of it is just judicial management, I
9 realize.

10 I would say that if it is in fact not the
11 Committee's intention to shift the burden, that
12 that be expressed, and that the rules expressly
13 say that the party resisting discovery must
14 articulate their defenses with specificity. And I
15 would even advocate that if the party advances a
16 burden argument, that that be supported by
17 admissible evidence. That is what the -- one of
18 the complex departments in the San Francisco
19 Superior Court requires.

20 So I am not saying that an engaged judge
21 would not interpret this rule in a way that is not
22 harmful. I'm worried about unintentional
23 consequences. And I would ask that if this
24 shifting in burden is not intended, that it be
25 expressed.

1 And I think that the sheer number of
2 comments from the plaintiffs' bar expressing
3 concern over this demonstrates how sincere the
4 concern is. And we would just ask for, you know,
5 that the rule or the comments be very clear in
6 this respect.
7 JUDGE CAMPBELL: Peter, did you have a
8 question?
9 MR. KEISLER: Judge Koeltl's question
10 covered what I was going to ask about.
11 JUDGE CAMPBELL: All right. One other
12 question. Gene?
13 JUDGE PRATTER: I don't see how there
14 would be a different result to your circumstance
15 about the snarky response from the defense saying
16 it's not a Redweld, it's more than a Redweld.
17 I don't care who has to bring it to the
18 judge's attention. A, it has to be brought to the
19 judge's attention by somebody. And I don't think
20 that the result would be different under the
21 proposal or from the current -- the current
22 situation.
23 MS. ANDERSON: Well, I --
24 JUDGE PRATTER: Frankly, I think that's
25 part of the problem with some of the -- you're too

1 young to remember this -- some of the
2 Queen-For-a-day issues that we've been hearing or
3 the examples we've been hearing. And that's a
4 good example. I don't see it being a different
5 outcome.
6 MS. ANDERSON: Well, my hope would be that
7 changes to Rule 34 would encourage more candid
8 exchange of this type of information. Frequently
9 I don't understand until after months of meeting
10 and conferring what objections are you withholding
11 documents on and what is the exact basis.
12 So Rule 34 would affirmatively require the
13 responding party to state the objections with
14 specificity from the outset, I would hope, and
15 then also identify which object -- what is the
16 basis of the objection. Are you withholding
17 documents because of privilege or is it an undue
18 burden? And if so, let's talk about that undue
19 burden.
20 I don't want defendants to produce, you
21 know, an incredible number of irrelevant
22 documents. I want to try to be reasonable. But
23 when I'm not given any information about the basis
24 of the burden, it's simply impossible to forge a
25 reasonable solution without court intervention.

1 And my hope is that Rule 34 will encourage more
2 candid exchange early on in the process.
3 JUDGE KOELTL: You support the change to
4 Rule 34?
5 MS. ANDERSON: Yes.
6 JUDGE CAMPBELL: All right. Thank you
7 very much for your comments, Mr. Anderson.
8 Ms. Bays?
9 MS. BAYS: Good afternoon. My name is Lea
10 Bays. I'm of counsel at Robbins, Geller, Rudman &
11 Dowd. Among other things, the firm represents
12 investors in securities class actions.
13 I strongly support the rule changes that
14 promote cooperation and transparency between the
15 parties as this is the best way to reduce the
16 costs of discovery. However, I believe that the
17 change in the scope of discovery does not further
18 these goals. The change is unnecessary and will
19 only spur adversarial and costly discovery
20 disputes.
21 The assertion that the change is necessary
22 because the proportionality language from
23 Rule 26(b)(2)(C) has not been sufficiently
24 utilized by courts or counsel is not accurate from
25 my experience.

1 I mainly -- in my practice, I mainly
2 consult with other attorneys or am involved in the
3 eDiscovery process. Almost every single
4 conversation I have is about burden. And every
5 discussion I have with opposing counsel is about
6 how to negotiate that burden while still being
7 able to gain access to the information that we
8 need. Almost all the discovery disputes that go
9 in front of judges has to do with that language.
10 So the fact that -- that there is some
11 impression that this isn't being utilized, I think
12 it is. I think that the rule is actually working
13 and we are using it in the meet and confer
14 process, which is where I think it should happen.
15 I don't think that the change will
16 actually lead to more tailored discovery and only
17 seeking the most relevant information. Instead, I
18 think it will lead to defendants trying to strong
19 arm unilateral and sometimes arbitrary narrowing
20 of the search methodology, which I think will go
21 against everything that we've been trying to do as
22 far as encouraging cooperation, in coming to
23 agreements on search terms, custodians, date
24 ranges, and sources of electronic information.
25 As already noted in many of the comments,

1 it seems that it shifts the burden. I understand
2 that some are confused as to why that is read, but
3 that is how people are interpreting it.
4 Any amendment should not encourage any
5 sort of blanket and unsupported burden arguments.
6 It should encourage cooperation and problem
7 solving among the parties to be able to expedite
8 the review process.
9 Any claim of burden should be
10 substantiated by the opposing party with actual
11 evidence. And I'm going to explain why this is
12 important and why it's important before getting to
13 court.
14 Yes, when you go to a judge, they will
15 have to present information about their burdens.
16 I think it's important for them to be doing it
17 beforehand, during the meet and confer process, so
18 we can actually avoid discovery disputes getting
19 in front of a judge.
20 I believe there was a question with how
21 things would be different or resolved now versus
22 if the language was changed and there was an idea
23 about a burden shifting in there.
24 If someone comes to me and says: This is
25 going to cost millions of dollars or it's

1 terabytes of data, I follow that up with requests
2 for actual information. What kind of sources are
3 you searching? What are your electronic systems?
4 Have you duplicated everything? If so, how have
5 you done that?
6 If you have search term hit lists, give me
7 an idea of that. And if there are ones that seem
8 to be overly broad, let's work with that and do a
9 sampling. Do you want to do a sampling of a
10 source that's extremely expensive to access? Then
11 let's do that. And I'm willing to cooperate on
12 that.
13 If the defendants are actually transparent
14 with this information and are willing to
15 cooperate, I can either see that the burden is
16 greatly exaggerated or completely unfounded or we
17 can work to solve the problem without limiting my
18 access to relevant information.
19 My fear is if the burden is even perceived
20 to shift, all of this transparency and cooperation
21 goes out the window.
22 This fear is exasperated by the removal of
23 the current language recognizing the relevance of
24 matters related to the existence, nature, custody,
25 condition of and location of documents. I've

1 already heard panelists at eDiscovery conferences
2 saying that after this rule change, they will no
3 longer have to provide any information on
4 electronic systems or any storage of ESI.
5 I think that is extremely dangerous and
6 goes -- that is what we turn to because as other
7 people have commented, defendants are often
8 extremely resistant to providing information on
9 their electronic systems or their burden until the
10 motion actually goes before the court.
11 If this is taken out, then there's nothing
12 that we can point to to incentivize defendants to
13 give us this information beforehand. It also
14 helps with being able to assess the adequacy of
15 the production before the production -- after the
16 production is made.
17 If the intent is not to shift the burden,
18 I will echo that this should be expressly stated
19 either in the rule or the comments. And that it
20 should also encourage transparency about
21 electronic systems and ESI storage.
22 I'm going to make one more point and then
23 I will stop. Regardless of where the
24 proportionality language is, I think that any
25 assessment of proportionality has got to include

1 the willingness of the producing party to use the
2 tools that are already available to them to reduce
3 the burden. Although ESI has increased, so have
4 the tools that we have available to us to deal
5 with them.
6 We have deduplication, we have analytic
7 tools of e-mail threading, concept searching,
8 clustering, and predictive coding, which I do not
9 find that a lot of defendants are even considering
10 using.
11 In addition, judges have encouraged and
12 promoted the idea of using 502(d) orders to reduce
13 the burden of privilege reviews. I don't see this
14 being utilized. We are often open to it, but it's
15 not being utilized.
16 For my -- if our -- I don't think that our
17 clients should be penalized by limiting the scope
18 of discovery when the producing party is not using
19 the tools available to reduce the burdens by other
20 means.
21 Thank you very much.
22 JUDGE CAMPBELL: Thank you.
23 Paul? And then Parker.
24 JUDGE GRIMM: Just a quick question. I
25 want to just make sure I sort of get an idea about

1 how the collection of proposed rule changes and
2 the existing rules that are not proposed to be
3 changed are all intended to work together and not
4 in isolation.
5 MS. BAYS: Right.
6 JUDGE GRIMM: So you've heard Mr. Barkett
7 say and a number of people referred, that since
8 1983, every plaintiff that asks for any discovery
9 request has certified, whether they realized they
10 have or not, that they have considered the
11 proportionality factors which are the exact same
12 factors that are referred to in Rule 26(b)(2)(C).
13 It hasn't been discussed here today, but
14 historically, the origin of Rule 26(b)(2)(C) was
15 the very next sentence after the scope of
16 discovery and it started off in 1983 as a
17 limitation on the scope of discovery and it was
18 only removed later. So it had started out exactly
19 where it was proposed to be put back.
20 When you are asking for information that
21 leads to this dialogue about whether it is
22 available or not available, and whether they've
23 deduped, or whether they've used computer-assisted
24 review, it is in the context of your asking for
25 Rule 34 responses.

1 The changes to Rule 34 say and a defendant
2 under Rule 26(g) certifies by making an objection
3 that they have done the proportionality analysis,
4 which means that if they are following that rule,
5 they have to have a basis, not just go fish. And
6 you now have a rule -- proposed change to Rule 34
7 that says if they make boilerplate objections and
8 they don't back it up, that they have an
9 obligation to do that.
10 Now, when they give you something that
11 which -- does not explain to you that they
12 deduped, that they've done the most efficient
13 means possible to be able to reduce it, and you
14 stand your ground and you go to a judge and you
15 say: Judge, they had to certify under Rule 26(g)
16 that they made a proportionality analysis.
17 They've not told me those numbers. They've made
18 boilerplate objections under Rule 34, I certified
19 as to why I think it's proportional, the ball is
20 in their court, they haven't done it.
21 How is it that you feel that that's going
22 to put you in a worse situation than you are now?
23 MS. BAYS: First of all, again, like I
24 said before, I would like to be able to take care
25 of this before going to a judge. I really think

1 that we've made extreme, extreme progress in being
2 able to cooperate with opposing counsel about
3 these issues and never have to make a discovery
4 motion. So I would like to be able to do it
5 before then.
6 And I don't think that that argument would
7 carry too much weight with defendants from what I
8 have seen.
9 So and as far as our certifications, we
10 make certifications based upon what our knowledge
11 is. We don't know what the other side's burden
12 is. They make certifications based upon what
13 their knowledge is. They may have a very
14 different idea about what is overly burdensome for
15 them.
16 So I think that it has to be backed up by
17 actual evidence to be able to assess that and look
18 at all of the factors together with all of the
19 information.
20 JUDGE GRIMM: Isn't that what you have in
21 34? So if they are not going to be persuaded
22 by -- they need to be specific under Rule 34.
23 They are not going to be persuaded by the
24 certification requirement under Rule 26(g). They
25 haven't given you the particularized information,

1 then what is it about that situation that gives
2 you a glimmer of hope that you are going to be
3 able to persuade them to cooperate without going
4 to the court, and if they get to the court, tell
5 me the judge that you've bumped into under those
6 circumstances that's going to go their way and not
7 yours.

8 MS. BAYS: I think right now we've
9 actually been able to get people to cooperate, I
10 really do. I -- if I am with a defendant who is
11 actually, you know, somewhat on board with
12 actually trying to reduce the scope of
13 discovery -- reduce the costs of discovery versus
14 just reducing the scope of discovery and limiting
15 my access to relevant information, we actually can
16 get cooperation.

17 But that's done through not by
18 specifically saying we are going to not give you
19 information based upon this request. It's based
20 upon the amount of data. It is based upon the
21 burden.

22 They are not saying they are not going to
23 give us information on this particular category.
24 They are saying: We will give you that
25 information, but we don't want to give you all of

1 it because it's too expensive.

2 So it's not like not having to do with
3 specific responses or objections to specific
4 requests. It's just generally, they want a cutoff
5 of that.

6 So I don't think that that language is
7 particularly helpful for this situation. And I
8 think that we really do need to be able to go
9 after that.

10 We need them to know that the burden is on
11 them to show this, so you might as well show it
12 now before we get to a judge, and that we can show
13 that this information regarding that is relevant,
14 because right now it's in the rules saying that it
15 is relevant. And you take that out, they will 100
16 percent use that against us and say that that is
17 not relevant.

18 I still get that and it's in the rules. I
19 still -- they are like it's not -- it's not
20 relevant to the claim or defense, I'm not going to
21 give you any of that information.

22 And then but usually when I point to the
23 rule and we discuss this and we discuss
24 cooperation, or I can say then that's fine, if you
25 don't want to give us that, then you can't make

1 any burden arguments. That's fine. And then,
2 therefore, that's how it's been working. And I
3 think it's been working well.
4 JUDGE CAMPBELL: Parker, did you have a
5 question?
6 MR. FOLSE: I was just going to ask
7 whether -- my experience is much the same as
8 yours, that when there is more information
9 exchanged about what a requesting party wants and
10 about what a responding party will have to go
11 through to get it, that there's a greater
12 likelihood of agreements being reached about how
13 to achieve what we've been talking about, which is
14 proportionality.
15 So I wondered whether you had given any
16 thought to specific changes that you think we
17 should be considering to promote that exchange of
18 information, to increase transparency, you know,
19 to use your word, which is a good word, that is
20 not reflected or that may be undermined by what's
21 before us right now.
22 MS. BAYS: I have always thought -- I
23 think that the -- the checklist, the meet and
24 confer checklists that have gone into effect in
25 the Northern District of California and now -- is

1 it Minnesota? That -- that discusses all the
2 different things that you should be discussing, I
3 don't think it gets as detailed as I would like,
4 and I would want to put in more things about
5 specifics about electronic systems.
6 But I think if you keep that in the meet
7 and confer process, and you make that mandatory
8 before anyone that you have to have discussed
9 these things and you have to have been given this
10 information before ever making a motion in court
11 whether to protect from discovery or to compel
12 discovery, that you should have exchanged all of
13 this information.
14 And there are certain district courts that
15 do require, you have to explain what sources
16 you're going to go through, you're going to have
17 to discuss electronic systems.
18 I find that incredibly, incredibly useful
19 in getting this conversation up front, and it
20 usually does avoid any disputes.
21 So I think if there was more of that or if
22 there was more explicit stuff in the 26(f) saying:
23 Look, you need to exchange all of this. And
24 that's part of when you say you've met and
25 conferred before filing a motion, then that

1 includes all of this. And I think that would be
2 really extremely, extremely helpful in avoiding
3 that.
4 JUDGE CAMPBELL: All right. Thank you
5 very much for your comments, Ms. Bays.
6 Mr. Sturdevant.
7 MR. STURDEVANT: Thank you, Mr. Chairman,
8 and members of the Committee. My name is James
9 Sturdevant. I'm the principal of the Sturdevant
10 Law Firm, a plaintiffs' law firm located in
11 San Francisco, California.
12 I'm pleased to be a participant and
13 witness at this hearing and hope to offer useful
14 testimony to the Committee as it considers whether
15 to adopt the proposal to amend Rules 26, 30, 33
16 and 34 of the Federal Rules of Civil Procedure.
17 By way of background, I've been in
18 practice actively since the spring of 1973, first
19 as a legal services lawyer in Connecticut and
20 later in California representing low and moderate
21 income individuals and classes of individuals,
22 principally in federal court during that time.
23 I specialize bringing cases concerning
24 statutory benefit programs, federal housing, and
25 unemployment programs, food programs, and

1 constitutional rights.

2 Thereafter I've been in private practice

3 since -- fully since 1980. And I have specialized

4 representing plaintiffs in class action litigation

5 involving a wide variety of subject matter claims

6 emphasizing consumer protection, unlawful and

7 fraudulent business practices, employment

8 discrimination, harassment, civil rights,

9 including the rights of institutionalized

10 individuals, Title IX, and the rights of Americans

11 with physical and mental disabilities.

12 I've litigated cases involving financial

13 services, insurance products and services, ERISA

14 claims, and claims of state, federal wage and hour

15 violations in employment.

16 I have tried and settled many class

17 actions exceeding a hundred million dollars and

18 nationwide injunctive relief.

19 I will provide a more detailed description

20 when I submit more detailed comments before the

21 deadline in mid-February.

22 Counsel who represent plaintiffs in

23 employment civil rights and consumer protection

24 litigation, as I do, almost exclusively handle

25 those cases on a contingency basis. That means

1 that they advance all or almost all of the costs,
2 including costs related to discovery.
3 These include obviously deposition
4 transcripts, videotapes where videotaped
5 depositions are taken, document production costs
6 imposed on the plaintiff, and expert witnesses
7 fees, among many others.
8 These are significant costs imposed on
9 plaintiffs and plaintiffs' counsel which deter any
10 but the irrational from taking more discovery than
11 they believe is necessary to preparing,
12 prosecuting and trying their case.
13 The proposed rule changes, like their
14 predecessors in 1993 and 2000, will, in my view,
15 incentivize defendants to oppose almost any
16 discovery beyond the significant limitations
17 proposed in the rules. Defendants will be
18 motivated to challenge relevance, breadth, and
19 scope issues much more aggressively, obliging
20 overworked judges and magistrate judges to resolve
21 multiple discovery issues frequently at an early
22 stage in the litigation when relatively little is
23 known to the plaintiff and to the court about both
24 the legal and factual issues involved in a
25 particular case.

1 The proposed amendments will impose
2 significant additional delays in the judicial
3 process as a result of motion to compels to get
4 discovery or to try to get discovery. And will
5 create additional significant costs which, as I
6 said, plaintiffs' counsel will be forced to bear
7 in order to obtain access to the information which
8 is essential to prove the case, obtain class
9 certification, and resist summary judgment on the
10 evidentiary basis required.
11 The proposals to restrict presumptively
12 allowable depositions from ten to five and
13 interrogatories from 25 to 15 send an unmistakable
14 message to federal judges and magistrates, let
15 alone defense counsel, that discovery should be
16 restricted both in numbers and categories.
17 So does the insertion of a specific new
18 proportionality standard in the rules. That
19 places a standard that obliges federal judge and
20 magistrates, not simply the lawyers who practice
21 before them, in deciding whether or not discovery
22 should be allowed.
23 The increased cost of motion practice and
24 the denial of necessary discovery will favor
25 existing -- pre-existing economic advantages of

1 defendants and the firms which represent them.

2 And as all of us know, in the great

3 majority of cases now being litigated in federal

4 courts involving civil rights, employment issues,

5 and consumer protection, the bulk of information

6 is possessed by the defendants, not the

7 plaintiffs.

8 Public litigation involving public as well

9 as individual rights must afford all parties with

10 equal access to available information so that the

11 courts and juries receive the information they

12 both need to decide the cases fairly.

13 Let me give you a couple of case examples

14 very briefly. One is an individual case and one

15 is a class action which would be adversely

16 affected by the rules.

17 The first is a multiparty, multidefendant

18 mortgage servicing fraud case litigated in the

19 Northern District of California. The plaintiff

20 alleged in the case that material information was

21 concealed from her about the owner of her loan.

22 And she was directed by the mortgage servicer to

23 communicate and deal solely with the owner of the

24 loan with respect to mortgage modification.

25 When she went to the entities that she was

1 told by the mortgage servicer owned her loan, each
2 of them denied it. And each of them concealed
3 material information that they were parties to a
4 trust instrument in which they had invested and
5 financial interest in the mortgage loan itself.
6 One of the entities to whom she was
7 referred, a national bank, did not tell her that
8 it was the master servicer under the trust
9 instrument and had plenary responsibility and
10 obligations to oversee all aspects of the trust,
11 including what the servicer did and didn't do.
12 The other entity also denied that it had
13 any ownership role in the loan and provided no
14 information to her.
15 There were five named defendants in the
16 case. In addition, there were employees and
17 contract workers of one of the defendants who
18 needed to be deposed as well as third-party
19 entities who took part in the transaction but were
20 not named defendants.
21 In sum, the plaintiff took more than ten
22 depositions, some multiple-day depositions of
23 percipient witnesses and would and should have
24 taken more but for the discovery cutoff in the
25 case.

1 The defendants resisted the production of
2 each and every document that the plaintiff asked
3 for in connection with Rule 30(b)(6) depositions,
4 and the defendants resisted the taking of a single
5 30(b)(6) deposition.
6 A motion to compel was required and after
7 extensive briefing. The magistrate judge
8 authorized all five 30(b)(6) depositions to go
9 forward and ordered the defendants to produce more
10 than -- each to produce more than 50 categories of
11 documents.
12 The documents and the depositions proved
13 the elements of the case with respect to aiding
14 and abetting the concealment of material
15 information, the financial incentives to each and
16 all of the defendants collectively.
17 The case also involved substantial
18 notarial fraud and what has been publicly called
19 robo signing. Robo signing is a practice where a
20 defendant in the process authorizes some
21 individual working for another entity to sign
22 documents on its behalf. We demonstrated through
23 the discovery and the deposition process that we
24 would not have otherwise gotten under the proposed
25 rules that robo signing had occurred, that the

1 person who authorized the foreclosure had no legal
2 authority to do so.
3 The second case involves a class action
4 involving what I call predatory lending. It's
5 presently pending in the Northern District of
6 California. And the class -- a statewide class
7 has been certified. The class consists of
8 thousands of borrowers. The substance of the case
9 is that they were offered loans of $2600 with
10 interest rates of 96 percent and above payable
11 over a period of 42 months.
12 If you do the math, you will find out that
13 the borrower, if they stayed -- if they paid fully
14 under the 42 months, would have paid nearly four
15 times the principal value of the sum loan.
16 The sole issue in the case on a classwide
17 basis of relevance here is unconscionability,
18 whether there were procedural elements of
19 unconscionability, surprise, oppression, and
20 whether the loans in terms of all of the factual
21 circumstances of their terms and what the lender
22 knew and what -- and when did the lender know it,
23 how much profit it was going to make, when were
24 the loans going to be paid off, all subject to
25 discovery. None of that information known to any

1 individual borrower or any collection of
2 individual borrowers.
3 We were -- we needed to take multiple
4 depositions. We ultimately took eight, more than
5 the pre-existing limit.
6 We also had a number of expert
7 depositions. The defendants took the depositions
8 of all three plaintiffs and nearly ten depositions
9 of absent class members. Those would not have
10 been allowed under the proposed rules.
11 Those are simply two examples. They are
12 exemplary. One is an individual case involving
13 multiple defendants. One is a class action
14 involving a single defendant.
15 But they aren't any different from
16 standard, routine employment discrimination and
17 harassment cases which you've heard a good deal
18 about in the hearings today and previously where
19 the facts and legal questions are inherently
20 complex and require and involve multiple
21 depositions to explore the facts and observations
22 of coworkers, managers, and human resources
23 personnel as well as the decision makers.
24 JUDGE CAMPBELL: Mr. Sturdevant, we are
25 beyond ten minutes, so if you could wrap up your

1 comments, that would be very helpful.

2 MR. STURDEVANT: Artificial prescriptive

3 limits in and of themselves are misdirected in my

4 opinion at the goal of obtaining justice in the

5 civil system and have an interim effect on the

6 judges charged with implementing them.

7 I urge you not to adopt them, and I will

8 submit much more extensive comments before

9 mid-April.

10 I'm happy to answer any questions that any

11 of you may have.

12 JUDGE CAMPBELL: Thanks, Mr. Sturdevant,

13 for those comments.

14 Mr. Rosenthal?

15 MR. ROSENTHAL: Only a few more to go.

16 Good afternoon. My name is John Rosenthal. I'm

17 an antitrust and commercial litigator by trade. I

18 also am a chair of Winston & Strawn's eDiscovery

19 information management practice group, a group

20 that last year spent over 100,000 hours on the

21 preservation, collection, processing, posting and

22 production of electronically stored information.

23 I'm also national eDiscovery counsel to

24 several Fortune 500 corporations in various

25 industries. And I am on the steering committee of

1 the Sedona Conference working group one.
2 At the outset, I would like to thank the
3 Committee and the AO's office for their dedication
4 and tireless work on these proposed rules. Your
5 work is both recognized and appreciated by many.
6 Overall, I strongly support the proposed
7 package. The rules changes will bring some
8 rationality to our discovery system in order that
9 we can stem the rising costs of eDiscovery and
10 particularly the burden of overpreservation.
11 I do disagree with those that have given
12 testimony and submitted comments that the
13 contemplated changes, particularly to
14 Rule 26(b)(1), will in any way close the doors of
15 the courts or inhibit the ability of anyone to put
16 on their claims or defenses of the case. That's
17 simply not the case.
18 This rules package is modest. It's
19 designed to reduce costs. It will not close
20 doors. To the contrary, I think it will open
21 doors to many litigants.
22 It's telling in my estimation that when
23 you look back two years, many of the people now
24 appearing before the Committee and submitting
25 comments opposed and said no to these rules before

1 they saw the first draft rule. I think that's
2 very telling.
3 I'll be submitting written comments on the
4 whole package, but I would like to focus my
5 comments here today on Rule 37. Proposed Rule 37
6 attempts to bring some reasonableness to the issue
7 of sanctions. The explosive growth of the ESI,
8 the absence of a uniform standard, and the
9 tactical use of sanctions or the threat of
10 sanctions by requesting parties has forced
11 corporations to overpreserve ESI. It has raised
12 the overall cost of litigation.
13 The proposed rule will allow corporations
14 to take steps to reduce the cost and burden of
15 overpreservation, establishing predictability and
16 providing protection from sanctions or the threat
17 of sanctions where a party acts in good faith.
18 With this said, I do suggest that the
19 proposed rule should be further refined to ensure
20 clarity, and as Robert Owen said this morning,
21 avoid wiggle room.
22 I cochaired the Sedona Conference's
23 drafting team for Rule 37 and was intimately
24 involved in all of the submissions the Sedona
25 Conference has made here. I would urge the

1 Committee to take a close look at those
2 submissions and in particular give careful
3 consideration to the alternative Rule 37(e)
4 proposed by the Sedona Conference in our December
5 2012 submission.
6 With respect to the Committee's instant
7 draft, I have some comments. On the issue of
8 curative measures, which has really flown under
9 the radar here, I do have some concerns.
10 And I would suggest that the current
11 version with respect to curative measures in
12 37(e)(1)(B) be abandoned.
13 The rule should exclusively focus and set
14 forth the sanctions standard predicated on the
15 showing of both culpability and prejudice. The
16 notion that sanctions and curative measures are
17 different is a false distinction unsupported by
18 decades of case law. In the overwhelming majority
19 of reported decisions, the sanctions handed down
20 by courts are now what the Committee is referring
21 to as, quote, unquote, curative measures.
22 The problem is compounded by recent
23 efforts by certain courts to describe such, what I
24 think to be terminating sanctions such as
25 permissive adverse instructions as no more than

1 curative or remedial measures. The Second
2 Circuit's decision in Malley versus Federal
3 Insurance Company is a prime example.
4 More importantly, the current draft allows
5 for the imposition of curative measures but
6 provides no standard as to what and when they
7 should be issued or can be issued. The absence of
8 such a standard in my estimation will have
9 negative consequences, including years of
10 litigation trying to determine when those measures
11 are appropriate, the proliferation of various
12 standards across the country requiring further
13 rules amendments down the road to have a uniform
14 standard, and I believe it will dramatically
15 increase the cost of litigation because I think
16 the curative measures provision will be used as a
17 tactical weapon by parties.
18 More importantly, the bifurcated approach
19 allows what I call the imposition of, quote,
20 unquote, de facto sanctions by some courts without
21 the showing of either culpability or prejudice.
22 In doing so, the curative measures exceptions
23 would substantially undermine the goals of this
24 Committee with respect to Rule
25 37(b) -- 37(e)(1)(B).

1 If the Committee is inclined to leave the
2 curative measures provision within the current
3 draft, then I would suggest that a showing of
4 prejudice should be required before any court can
5 order curative measures.
6 With respect to the remaining portions of
7 37(e), willful and bad faith, I believe both words
8 are subject to varying interpretations. When you
9 examine the case law, it's not just "willful" that
10 Learned Hand described as an awful word. When you
11 look at the cases, "bad faith" is being construed
12 by courts in different ways either to be
13 intentional or nonintentional.
14 I respectfully suggest that the court
15 should either adopt an entirely new term such as
16 the good faith term proposed by the Sedona
17 Conference or define both "willful" and "good
18 faith" and the suggested definition would be the
19 Sedona Conference definition that has been
20 referenced here today.
21 With respect to the Committee's question
22 on substantial prejudice, I would urge the
23 Committee that it should go further and define
24 substantial prejudice. And in particular, I would
25 offer the suggestion of "materially hindered in

1 presenting or defending against the claims in the
2 case."
3 Regarding the innocent loss provision of
4 37(b)(2), I would suggest that you cannot draft
5 rules for the exception or in this case what I
6 call the mythical unicorn. I would urge the
7 Committee to limit this provision in its entirety.
8 And instead, I would urge the Committee to
9 consider the absent exceptional circumstances
10 language that is suggested by the Sedona
11 Conference and put that as a predicate to (b)(1)
12 and eliminate (b)(2).
13 I would also ask the Committee to consider
14 whether there should be additional elements to be
15 considered in the rule with respect to the
16 issuance of sanctions. And in particular, whether
17 or not there should be a requirement that any
18 sanctions motion should be timely. Second,
19 whether a sanction motion should be predicated or
20 the -- the issuance of sanctions should be
21 predicated on the issuance of the least severe
22 sanction to remedy the failure to preserve, a
23 standard that is now in almost every circuit in
24 the country and is not referenced in this rule
25 package.

1 Finally, I would suggest a factor should
2 be considered that the -- whether or not the
3 sanction is proportional not only to the loss but
4 the culpability and the prejudice.
5 Regarding the factors, I do suggest the
6 factors should be further refined in order to
7 avoid both ambiguity and protracted litigation
8 over what those factors mean and I would refer the
9 Committee to the Sedona Conference's submission in
10 that regard.
11 Thank you very much.
12 JUDGE CAMPBELL: All right. Thank you,
13 Mr. Rosenthal.
14 Any questions? Parker?
15 MR. FOLSE: I wasn't sure that I
16 understood the point you were making about
17 curative measures versus sanctions. I think you
18 stated that the idea that there is a real
19 difference or a meaningful difference between the
20 two is a misunderstanding.
21 Are you suggesting that the rule be
22 changed so that even curative measures could not
23 be ordered by a court absent a finding of
24 culpability?
25 MR. ROSENTHAL: Yes, I would advocate

1 that. I think that what -- I do not
2 believe -- courts have available under other rules
3 a whole variety of curative measures. They could
4 change the scheduling order, they could order
5 additional depositions, they could grant costs,
6 under a variety of other rules.
7 I think when you introduce and try to
8 bifurcate between the sanctions and curative
9 measures within what has traditionally been a
10 sanction rule, 37(e), you're going to create a
11 whole host of problems, particularly when you
12 haven't really articulated a standard as to when
13 curative measures can be issued.
14 In terms of the false distinction, when
15 you look, and we have surveyed extensively all of
16 the sanctions cases, the reality is that 99
17 times -- 99 percent of the time, when a court
18 says, "I'm going to sanction you," what they do is
19 they offer additional depositions, they change the
20 schedule, they impose additional fees as the,
21 quote, unquote sanction, what the Committee is now
22 calling the curative measure.
23 I think the better approach is what we
24 suggested in Sedona Conference which is you lay
25 out the whole range of quote, unquote, curative

1 measures and sanctions and that you say: Here's
2 the range. And with respect to terminating
3 spoliation instructions and terminating sanctions,
4 you have to show culpability. And for the other
5 ones, you have to show prejudice and loss, but not
6 necessarily culpability.
7 JUDGE CAMPBELL: A follow-up question on
8 that. If Rule 37(e) specifically said that I
9 can't, for example, order additional depositions
10 as a curative measure without culpability, why
11 would I think I can go do it under another rule if
12 it is specifically prohibited by 37(e)?
13 MR. ROSENTHAL: I don't think anything
14 prohibits the court under Rule 16 or Rule 26 to
15 order additional discovery. For example, if
16 there's a question, for example, has there been a
17 loss of information. Courts now regularly order
18 additional discovery to determine that question,
19 not necessarily under 37, but either under their
20 inherent powers or other rules.
21 JUDGE CAMPBELL: Okay, thanks very much,
22 Mr. Rosenthal.
23 Rick?
24 PROFESSOR MARCUS: I'm sorry to interrupt,
25 but one thing that I understand you to be saying

1 and I want to be sure whether I'm right.
2 It's quite possible that if this Committee
3 decided to do something more like what the Sedona
4 submission urges be done, that would lead to the
5 need to republish and start over the public
6 comment period and put everything over at least a
7 year. You are saying you want that?
8 MR. ROSENTHAL: I'm not saying I want
9 that.
10 PROFESSOR MARCUS: Or are you saying you
11 want to go forward with what we could do now or
12 put things over at least a year to do something
13 very different?
14 MR. ROSENTHAL: What I am asking the
15 Committee is go back and look at the Sedona piece
16 and consider whether anything done in the Sedona
17 piece should be incorporated into this package. I
18 don't think that would require you to restart.
19 PROFESSOR MARCUS: I'm not saying it
20 would, but it might.
21 MR. ROSENTHAL: Well, we are certainly not
22 advocating that. I think the solution is if you
23 want to stay with this current package, either
24 take curative measures out or require some kind of
25 standard before the imposition of curative

1 measures, and in particular a showing of
2 prejudice.
3 JUDGE CAMPBELL: Okay. Thanks very much,
4 Mr. Rosenthal.
5 MR. ROSENTHAL: Thank you.
6 JUDGE CAMPBELL: Mr. Benenson?
7 MR. BENENSON: Good afternoon. My name is
8 Rich Benenson. I'm the national cochair of the
9 litigation practice group for Brownstein Hyatt
10 Farber Schreck. The firm is based in Denver,
11 Colorado. We have about 70 lawyers in our group
12 covering about 14 offices.
13 We are regularly practicing in state and
14 federal courts throughout the country. We
15 represent companies and individuals of all shapes
16 and sizes often as plaintiffs, often as
17 defendants. And I think we bring some interesting
18 perspective to today's dialogue.
19 As an initial matter I wanted to thank the
20 Committee for the opportunity to present our views
21 today for consideration in the final rules
22 package.
23 I would also like to thank the Committee
24 for its hard work and vision with respect to this
25 set of proposed amendments. They are welcomed by

1 lots and lots of folks and we hope that they get
2 enacted.
3 I would like to focus my comments today on
4 the proposed changes to Rule 26, and in particular
5 the proposal for the express insertion of the word
6 "proportional" to the rules.
7 I believe that the express insertion of
8 the term will lead to better and more efficient
9 litigation, and will ease some of the significant
10 financial burdens that litigants are currently
11 facing as part of the discovery process.
12 Importantly, I want to note, I do not
13 believe that the express inclusion of that term
14 will in any way have an impact on closing the
15 courthouse doors or unfairly restricting
16 discovery, at least necessary discovery.
17 My experience is quite to the contrary.
18 And I base that experience on a pilot program in
19 the Colorado state courts. The front range of
20 Colorado, Colorado Springs up to Fort Collins, has
21 initiated a pilot program. The thrust of the
22 program is to resolve cases, particular business
23 cases more quickly and efficiently. And as part
24 of that emphasis, there's a great focus on the
25 element of proportionality.

1 Rule 1.3 of the pilot program, for
2 example, provides that at all times, the court and
3 the parties shall address the action in ways
4 designed to assure that the process and the costs
5 are proportionate to the needs of the case. The
6 proportionality rule is fully applicable to all
7 discovery, including the discovery of ESI. And
8 the proportionality rule shall shape the process
9 of the case in order to achieve a just, timely,
10 efficient and cost effective determination of all
11 actions.
12 Under this rule, the parties are required
13 to address proportionality first in the initial
14 case management and the meet and confer that leads
15 to that case management conference. But it
16 doesn't stop there. That obligation to discuss
17 proportionality continues through the entirety of
18 the case.
19 And I can tell you from firsthand
20 experience that the process is working. I'm
21 currently lead counsel in a consumer protection
22 class action case. And we've heard a lot today
23 about class actions and the views of plaintiffs
24 and defendants in class actions.
25 And I thought it was interesting that one

1 of the former speakers talked about the desire for
2 more proactive communication. Well, my experience
3 is that an express requirement to discuss
4 proportionality facilitates that exact result.
5 In our case, because the parties were
6 required at the outset, even before the case
7 management conference, to discuss proportionality,
8 it forced the parties to become better informed
9 and more quickly informed about the scope of
10 discovery, the claims and defenses in the case,
11 and the theories and evidence that would support
12 those claims and defenses. As a result, there
13 were productive, proactive conversations about
14 proportionality before we even went to the court.
15 Why did that happen? Because that was
16 required under the rules. And that was a
17 departure from our normal practice.
18 The proportionality requirement has also
19 forced the parties to have continuing
20 conversations about the need for any supplemental
21 discovery or supplemental depositions or
22 supplemental written discovery.
23 As a result, in our case, the plaintiffs
24 have received what I believe and I think what they
25 believe to be much more focused and relevant

1 disclosures and discovery, and they received that
2 information at an earlier part in the case than
3 they would have otherwise.
4 As a result, the case is proceeding more
5 efficiently, our costs are down, and plaintiffs
6 have gotten the information that they need.
7 Now, to be clear, even with
8 proportionality, discovery in that case is
9 asymmetrical. But I want to be clear, I'm not
10 suggesting symmetric discovery through
11 proportionality. I think proportionality is
12 important as a concept, because it reinforces that
13 discovery scope is not a one-size-fits-all
14 proposition. Proportionality should work both
15 ways.
16 We've heard about large consumer class
17 actions. Proportionality in that context will be
18 different than in a smaller business-to-business
19 medium-sized case.
20 But by including expressly the concept of
21 proportionality into the rules, the parties will
22 be forced to focus on that issue. And the court,
23 I believe, will have more discretion and authority
24 to design discovery that is proportionate to that
25 particular case.

1 I want to reinforce that I don't think
2 proportionality only affects large class action
3 cases. Indeed, I submit it's even more important
4 in smaller and medium-sized cases.
5 The panel has heard today from several
6 folks, and I won't belabor the point. But
7 discovery costs have become a very large
8 consideration in litigation. More and more of my
9 clients are making decisions about resolution of
10 the case, not based on the merits, but based on
11 discovery costs and the desire to either avoid
12 them or because they can't afford them.
13 I submit that if that problem is solved,
14 access to the courts actually increases. And
15 civil justice and the quality of civil justice
16 actually increases.
17 Indeed, I am regularly in discussions with
18 my clients about budgets, and the single most
19 problematic piece of that is discovery. And I
20 think that that economic dynamic around discovery
21 affects both sides of the equation. Plaintiffs
22 and defendants are equally impacted in these
23 medium-size business-to-business cases. And I
24 would submit that that's where the proportionality
25 requirement is most needed.

1 I believe that by adding proportionality
2 requirements to the rules, that discovery costs
3 will be reduced, and the discovery phase of
4 litigation will be made more efficient. And I do
5 believe that this would benefit all
6 litigation -- all litigants and would enable more
7 access to civil justice in the courts.
8 Again, I would like to thank everybody for
9 their time, and I have a few minutes for
10 questions.
11 JUDGE CAMPBELL: Questions from anybody?
12 Yes, John?
13 MR. BARKETT: Is there any kind of report
14 from the Colorado experiment, the pilot product
15 that you described surveying the lawyers producing
16 information on how it's worked and the like?
17 MR. BENENSON: The pilot program is still
18 in its inception but the survey has started. They
19 expect it to be completed in about 12 months.
20 JUDGE CAMPBELL: Elizabeth?
21 MS. CABRASER: Under that program, are
22 there any presumptive limits on discovery or
23 other -- on depositions or other discovery
24 techniques?
25 MR. BENENSON: There are. One of the most

1 significant ones is no depositions of experts
2 unless the court finds, needs and grants
3 expressly.
4 JUDGE CAMPBELL: All right. Thank you
5 very much, Mr. Benenson.
6 MR. BENENSON: Thank you.
7 Mr. Cooke?
8 MR. COOKE: Good afternoon, thank you. My
9 name is Andy Cooke. I practice in a private law
10 firm called Flaherty Sensabaugh Bonasso. My firm
11 represents individuals, small businesses, large
12 businesses, and wide-ranging and diverse
13 litigation. My practice is primarily in product
14 litigation, representing manufacturers.
15 I'm thankful for the opportunity to speak
16 this afternoon as a practitioner with an active
17 civil trial practice for the past 20 years in
18 federal and state courts.
19 In the majority of my cases, I represent
20 defendants, but I also represent individuals and
21 commercial plaintiffs.
22 I appreciate and commend the extensive and
23 thoughtful work of the advisory committee. I know
24 it's late in the day, so I will be brief.
25 Because my experience demonstrates to me

1 that the interpretation and application of the
2 current discovery rules endangers the resolution
3 of many cases on their merits, I support in
4 particular the proposed amendments to Rule
5 26(b)(1), and I will focus my comments there.
6 The advisory committee's proposed
7 amendment to Rule 26(b)(1) would better define the
8 scope of discovery to allow discovery of any
9 nonprivileged matter that is relevant to any
10 parties' claim or defense, and proportional to the
11 needs of the case. This change would provide a
12 meaningful improvement compared to the overbroad
13 scope of discovery defined by the current Rule
14 26(b)(1).
15 The current overbroad scope is a
16 fundamental cause, in my experience, of the high
17 cost and burdens of modern discovery.
18 I also support the striking of the often
19 misapplied phrase, "relevant information need not
20 be admissible at the trial if the discovery
21 appears reasonably calculated to lead to the
22 discovery of admissible evidence."
23 This language has erroneously been used to
24 establish a very broad discovery scope. Even
25 though it was intended only to clarify that

1 inadmissible evidence such as hearsay, for
2 example, could still be within the scope of
3 discovery, so long as it is relevant. That
4 principle is as preserved in the proposed
5 amendment.
6 I believe the changes to Rule 26(b)(1)
7 will encourage thoughtful discovery. I believe it
8 will encourage cooperation and potentially may
9 result in fewer discovery motions because the
10 rules will provide clarity and what's permissible
11 in discovery.
12 The current location of the
13 proportionality language requiring responding
14 parties to object has failed to limit the problems
15 of overly broad discovery. Adding the requirement
16 of proportionality to Rule 26(b)(1) will advance
17 literally and practically the important principle
18 of proportionality in civil discovery.
19 Let me address just very briefly a problem
20 that I see on a week-to-week or month-to-month
21 basis in my practice.
22 Too often discovery is used as a -- to
23 gain tactical or settlement leverage for discovery
24 on discovery or for setting up requests for
25 sanctions. Fundamentally, the discovery rules

1 were adopted to promote a just outcome in a manner
2 that is speedy and inexpensive as can be possible.
3 The rules are there to assist the parties in
4 preparing for trial on the merits.
5 Discovery should be about the legitimate
6 search for necessary information to prepare a
7 party's case, not about a tactic to run up costs
8 or to gain a tactical advantage. There should be
9 no tolerance for tactical discovery, gamesmanship,
10 or discovery-on-discovery litigation, but it is
11 unfortunately too common under the existing rules.
12 I submit that the adoption of the proposed
13 revisions to Rule 26(b)(1) will deter parties from
14 engaging in overly broad, unduly burdensome and
15 vexatious discovery practices.
16 Too frequently litigants recognize that
17 the current rules can be used to drive up the
18 opposing party's costs and expose the opposing
19 party to sanctions.
20 Under current practice, parties justify
21 overbroad discovery requests by stating that such
22 requests may lead to the discovery of admissible
23 evidence, ignoring the rule's express invocations
24 of relevance, and identifying a policy that's
25 expressed nowhere in the rules themselves that

1 discovery should be limited and broad.

2 By focusing on the claims and defenses, by

3 removing the "reasonably calculated" language and

4 requiring that discovery be proportional to the

5 needs of the case, parties would be required to

6 focus on that discovery that is necessary to

7 assert a claim or to present a defense. That is,

8 they will be required to contemplate discovery

9 necessary before the discovery is propounded.

10 The Rule 26 amendments represent a

11 substantial step toward providing judges with

12 well-defined and applicable guidance and in

13 reversing the far too prevalent misconception that

14 liberal or unlimited discovery that is reasonably

15 calculated to lead to the discovery of admissible

16 evidence effectively means that discovery is

17 unlimited by anything other than well-grounded

18 privilege claims.

19 Finally, and with due deference to Justice

20 Pullan from Utah, most states have adopted the

21 Federal Rules of Civil Procedure in whole or in

22 part. And many would be informed by the action

23 taken to amend the Federal Rules of Civil

24 Procedure.

25 Accordingly, the adoption of the proposed

1 amendments could have significant effects on
2 discovery practices in state as well as in federal
3 courts.
4 Thank you for the Committee's efforts to
5 reform the Federal Rules of Civil Procedure, and I
6 support the Committee's aim to create procedures
7 that require litigants to focus on the merits of a
8 case.
9 I am happy to take any questions.
10 JUDGE CAMPBELL: Questions?
11 All right, thanks very much, Mr. Cooke.
12 Mr. Scruggs. You get the last word,
13 Mr. Scruggs.
14 MR. SCRUGGS: Thank you. And along those
15 lines, as the last witness, I hope to provide an
16 electric conclusion to today's events, without
17 repeating any arguments that you've heard so far,
18 or at the very least to cover that repetition in
19 my slight southern drawl to make it more appealing
20 to you.
21 But accent and repetition aside, my name
22 is Jonathan Scruggs. I'm here on behalf of
23 Alliance Defending Freedom and to express our
24 opposition to the proportionality language that
25 you've heard so much about and some of the

1 lowering of the presumptive discovery limits that
2 has also been discussed.
3 Rather than repeat a lot of the arguments
4 that you've heard from many of the plaintiffs'
5 counsel, I would like to reiterate those, but
6 really kind of take it from our own I think rather
7 unique perspective of what my organization does.
8 Alliance Defending Freedom is a nonprofit
9 national legal organization that advocates for
10 religious liberties. And one way we do that is
11 file civil litigation on behalf of individuals and
12 organizations. We do so for free against large
13 governmental entities who have violated or
14 potentially violating constitutional rights.
15 So, for example, we are currently
16 representing Conestoga Wood Specialty Corporations
17 before the Supreme Court in their challenge to the
18 Affordable Care Acts abortion pill mandate,
19 alleging that those -- that that mandate violates
20 RFRA.
21 But we don't just represent plaintiffs.
22 We also represent defendants who attempt -- who
23 are attempting to accommodate religious liberties.
24 Again, for example, we are currently representing
25 the Town of Greece, New York, before the Supreme

1 Court in their efforts to open up their latest
2 legislative sessions with religious invocations.
3 So based on this rather, I think, unique
4 experience, we wish to offer our opposition to
5 really the proportionality language is what I like
6 to focus on and the other discovery limitations.
7 And our fear really in the context of the cases
8 that we do, cases that really involve almost zero
9 monetary relief or low monetary relief. In a
10 typical case we do a First Amendment case, it
11 usually involves a First Amendment violation and
12 no other physical injury. And in that context,
13 usually litigants can only get nominal damages.
14 In fact, at most usually they can get one dollar.
15 So faced in the situation where there is
16 literally very low monetary value, we greatly fear
17 what a proportionality analysis will bear in this
18 context, especially when that analysis is being
19 made in the first instance by defendant's counsel,
20 who we often find don't understand really the
21 vital liberties at stake and the cases we do.
22 We've heard so much today about the
23 multi-billion dollar lawsuit, and that's really a
24 big impetus. But oftentimes I've personally found
25 that when either a defendant or sometimes even

1 when a judge involves a -- encounters a case that
2 we do, it's kind of a bit confusing because our
3 clients are not seeking damages in an extreme
4 degree, and they can't be settled on that basis.
5 So in that context, we fear that
6 defendants will just immediately object to seeing
7 that we are only seeking one dollar, to object
8 that it's not proportional and to really limit our
9 ability to protect civil liberties, not just on
10 behalf of our clients, but really on behalf of
11 everyone.
12 So again, I'm going to be brief since I'm
13 the last person. And end my conclusion -- end my
14 statements there.
15 Thank you.
16 JUDGE CAMPBELL: Mr. Scruggs, as you know,
17 in the factors that are specified in the proposed
18 proportionality language we've included the
19 importance of the issues at stake in the action,
20 which is already in 26(b)(2)(C).
21 Why is it that you don't think you could
22 argue that point if you're faced by a defendant
23 who says he shouldn't get any discovery, he's only
24 seeking nominal damages?
25 MR. SCRUGGS: Well, I think oftentimes

1 cases unfortunately get boiled down to monetary
2 things. I think even today, look at who's come
3 before this panel. It's people representing large
4 clients with a lot of money at stake.
5 And so I think even before a judge, but
6 even more so, with the defense counsel who has to
7 make that determination initially and then object
8 and then we have to bring the motion to compel, I
9 don't see it as worthwhile, or at least it seems
10 very risky to me unless the language is more
11 clarified in terms of importance, not just in
12 monetary terms being the issues, but being
13 importance of issues whether in constitutional
14 terms or in other terms.
15 JUDGE CAMPBELL: John?
16 MR. BARKETT: In the 1983 amendment that
17 is what is now (b)(2)(C) as Judge Grimm pointed
18 out earlier, it was originally part of (b)(1).
19 And the advisory committee note has a sentence
20 that reads that the rule recognizes that many
21 cases in public policies fear, such as employment
22 practices, free speech and other matters may have
23 importance far beyond the monetary amount
24 involved, the court must apply the standards,
25 referring to what is now the (b)(2)(C) standards,

1 in an even-handed manner that will prevent use of
2 discovery to wage a war of attrition or as a
3 device to coerce a party whether financially weak
4 or affluent.
5 If you haven't had a problem under the
6 existing regime, why is it you think you would
7 have one under the proposal?
8 MR. SCRUGGS: I think at least in
9 practical terms, shifting the language forward, I
10 think potentially, I don't want to say alerts the
11 defense bar, but essentially reinvigorates the
12 defense bar to argue in strict proportionality
13 terms and in monetary terms.
14 That's, I think, the concern, that in
15 theory, while there may not be a theoretical, I
16 think, problem, I think in practice, that could
17 come up more often. And that's what we are afraid
18 of with the shift in the language to at least make
19 it more explicit.
20 JUDGE CAMPBELL: Any other questions?
21 Parker?
22 MR. FOLSE: Is your solution to
23 the -- this fear that even though the standards
24 may be in the rules already, that this will send
25 some sort of a signal that will make it -- that

1 will effect some change in the landscape, is your
2 solution to recommend that the language not be
3 moved from where it's currently located into
4 (b)(1), or is your solution to add something to
5 the Committee note that no such change would be
6 intended, or what exactly would you have us do?
7 MR. SCRUGGS: Well, I think the preference
8 would be to remain the same, but we would also, as
9 a secondary request, do the second thing that you
10 advised, I think, would be our secondary
11 preference along these lines.
12 I'm glad that I am eliciting so many
13 questions as the last speaker today. We can just
14 be here all night maybe.
15 JUDGE CAMPBELL: On that note, does
16 anybody have another question?
17 Mr. Scruggs, thank you very much for your
18 comments.
19 MR. SCRUGGS: Thank you very much.
20 JUDGE CAMPBELL: And thank you to
21 everybody who's been here. We very much
22 appreciate this input. We look forward to
23 receiving your continuing input.
24 And we will stand adjourned.
25 * * *

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3 C E R T I F I C A T E
4
5 I, MERILYN A. SANCHEZ, do hereby certify
6 that I am duly appointed and qualified to act as
7 Official Court Reporter for the United States
8 District Court for the District of Arizona.
9 I FURTHER CERTIFY that the foregoing pages
10 constitute a full, true, and accurate transcript
11 of all of that portion of the proceedings
12 contained herein, had in the above-entitled cause
13 on the date specified therein, and that said
14 transcript was prepared under my direction and
15 control.
16
17 DATED at Phoenix, Arizona, this 15th day of
18 January, 2014.
19
20
21
22 Merilyn Sanchez, CRR, RMR
23 Official Court Reporter
24 401 W. Washington, SPC 37
25 Phoenix, AZ 85003

1 (602)322-7250

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