TRANSCRIPT OF PROCEEDINGS

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

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BEFORE THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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RULES OF CIVIL PROCEDURE)
JUDICIAL CONFERENCE ADVISORY)
COMMITTEE ON CIVIL RULES)

Friday,
February 7, 2014

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

BEFORE: HONORABLE DAVID G. CAMPBELL, CHAIR

APPEARANCES:

Committee Members and Reporters:

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

Speakers:

MATTHEW CAIRNS, Gallagher, Callahan & Gartrell
DONALD H. SLAVIK, Robinson Calcagnie Robinson Sharpiro Davis, Inc.
RALPH DEWSNUP, Utah Association for Justice
MAJA C. EATON, Sidley Austin LLP
BECKY KOURLIS, Institute for the Advancement of the American Legal System
MICHAEL O'KEEFE COWLES, Equal Justice Center
JOHN W. GRIFFIN, Marek, Griffin & Knaupp
MARY NOLD LARIMORE, Ice Miller LLP
WILLIAM B. CURTIS, Curtis Law Group
J. MICHAEL WESTON, Lederer Weston Craig PLC
SUJA A. THOMAS, University of Illinois, College of Law.
MARK P. CHALOS, Lieff Cabraser Heimann & Bernstein
BRADFORD A. BERENSON, GE
MICHAEL J. HARRINGTON, Eli Lilly and Company
WILLIAM T. HANGLEY, Hangley Aronchick Segal Pudlin & Schiller
GREGORY C. COOK, Balch & Bingham LLP
MICHAEL C. SMITH, Texas Trial Lawyers Association
THOMAS R. KELLY, Pfizer, Inc.
JOHN H. MARTIN, Thompson & Knight LLP
LEIGH ANN SCHELL, Kuchler Polk Schell Weiner & Richeson, LLC.
DAVID WERNER, Shell Oil Company
MICHAEL L. SLACK, Slack & Davis, LLP
STEVEN M. PUISZIS, Hinshaw & Culbertson LLP
MEGAN JONES, Hausfeld LLP (on behalf of COSAL)
WILLIAM H.J. HUBBARD, University of Chicago, the Law School
LEE A. MICKUS, Snell & Wilmer
DONALD J. LOUGH, Ford Motor Company
GILBERT S. KETELTAS, Baker Hostetler
DAVID A. ROSEN, Rose, Klein & Marias LLP
STUART A. OLLANIK, Ollanik Law LLC
J. BERNARD ALEXANDER, III, Alexander Krakow & Glick
CONOR R. CROWLEY, Sedona Conference Working Group
NEVA LUSK, Spilman Thomas & Battle, LLP
KARL R. MOOR, Southern Company

Speakers: (Cont'd.)

SUSAN M. ROTKIS, Consumer Litigation Associates, PC
DAN REGARD, iDiscovery Solutions
JOHN D. MARTIN, Nelson Mullins Riley & Scarborough LLP
ASHISH S. PRASAD, Discovery Services LLC
Ariana TADLER, Milberg LLP JENNIFER
HENRY, Thompson & Knight DAVID
KESSLER, Norton Rose Fulbright
JOHN F. SULLIVAN III, K&L Gates LLP
DANYA SHOCAIR REDA, New York University

BRIAN P. SANFORD, Sanford Bethune

P R O C E E D I N G S.

(9:00 a.m.)

HON. CAMPBELL: Good morning, everybody. Welcome to sunny Dallas. I was telling folks we picked this city because of its good weather in February.

We're glad you're all here. We know that we have lost at least one speaker who can't make it because of the -- couldn't make it yesterday because of the weather, and we hope we haven't lost others.

Welcome to all of the members of the committee. It's good to have all of you here as well.

Judge Sutton, I know, couldn't get a flight until this morning after his was canceled, but he should be here in an hour or so.

We very much appreciate those of you who come to address the committee today. We greatly value the comments that you will be making, and the input that you have provided.

We are in the process of reviewing all of the written comments. As of yesterday we had 532 and counting. It's a challenging job to stay abreast of those with our day jobs, but we are going to review them all. There is a lot of thought reflected in those comments, as well as we know in the comments that are made today.

As you know, we have got 40 -- well, actually now 39 folks who are going to be addressing us today, so it's important that we stay on schedule. We have five minutes allotted for you to make your comments, and then five minutes for committee questions.

If you run over your five minutes a few minutes, that's fine, but we will try to end every speaker's time at the lectern by about ten minutes so that we get everybody through in a reasonable amount of time today, and we have a chance to hear from all of you.

We have some lights on the lectern up there. You will get a yellow light when there is one minute left -- two minutes left, and a red light when five minutes have arrived.

But as I said, if you go over that by a few minutes, that's fine, we will just shorten our questions to make sure we get you on and off in about ten minutes.

So with those introductory comments we are going to start with Matthew Cairns.

MR. CAIRNS: Cairns.

HON. CAMPBELL: Cairns. Welcome Mr. Cairns.

MR. CAIRNS: Thank you very much.

HON. CAMPBELL: Let me mention one other thing as you begin.

Mr. Cairns, if you could, when you begin tell us if there is an affiliation that is relevant to the comments, if you are a member of a group that you canvassed. We would be interested as well in your area of practice if you are a practicing lawyer, or your focus, if you're a professor.

All right. Please, Mr. Cairns.

MR. CAIRNS: Thank you, your Honor.

My name is Matthew Cairns. I'm with the Concord, New Hampshire law firm of Gallagher, Callahan & Gartrell.

For 27 years it's been my privilege and honor to be representing and defending the interests of individuals, corporations and municipalities in civil litigation.

This is my second time before the committee. In 2009 I was here as the first vice president of DRI, the voice of the defense bar.

I'm now a past president of DRI, and despite my youth I am referred to as a senior advisor. It's disconcerting.

Later today you will be hearing from two DRI officers, President Mike Weston; and secretary/treasurer, Steve Puiszis.

I, however, am here today to speak to you as a lawyer who has to explain discovery issues to individuals: small businesses, municipalities, school districts in New Hampshire.

First, because I'm batting the league off, let me thank you all on behalf of those who have come before me, and those who will be here later this afternoon.

The committee is tackling important issues that have in many ways undermined a level playing field that our individual and corporate citizens expect of our court system.

Discovery disputes consume time and resources that should be spent by plaintiffs and defendants in litigation, not in discovery fights.

More often than not in my cases a litigant cannot even afford discovery disputes, and in the case of municipalities the intrusion into their individual volunteers' lives that discovery disputes create.

One of my towns, which is above the notch in New Hampshire, that's the northern counties of the state, has only one computer in the entire town hall. I had a case with them which has required me to put a hold on ten volunteers' personal computers. Those are computers that their wives and children use on a daily basis.

Needless to say, the intrusion into privacy is great, and needless to say, the push for having me resolve a meritless case simply to protect those volunteers' privacy is very strong.

I read with interest the comments from the earlier hearing, and some of the written submissions on both sides of the debate. To my reading, nothing has changed, nothing that has been proposed should cause this committee to change course.

The LCJ and others, including Professor Hubbard, who will be speaking here later today, will be providing empirical verifiable evidence of what is wrong with the current state of discovery practice under the rules. They have also explained how the changes you propose will solve those problems.

Those opposing change seem to rely on hyperbole and hypothetical, the claim that without unfettered discovery they will be unable to adduce the evidence to support their claims, notwithstanding the requirements of Rule 11 out the outset of their case.

They also fear unethical conduct by the Court, responding parties that will hide important evidence or try to bury people with unnecessary production.

What the opponents to change did not explain, perhaps because they cannot, is how the proposal provisions will so radically change discovery that the changes should be rejected.

The committee's revisions to Rule 26 emphasize proportionality, and in doing so promote discovery tailored to the case, discovery that will advance the ball.

The proportionality approach will basically share the burden on litigants. Both the requester and the responder will have to assess, and perhaps demonstration of motion be required, whether the Court can -- excuse me -- whether the cost and/or breadth of discovery sought is truly relevant to the claim or defense. This is a two-way street. It's not uniquely a plaintiff or defendant. It's an effort.

To that point, let me speak briefly to Rule 16(b)(3). That's the -- as you know, that's the section where you give the judge the opportunity to include in his discovery order a requirement that folks first reach out to him before -- or her -- before they file a discovery motion.

Chief Judge Leplante in the New Hampshire district court has that rule. His colleagues do not, and I'm not sure why they do not, because every time I have had a discovery dispute with Judge Leplante we have had to call him up on the phone, both sides get on a conference call with him, and he then applies the rules of proportionality and other things to the Court.

The things that you're asking, and we're here emphasizing, he takes that responsibility very seriously, and uses it as part of his case management docket.

Similarly, if he puts a limit on depositions, and you're getting ready to go over that limit, you call him up, he gets involved in the case. He gets an understanding of what's happening, and helps creates opportunities for judicial touches on the file rather than a structuring conference, an adversarial motion and then a trial.

Your proposed changes are not so radical, and do not spell the end of discovery, in my opinion. The changes strengthen what is already there, and what changes may do is spell the end of abusive and ineffective discovery as is often conducted today. And in doing so, it will create the dawn of an age of discovery as it should be conducted. I think we should all welcome that sunrise.

I'm 11 seconds over. Thank you.

HON. CAMPBELL: Thank you, Mr. Cairns.

Are there questions from any members of the committee?

Solomon.

HON. OLIVER: Good morning.

MR. CAIRNS: Good morning.

HON. OLIVER: Do you think the rules change the obligations of the parties or alter them with regard to the proportionality -- in regard to proportionality?

MR. CAIRNS: I think the proposed change, your Honor, does not change the proportionality requirements that exist.

What it does is it emphasizes what most people forget is already there. By moving them up into 26(b)(1) it gives proportionality the emphasis that I believe it should have rather than have them be buried in a small Roman numeral phrase several lines below.

HON. CAMPBELL: Parker.

MR. FOLSE: As a result of that change would you anticipate using lack of proportionality in your practice to a greater extent as a basis for objecting to discovery requests than you do now with the current placement language?

MR. CAIRNS: I believe -- I believe I would.

I will confess that in my practice in New Hampshire we're not seeing a lot of the old breadth

of discovery abuse that a lot of other people are seeing.

But with regard to municipalities and other things, I would be able to point to it. I think the judges would be more aware of it. Not that they are not aware of it now, but it would be highlighted for them, and I would highlight it earlier in the process.

So, yes, I would probably use it more.

HON. CAMPBELL: Other questions?

PROF. MARCUS: You mentioned not only the town computer, but something like ten personal computers were subject to a hold.

MR. CAIRNS: Yes.

PROF. MARCUS: How would these rule changes change that?

MR. CAIRNS: The reason why the personal computers were all put on hold were because the plaintiff elected to sue the volunteer members of the board in their individual capacities. And the meritless part of that claim nevertheless was so far down the road for me to be able to address that, that we had to lock down these computers early on.

It would have been nice if we had had an opportunity to address the proportionality of those claims before the litigation hold was put on, if that makes some sense, but I think that in the end what it did is it -- the point of the example was a rogue settlement to protect privacy as opposed to the merits of the case.

That's the same way -- if it's a million dollar discovery fee for a corporation, this was a -- virtually no cost, but so invasive to the personal privacy of the people that the breadth of whole cause of the problem that caused my client to put pressure on the insurance company to resolve the case.

HON. CAMPBELL: Jeff?

HON. SUTTON: I had a similar question.

HON. CAMPBELL: Other questions?

(No response.)

HON. CAMPBELL: Donald Slavic.

MR. SLAVIC: Good morning, your Honor.

My name is Don Slavic. I'm an attorney from Steamboat Springs, Colorado. I am a senior counsel for a firm in southern California.

I have practiced for 33 years, almost exclusively representing injured consumers in products liability, aviation and utility negligence cases.

I have handled cases in more than 30 states in both federal and state courts, and I spent much of the 2010 to 2012 period as a member of plaintiffs' steering committee for the Toyota Unwanted Acceleration MDL venue in federal court in southern California.

I'm admitted to the bars of four states, and over a dozen federal district and circuit courts, and I am a licensed professional engineer.

I have filed comments on behalf of the American Association for Justice Products Liability Section, a group I have chaired in the past.

In my comments I filed last month I addressed four areas of witnesses for which we need depositions. I want to address the limitations -- proposed limitations regarding the presumption of limits on depositions, interrogatory and request for admissions.

I addressed four areas in my comments that dealt with fact witnesses, manufacturers, employees, experts and damages. One I forgot, after going back and looking at my most recent trial, was an area that is very important in our area of products liability litigation. That's other similar incidents, we call them OSIs, and the witnesses necessary to generate the evidence we need to get to trial in those areas.

In products liability cases one of the most important questions in the minds of jurors is whether or not other consumers have been affected by the alleged defective condition of the product. Has it happened to anybody else, is what they want to know.

Therefore, it's important for us to obtain information from the defendant about other similar incidents, and to lay the predicate foundation for the introduction at trial.

This usually requires discovery in especially depositions. Depositions can be taken of the persons who have experienced the alleged problem, and sometimes independent witnesses to their events.

In my experience one or two are not enough, and often five or more OSIs need to be proven up with a corresponding number of depositions.

Request for admissions and interrogatories are also used to obtain information to prepare admissible foundation for these OSIs.

This is not a theoretical issue, but a real practical one that I and members of the AAJ Product Section found in most of their cases.

Setting a presumptive limit of five depositions in a case or 25 requests for admissions or 15 interrogatories only cause us to seek permission from the Court in most cases for waiver of such limits, higher limits, resulting in more motion practice, additional expense on the part of both parties and delays in adjudication of the claim.

Of course, this does not comport with the provisional Rule 1 that the rule should be construed and administered to secure that justice be the inexpensive determination of every action proceeding. With regard to those limitations, I ask that no changes be made to the current rules.

The other area I wish to address is the proposed change to Rule 26(b)(1) regarding the scope of discovery.

After many decades we have a well understood scope, any nonprivileged matter relevant to the action, and not necessarily admissible, will be part of discovery.

Dropping this and substituting some kind of proportionality test here, as opposed to the later rules, will only be to years and years of litigation over the five factors in the proposed amendments.

What's the definition of a known controversy in a contested products liability case, or in economic and non-economic damages?

How does one judge the importance of the issues at stake?

It's discovery of the resources the parties need before further discovery is done, which is take more depositions.

How can parties ever agree on the importance of discovery to resolve the issues, and what factors affect the expense versus benefit analysis?

The previous speaker talked about, quote, "meritless claims." How does one judge whether something is meritless in the beginning?

I certainly am -- given Rule 11 don't want to file meritless claims.

The proposed amendment only creates tremendous ambiguity and ancillary litigation. Again, increasing the time and expense of the parties, the burden on the Court and further delaying in getting to trial.

The balance of the rules already specifically address cost issues have been problematic enough, but please don't add to it.

I can give you an example of a recent case that I tried in federal court in May of this last year. It was a relatively simple products case with five vehicle occupants. One deceased.

We had to take depositions of six lay witnesses, ten expert witnesses, two 30(b)(6) witnesses, five OSI witnesses. Only 20 interrogatories were used. But, again, 20, not 15.

The defendant produced documents on two hard drives in a searchable format. Note that they did this because they had been sanctioned in a prior case for producing that same material in an unsearchable format, making it so difficult that no one in a prior case that the party plaintiffs could not even ascertain this information.

However, my most productive discovery was the identification of the defendant of other similar incidents and claims, which led me to other attorneys with other similar claims in other prior cases which made it much more expedient and efficient for me to pursue the case.

I see the light is on. I just want to wrap up by saying, over 30 plus years I have seen a decline in jury trials, and I know why.

It's because of the motion practice and the expense. We have put in Daubert, as well as a whole other layer of expense and time. We added Twombly and Iqbal, another layer of expense and time.

Please don't add another layer of expense and time by putting in these rules which will lead to further litigation and motion practice.

Thank you.

HON. CAMPBELL: All right. Thank you.

John.

HON. KOELTL: Let me ask.

How many depositions did you end up taking in the Toyota MDL?

MR. SLAVIC: In the Toyota MDL, let's see. I know we had 280 days of depositions. But it was a multi-district litigation, and it became a class action consolidation of somewhere around 250 class actions, and somewhere north of 150 or 200 individual personal injury cases.

HON. KOELTL: And in the other case you mentioned --

MR. SLAVIC: The other case I mentioned was a single personal injury wrongful death case. And in that case depositions -- we had five to a side, two, seven, thirteen, twenty-three depositions.

HON. KOELTL: And --

MR. SLAVIC: There was no motion practice.

HON. KOELTL: And the presumptive limit is now ten?

MR. SLAVIC: Ten.

HON. KOELTL: That didn't prevent the parties from agreeing without motion practice to have in one case 280 days, and in the other case 23 depositions?

MR. SLAVIC: In the first case we had pushed for it at the beginning, and it was understood

what needed to be done.
There was an agreement by the parties with the Court understanding the importance of the issues in that one. That was a large case.
This other one, because the Court -- because the parties were experienced and knew what it took to take the case and prepare the case, it was understood.
But moving from ten to five you're just putting down further lines, is my point, is that you're now saying discovery is not important.
HON. KOELTL: But you don't -- you don't really think that if either of those cases, moving from ten to five would have affected the other side, or the judge, in the number of depositions, do you?
MR. SLAVIC: In the Toyota case, I might -- I'm not going to address. That's a whole different issue.
But with regards to this other case, I think it would have put them in a better position to say you only get one 30(b)(6) instead of two 30(b)(6)s. You know we are not going to let you take depositions on both sides.
We lose the bargaining position. We lose the ability to deal with them. Again, further motion practice. I can see the motion practice. The balance of -- the proportionality is going to be difficult enough.
The reason that we try one federal court case every other year or so now, as opposed to multi-cases each year back in the 1980s when I started practicing, is because of this motion practice.
HON. CAMPBELL: Other questions?
(No response.)
HON. CAMPBELL: I have a question on your comment, although it was brief, on requests for admissions.
Mr. SLAVIC: Yes, sir.
HON. CAMPBELL: Organ and Arizona have put limits on request for admissions of -- I think, 25 in each state. Both states had surveys conducted before the Duke conference that gave rise to a lot of these ideas.
And in the surveys in both states a majority of the lawyers said they wouldn't change that as long as they could litigate perfectly effectively with 25 or fewer requests for admissions.
Could you give us your thoughts on why you think that limit would create problems?
MR. SLAVIC: Well, interestingly, the limits may not cause much problem, because when we file a complaint, as one of my colleagues noted, our complaint is a set of requests for admissions essentially.
The defense may be more harmed. I get requests for admissions from the defense, 40, 50, 60, but if it helps narrow the scope of the issues going to trial, I think they're important.
In putting a limit on them, my concern is that it's going to lead to, again, other problems, other problems of either other discovery needed, more motion practice, more issues have to go to trial that shouldn't have to go to trial.
HON. CAMPBELL: All right. Thank you very much, Mr. Slavic.
Ralph Dewsnup.
MR. DEWSNUP: My name is Ralph Dewsnup. I have practiced law in state and federal courts in Utah for the past 36 plus years.
I am also admitted to practice before the Federal Circuit Court of Appeals for the Tenth Circuit and the U.S. Supreme Court.
The focus of my practice is representing plaintiffs in personal injury matters. Principally those that involve medical malpractice and defective products.
My firm is Dewsnup King & Olsen located in Salt Lake City, and we have 11 lawyers.
I'm testifying today on behalf of the Utah Association for Justice. I have served as president of its predecessor organization for two years, from 1990 to 1992.
I also served on the Utah Judicial Council's Committee on Improving Jury Service from '97 to 2004.
And on the model Utah Jury Instruction Committee from 2005 to 2007.
I was a member of the National Board of Trustees for American Inns of Court Foundation from 1988 to 1998. I served on its executive committee for the last four years of that period.
I'm also a retired United States Air Force Brigadier General having served in the Utah National Guard.
The UAJ is opposed to the proposed changes to the Federal Rules of Civil Procedure, and asked that I appear and set forth some of the reasons why.
My testimony will be supplemented with written comments that will be filed with the committee.
As I reviewed the testimony and position papers of some of those that appeared before this committee, I'm convinced that many of my own observations and opinions have already been expressed.

What concerns me, though, is the distinct impression that I have that the train has left the station, and that something is going to be adopted. It's just a question of what.

I have experienced a similar phenomenon and seen the erosion of the rights of victims of medical malpractice victims in my state as legislators and opinion makers bowed to pressure from interest groups, and changed laws in an effort to correct a supposed problem that didn't exist at all. At least not in our state.

It was done in the most draconian of ways, and over a period of time statutes of limitations was shortened, mandatory screening panels were instituted, affidavits of merit were required, burdens of proof were intensified, periods of liability were eliminated, and jury awards were capped. These were limited and insurance companies in our state got richer and victims pounded sand.

The atmosphere that's producing the present cry for the Federal Rules changes feels all too familiar. I just hope that my feelings are wrong.

As many of you know, Utah has already gone far beyond the federal proposal in implementing its version of proportionality.

Whereas, the federal focus is threefold, proportional discovery, attorney cooperation and early enacted judicial case management.

I view Utah's focus as being different. Given the heavy judicial case loads and scarce resources, it was impractical to urge early judicial case management.

Attorney cooperation has been encouraged through moral persuasion and civility campaigns.

However, proportionality was implemented by rule with a vengeance.

Since I have seen Utah experience touted as a positive example of what the federal changes can achieve, I want to comment on what I see happening.

We have a three-tiered system based on the amount in controversy.

Tier one if for cases up to $50,000 in damages.

Tier two is for those between 50 and $300,000 in damages.

And tier three is those -- for those over 300,000 in damages.

In tier three cases total fact depositions must be less than 30 hours, and limits on interrogatories, requests for production and requests for admissions are set at 20 each.

Tier two is half that in each category.

Tier one allows a total of three hours of fact depositions, no interrogatories, and only five requests for admission and production.

All discovery must be completed within strict time limits. Only when ceilings are reached in each category may a party petition for extraordinary relief.

Then judges are requiring a showing of truly extraordinary condition. Not extra ordinary circumstances, but extraordinary circumstances. And standards about what that means are not spelled out, they are very subjective, and inconsistently applied.

As a practical matter these limits are often bypassed by counsel. The rules are being looked at by attorneys who recognize their impracticality, and agree among themselves to simply take more depositions, or ask and answer more interrogatories. Leave of court is not sought nor obtained.

Therefore, whatever data has been compiled in the case of success of a tiered approach in our state, I don't think will be very reliable.

Utah rules now limit discovery to that which is both relevant and proportional. The proportionality is defined as requiring consideration of 11 different elements. Then the rule places the burden on the party seeking discovery to show both proportionality and relevance.

What happens is that all a party has to do to halt discovery is object that it's not proportional, then it's up to the party seeking discovery to make the case for proportionality, giving the plaintiff in a product liability case with the burden to show the requirement of all 11 proportionality elements in a vacuum. The defendant has all the documents. The game of hide the ball begins.

Remember, the defendant designed the product, tested it, manufactured it, marketed it, and has all of the records of its performance in the marketplace.

Yet all it has to do is to assert a proportionality objection, the plaintiff is forced to file a motion, a supporting brief, perhaps supported by an expensive expert affidavit to get important information.

Even then the defendant may withhold some of the information in the answer that it gives.

Meanwhile, the clock is ticking on the time allotted to give discovery.

Which product manufacturer would not want the ability to routinely object to the proportionality of discovery, and then force all plaintiffs to prove proportionality.

Some plaintiffs would simply give up, or be spent into submission, if they can even find an attorney who is counting the cost of litigation, willing to take -- to represent them in the face of such tactics.

I laud the recommendations that the Courts become involved early in the management of cases, and I encourage anything that promotes civility and attorney cooperation, but I submit that sufficient proportionality safeguards are already in the Federal Rules, and would add that if adopted the proposed proportionality rules may actually result in preventing a fast, expedient and inexpensive determination of cases.

If you have any questions.

HON. CAMPBELL: Robert.

DEAN KLONOFF: The rule --

HON. CAMPBELL: I think it's on. You just need to get in front of it.

DEAN KLONOFF: On the one hand you talk about all these horrible consequences that will result.

On the other hand, I thought you said that the parties are working between themselves, and essentially dealing with the issues and allowing more discovery.

MR. DEWSNUP: Almost ignoring the rules, that's right.

What good is a rule if it isn't followed?

HON. CAMPBELL: Peter.

MR. KIESLER: It sounded that what made proportionality the proportionality with a vengeance was this very strict conception of burdens where the producing party merely needed to object, and then the requesting party had to produce information about something which presumably it wouldn't even have access to information about, which is the imposition on the producing party.

If that were taken out of it, if somewhere in the rule process the note, whatever it were, were made clear that this wasn't about formally creating those kinds of burdens, but just identifying the factors that have to be taken into account by all parties and the judges, would you still object to the concept of proportionality if, for example, it was understood that it would be the producing party that would have to explain to the judge why there would be a burden, and it would be the requesting party that would have to explain why the information was important, and it wasn't that kind of strict allocation of proof that you describe?

MR. DEWSNUP: Not to the same degree.

I don't think we object conceptually to the idea of proportionality if it makes sense, but when it's implemented by rule, there is always some territory at the edge of the rule that is not defined, and it creates less of opportunity for mischief.

HON. CAMPBELL: Any other questions?

John, quickly.

MR. BARKETT: Yes.

Are you talking about the equivalent of the Federal Rule 11 or 26(g)?

MR. DEWSNUP: Yes.

MR. BARKETT: Have either of those rules been utilized to deal with the concern that you have expressed over what I understood to be really -- maybe not frivolous objections based on proportionality, but time-consuming and expensive objections based on proportionality?

Because it seemed to me that both of those rules would deal with that concern, if in fact it's a serious one.

MR. DEWSNUP: I haven't seen very much litigation involving Rule 11 in Utah courts.

These rules are only two years old, and I don't think there is very much experience with it.

MR. BARKETT: What's your sense on how those rules work in federal court if in fact defendants begin to raise proportionality objections that -- at least from your description, you're suggesting would have no merit?

MR. DEWSNUP: Well, if they have no merit, I think that they run into problems with any judge. But I think the proportionality rules that exist already under Rule 26(b)(2)(c) are adequate, and they allow a party to assert when they think they're being used.

MR. BARKETT: So why would things be different with this change?

MR. DEWSNUP: Well, one, because it changes the whole emphasis, places the rule in the forefront of Rule 26 instead of in the background.

I don't think people are utilizing the opportunities that already exist.

When you don't define who has the burden of proof, then it's up to the judge where the burden is placed.

And when there is no certainty as to how that's going to occur, I think that's mischief.

HON. CAMPBELL: All right. Thank you very much, Mr. Dewsnup.

MR. DEWSNUP: Thank you.

HON. CAMPBELL: Maja Eaton.

MS. EATON: The name is Maja Eaton.

HON. CAMPBELL: Maja. I apologize.
MS. EATON: It's easy to say, hard to spell.
I want to thank you for the important work that the committee is undertaking.
I have practiced law for 30 years with Sidley Austin, exclusively in the area of products liability and mass torts, and on behalf of pharmaceutical and medical device manufacturers.
I have also been involved in toxic tort litigation on behalf of industrial companies in the U.S.
I want to make clear that my testimony is personal rather than on behalf of my firm. I recognize that I'm very proud and lucky to be a partner, and my comments are my own and not on behalf of the firm.
I am also affiliated with Lawyers for Civil Justice, have been for seven years, and I have endorsed the comments that have been submitted by the Lawyers for Civil Justice. But, again, my observations today are my own.
The committee's proposed rules are an important step in addressing what I perceive as the challenges and abuses, quite frankly, in civil litigation today.
In my 30 years of practice I have witnessed a shift away from what I remember as a young associate as -- you know, my first assignment being sit down and craft your opening statement or your closing statement and then work in discovery to bring those issues to the fore, or to identify and bring forward in early case management the issues that will be helpful, most helpful to resolution, whether it's summary judgment or motions to dismiss.
But lately, I'd say for the past ten to fifteen years, what I have seen has been a shift away to focusing on discovery as a means to an end, and the end is usually trying to force settlement.
And the -- there seems to be a prize for identifying discovery abuses that then can be the subject of ancillary litigation, and it has become a real issue.
Primarily, as I see it, there has been an explosion, I think, in the last ten years as well in multi-district litigation. And it's been in that context, unfortunately, although MDLs are set up to be an efficient way to handle mass tort litigation, it often becomes carte blanche for unfettered discovery and seeking out of a sort of gotcha mentality.
And I applaud the committee's proposed amendment to Rule 26(b)(1), and putting proportionality right up front to keep that as a goal.
I know that the committee notes and the rules don't currently address multi-district litigation in particular, but one of the issues I do see with the proportionality if 26(b)(1) is adopted, is that in multi-district litigation, because of the size of the litigation, I think there is a natural tendency on the part of both the parties and the Court to think of that as somehow broadening the scope of discovery simply because you have got 150 or 15,000 cases.
But the -- I think early case management resolution -- or early case management principles and the principles of proportionality should be applied in multi-district litigation as well to focus the parties early on on issues that are amenable to resolution, or that will dispose of the entire issues early on in the litigation through local time orders. I don't currently see that in the advisory committee notes, but I offer it up for consideration.
Also, just because you have a multi-district litigation, that's where I practice most today, the issues -- the common issues which have created the need for multi-district litigation don't somehow then broaden liability discovery. But that seems to be some of the -- seems to be the expectation and the attitude on the part of both the litigants and the Courts.
I would just -- I think -- you know, if we focus on the factors in 26(b)(1) that might define the scope of discovery, things like being in controversy, the importance of the issues and the size of the litigation sometimes can overshadow looking at the issues that are to be resolved, as opposed to the size of the litigation itself.
Thank you.
HON. CAMPBELL: Questions?
Parker.
MR. FOLSE: In a supplementary public comment that the Lawyers for Civil Justice filed -- have you seen that?
MS. EATON: Yes, I have.
MR. FOLSE: One of the points that's made there is that people who object to the proposed amendment concerning proportionately are misunderstanding that under the current state of the law the burden falls on the resisting party to show that a discovery request is not proportional, and that nothing in the proposed rule would alter that.
Is that -- I guess it's two questions. Is that a point of view that you share?
MS. EATON: Yes, it is.
MR. FOLSE: And second, do you see, given

some of the comments, examples of which we have already heard this morning, do you see value if the rule is adopted in making clear through an advisory note, or otherwise, that no intent to change burdens is intended as a result of the proposed amendment?

MS. EATON: You know, in discovery disputes I have always considered it to be a burden of persuasion as opposed to a strict burden of proof, and in that respect I don't see this rule changing that.

In fact, what it does is move the discussion of proportionality and the scope of discovery and make it the responsibility -- the early responsibility of both the litigants and the Court, and it's that -- if there is an expectation that you're going to have those discussions up front, then I think the issues of likely dispute are going to be identified.

And, again, it becomes a burden of persuasion, whether you're filing a motion for protective order, or a motion to compel. The issue is going to be proportionality, does this discovery exceed the real needs of this case?

And we lose sight of -- you know, we lose sight of what ultimately is going to be tried, or the issues like preemption, for example, that may be used early on to shape the issues. So I don't see it changing burdens of proof. I don't think of them in terms of burdens of proof.

MR. FOLSE: Thank you.

HON. CAMPBELL: John.

HON. KOELTL: Your comment with respect to MDL and the amount involved, would it be more helpful in the list of factors to be considered for proportionality if the factors didn't begin with the amount in controversy, but something else, like the importance of the issues at stake?

MS. EATON: Yes. Indeed, I think starting with a case where there is a lot -- you know, a million dollar case, or a $5 million case may still turn really on one issue.

When you have an MDL, at least in product liability litigation, you're still going to be struggling with the issues of design defect or failure to warn or warranty issues, and those issues are common across the cases.

So I think a focus on what truly are the issues in the case, whether it's described as important, but just the relevance and the materiality of the issues, I think would be helpful.

HON. CAMPBELL: Other questions?

(No response.)

HON. CAMPBELL: Let me ask one, if I can.

If the change was adopted and I am a defendant and I receive a discovery request, do you think it would be appropriate for me to say in the response I'm not going to answer, or I'm not going to respond to this request because it would unreasonably tax my resources?

MS. EATON: Well, the cost benefit is already -- excuse me -- one of the considerations for proportionality, that the discovery -- that the cost -- the utility of the information is outweighed by its cost, that is an objection that defendants currently use today. I don't know that the rules would change that.

HON. CAMPBELL: All right. Thank you very much, Ms. Eaton.

Becky Kourlis.

MS. KOURLIS: Good morning.

I want to begin, and this is not a platitude, by thanking you-all so much for the hours and days and weeks and now years that you have put into this work. I think everybody in this room recognizes what a prodigious undertaking it has been and will continue to be, and we thank you.

I'm Becky Kourlis. I'm the executive director of the Institute for the Advancement of the American Legal System, AALS, at the University of Denver.

We have filed two sets of comments, to which I will refer briefly in a moment, but I want to begin at a little bit of a higher level, if I may.

You, as rule makers, and I think many of us in this room have also been on that side of the table, have the responsibility of simultaneously having a long-term vision of the civil justice system, and at the same time being acutely mindful of the minute operational details.

In other words, you have to keep one eye on the 5,000 foot view, and the other on the five foot view, and that's a bit dizzying at times.

These new rules proposals must operate at both levels. They must serve the ultimate vision, and must actually work on the ground.

More profoundly perhaps, they should have impact on changing the legal culture.

Starting from 5,000 feet I believe it is everyone's vision that the system should live up to its Rule 1 promise, that it should really provide a just, speedy and inexpensive process for the resolution of every dispute.

Plaintiffs and defendants alike, academics, judges and court staff would all like to see the system be trusted and trustworthy.

Functional, not dysfunctional, and undergird by rules that provide the right defaults in the event one or both counsel or the judge are not paying attention.

I think there is also broad agreement across the country with the proposition that the system currently invites gamesmanship, which can sometimes be punitively expensive for one side or the other or both.

Solutions to those problems are your job. But as the saying goes, the devil is in the details, and that's where we find ourselves now.

Everyone seems to agree that more active judicial case management is part of the right set of solutions. There appears to be very little disagreement with that set of proposals.

I would add, by the way, here that this is one of the areas in which the federal system is indeed different from some of the state systems.

You heard from an earlier person who testified that in Utah there was a presumption that judges had too great a docket to be able to manage with detail.

At the federal level I think you operate from perhaps the opposite presumption, that indeed judicial case management on a case-by-case basis is possible, and should be part of the solution.

Having a judge who is knowledgeable about the case overseeing disputes and shaping discovery is something that attracts broad support, it matters, it's clearly part of the answer.

The question is, as Professor Gensler would put it, should the judges be managing up or managing down?

Where is the default against which they manage, where is the fallback, and that's the rub. That's where the disagreement arises.

The discovery constraints have been the source of the disagreement which you will hear in this room, and which is reflected in the comments.

Generally speaking, the plaintiffs are concerned that these proposals will permit defendants to further hide the ball. The defense attorneys are concerned that these proposals don't go far enough. Clearly, the answer is somewhere in between, and it falls to you to cut that balance.

What I would like to suggest that we all remember is that access is not just at the door of the courthouse. It is access to a full and complete process, including resolution on the merits by a judge or a jury.

We have a system that is geared towards settlement, and I'm not sure that's a good thing.

We have a system that is prohibitively expensive, and I'm quite sure that is not a good thing.

What we should seek to achieve is a transparent accessible system in which people get access to the information they need in order to present their claims or defenses, in which they have access to a judge who is knowledgeable and able to resolve their issues expeditiously and access to an ultimate resolution on the merits.

It should not be the goal of the system to push parties toward settlement either by virtue of the cost, or by virtue of the process itself.

I believe that if I -- this is sort of ironic, but having been on a court that uses this particular system of lights, I'm not exactly sure what that particular system of lights is telling me, but the bottom line is that I stand ready to answer your questions.

In particular, if I may, I would like to use a little bit of time speaking about a couple of studies that have come out in the last two days, in fact.

One on the New Hampshire Project, and one on the Boston Litigation Section Project.

So --

HON. CAMPBELL: Please, go ahead and do that.

MS. KOURLIS: You find yourself in this very interesting posture where you are asked to step forward and lead perhaps before all the data is in.

These next two studies, I think, will suggest to you that even when all the data comes in there are going to be significant problems, and leaders will still be asked to lead.

The New Hampshire Pilot Project Study suggests, interestingly, and we will supplement our comments with the link to that report, that in fact the pilot project rules in New Hampshire made not much of a difference at all.

That all of these new requirements, fact-based pleading, mandatory disclosure, more accelerated case management requirements didn't really change much in New Hampshire in terms of time to disposition of the cases.

The surveys suggested that most of the attorneys liked what they were being asked to do, but that in fact it comported with what they were doing anyway. So it was a culture issue.

The one area in which it did make a significant difference, which is very interesting, is that there were fewer default judgments against defendants based upon this new process in a statistically significant

number.
So I will tender that to you-all for whatever it's worth. I think you have already heard that there are concerns that as the data begins to come in all of us are going to be in a posture to say, yes, but.
Yes, but that may or may not be analogous to what we're looking at.
Yes, but those were different rules.
Yes, but it was a different culture, you're talking about New Hampshire, not New York.
The Boston Litigation Section Study was a set of surveys. It was not coupled with data analysis from the Courts themselves.
That set of surveys suggested that the attorneys litigating under the pilot project were very favorable about it.
Now, keep in mind -- then this, of course, relates to one of the fundamental partings of the waters in these discussions, those cases were cases where the attorneys had the opportunity to opt out.
So they were before the Court in a business court setting. The Boston Litigation Section is essentially a commercial section. And they were in a pilot project context, but they did have the opportunity to opt out. Few of them did parenthetically, but they had that opportunity available to them.
Net, net, they felt that the pilot project rules were better than the then existing rules, that they did provide a better resolution, speedier, less expensive resolution.
So, again, we will file that report with you in supplement to our comments.
I guess I stand ready for any additional questions you-all have. My fundamental message is you are leaders and you're not going to achieve consensus and you are not going to achieve certainty of the data.
You can learn from all of that which you have heard.
You rely upon your own experience and upon the data.
Ultimately, you have to decide if this is the right direction in which to move, and on behalf of AALS, we believe that it is.
HON. CAMPBELL: All right. Thank you very much, Ms. Kourlis.
MS. KOURLIS: Would you like me to answer any further questions, your Honor?
HON. CAMPBELL: Well, we probably have time for one if there is any questions.
(No response.)
HON. CAMPBELL: We look forward to getting those links to those other studies.
MS. KOURLIS: Thank you very much.
HON. CAMPBELL: Thank you very much.
Our next speaker, I believe, is Michael Cowles.
MR. COWLES: Yes, your Honor. Thank you for your time.
My name is Michael O'Keefe Cowles, and I'm an attorney for an organization called Equal Justice Center. We litigate on behalf of clients proudly through Fair Labor Standards Act and Title VII claims in and around the State of Texas. We represent solely low-wage litigants who wouldn't have access to the Courts.
In all of our cases there are significant asymmetry in terms of the information that each side has. Our clients are operating in an informational deficit, and are often dependent on what they can recover from the defendants in order to prove fundamental aspects of their case.
The proportionality rule -- the proposed proportionality rule relegates low-income clients such as ours to a type of second class citizenship in terms of their access to the Courts. It deprioritizes their claims, undermining FLSA and Title VII laws that were designed to protect workers of all income brackets.
The Supreme Court has repeatedly rejected the idea of proportional justice. Rejecting proportional attorney fee awards in Title VII and FLSA claims solely because the damages at issue were relatively small.
In the case of the City of Riverside v. Rivera the Supreme Court said, "A civil rights plaintiffs seeks to vindicate constitutional rights that cannot be valued solely in monetary terms."
The conditions of proportionality terms in the proposed rules sets the stage for low-wage litigants essentially taking a back seat.
With regard to the proportionality rule, while our client's claims might not constitute a, quote, "amount in controversy that is substantial to defense attorney or a judge," to our clients it makes a difference between being able to adequately feed their families, and house their children.
In the current political context problems of inequality and misallocation of public resources, including access to the justice system, are already being exacerbated.
In these cases it is harder to uncover the facts.
In our cases it is harder to uncover the facts

because a violation of their rights is often done through informal means and off the books, so we require a wide array of discovery requests in order to obtain the information that we need to fully explain and prove our client's claims.

While the rules don't specifically indicate who bears the burden of proof, this will undoubtedly fall on the requesting party.

As I explained, in our case, because of the age and asymmetry in terms of information, that's left to the plaintiff.

Low-income worker cases would simply not be worth the hassle for the private bar if, as these rules undoubtedly do, would increase the cost of litigating through the discovery period, through exacerbated motion practice, filing motions to compel because of defense counsel's use as a weapon of saying that the proposed discovery requests aren't relevant.

The increased cost of discovery would further skew the economics of attorneys working on a contingency-fee basis.

All this would have the result that attorneys working on a contingency-fee basis would simply pass by litigants who have low-dollar amount claims.

The increased discovery -- the discovery rules would set the stage for a greater conflict, we believe, not less, around discovery.

Discovery fights have exceedingly ran our practice, but it's something we are able to work through with our defense counsel. But the new rules will afford defendants a new weapon in terms of the ability to outspend the plaintiff, or even just a threat of increased litigation around important discovery documents needed.

The proposed rules encourage discovery fights that will unjustly increase the cost of pretrial practice and judge's dockets -- and weigh down judge's dockets.

Starting in the dark as our clients do in terms of proving their case, because they don't have the information the defendants have, and particularly in their position working at the bottom rung, sometimes complex corporate structures involving multiple potential defendants means that at times depend largely on a thoroughly litigated discovery process and information that we are able to recover even though we don't necessarily know exactly what we're looking for starting off.

That is all for my comments, your Honor.

HON. CAMPBELL: Thank you, Mr. Cowles. Paul.

HON. GRIMM: Just a quick question, if I could. I would like to get an understanding, if I could.

Currently when you litigate these cases, under Rule 26(g) you are required to certify that you have considered proportionality as you -- as you interpose a discovery request just like the responding party must certify that they have considered proportionality when they object. That won't be changed by this rule.

Currently in the cases that you referred to under Title VII and the Fair Labor Standards Act, those are fee shifting. So the more the defendant fights, you fight back and prevail, the greater the fee that you will recover as the attorney at the end of it.

The comment that has existed since proportionality came into effect in 1983 was a very clear statement in the advisory note that the value of the case oftentimes could not be judged by the monetary recovery in civil rights cases, free speech cases, and the other type of public interest cases that are the bulk of what you have in your practice are to be considered in determining how to apply the existing proportionality factors, and the existing proportionality factors are the same factors that the new rules would say.

Tell me how it is that you can predict that there will be this significant cost when everything that is in the new rule captures the existing law, and tell me how you deal with that presently if the present system is, in your view, so much better than what we propose.

MR. COWLES: Well, I mean, I would say that while certainly the notion of proportionality exists in the current Rule 26, it is not codified to the extent that it is. So it doesn't allow defendants to use as a weapon the threat of --

HON. GRIMM: It's the same language, isn't it?

MR. COWLES: Well, in the rule itself.

But limiting the language -- eliminating the language, "Further cause the Court may order discovery from any -- for any matter relevant to the subject matter involved in the action."

Eliminating the language that allows for a greater breadth of discovery, I think shifts the burden onto the requesting party to show that under the new language of 26(b) their comments -- their discovery requests are --

HON. GRIMM: Relevant to the claims and

defenses.
MR. COWLES: But my point starting out was that starting off with a case without my client operating on such information deficit, we don't necessarily know what it is we're looking for.
And with regard -- I would just like to say that with regard to your comments of existing statutes in those claims, while it is true that if you fully litigate those claims, you are able to recover attorney's fees in terms of the possibility of settlement in the interim, is defendant largely on recoverable amounts for the client.
HON. DIAMOND: I don't think I understand.
You're suggesting that reducing the number of interrogatories, document production requests, or in this case depositions, is going to increase discovery costs.
Is it necessarily going to decrease discovery?
MR. COWLES: I should have clarified.
My comments were particularly focused on the proportionality requirements of Rule 26.
HON. DIAMOND: So the other proposals, you agree could well decrease discovery costs?
MR. COWLES: I -- to be honest, we haven't looked at that issue extensively.
I would say that while it might, to some degree, limit discovery cost, it would also simultaneously limit seriously the amount of pertinent information that our clients would need in litigating complex cases.
HON. CAMPBELL: Richard.
PROF. MARCUS: An earlier speaker addressed the amount in controversy provision that you are talking about, and seemed to say that it should not permit broad discovery in the billion dollar case.
Would it be comforting to you if that consideration were moved farther down the list instead of coming up first? That might be something that could happen.
MR. COWLES: Certainly. I mean, I think anything we can do to move away from a deprimarization (sic) of low-wage cases would necessarily be beneficial to our clients.
HON. CAMPBELL: Gene.
HON. PRATTER: I recognize you haven't offered comments on this, but your clientele and your focus in your opinion work prompt me to ask if, A, if you have ever used the forms that are attached to the rules; and if you have, your view about the proposal that the forms be abrogated?
Mr. COWLES: I apologize. I haven't looked into that issue, so I can't comment on it.
HON. CAMPBELL: John.
MR. BARKETT: I just wondered, do you keep metrics on the current cases that you have? How many are successful? How many aren't successful? Which cases are recovered, and which cases are not recovered?
If so, could you give us the latest calculation of whether it's a calendar year or fiscal year?
MR. COWLES: I'm sorry?
MR. BARKETT: The cases that your center sort of manages or outsources or oversees, whatever the right word would be, how many actually result in either a favorable outcome or a favorable settlement or are dismissed or you lose on summary judgment? Where you prevail, whether attorney's fees are recovered? That sort of thing. Do you keep those kinds of metrics?
MR. COWLES: Well, offhand I can say almost all of our cases are successful, and specifically our Fair Labor Standards Act cases we take, the cases we take have clear wage violations, and it's usually typically only a matter of determining the extent of the violation.
MR. BARKETT: So then what's the significance of -- you complained earlier about your inability to figure out what to discover. It sounds like you know exactly what you need to go after.
MR. COWLES: Well, in a lot of our cases defendants don't keep formal payroll records.
MR. BARKETT: Isn't that already the problem, that they don't keep them?
MR. COWLES: That is the problem, but through discovery we're able to do -- we're able to pursue and investigate ancillary documents that help further color in the full extent of our client's claims and extent of their damages.
MR. BARKETT: So I'm having difficulty understanding how you would be frustrated in any manner under the proposed changes to do what you just described.
MR. COWLES: Well, I think that if we -- the problem starting out is that we don't know exactly what documents are going to speak to that.
So with the threatened -- the threat of -- the threat of pursuing -- or just outright denying this, and forcing us into a motion to compel in order to retrieve those documents, but we don't exactly know what it is we are looking for starting out that would speak to our client's specific hours worked and damages, puts us in a

disadvantageous position.

HON. CAMPBELL: Thank you very much for your comments, Mr. Cowles.

John Griffin.

MR. GRIFFIN: Good morning.

I would like to talk to you a couple of minutes about structural issues, and then substantive issues with a couple of the more far-reaching proposals that are before you.

My name is John Griffin. I, at the tender age of 58, am what some young lawyers call a dinosaur in the sense that I have tried 60 or 70 jury cases, and still try cases for plaintiffs and defendants around the country.

MS. CABRASER: Welcome to Jurassic Park.

MR. GRIFFIN: Thank you for that. My kids would be proud of you saying that. Bless you. Thank you.

I bring a perspective of being largely on the plaintiffs' bar, but representing municipalities and doing some defense work as well.

I am a member of the American Bar Association; the American Diabetes Association; ABOTA, the American Board of Trial Advocates; and lots of bipartisan groups. But I am also a member of plaintiffs' bar such as AAJ and NELA.

The perspective that I bring, though, this morning is for my journey serving as the national chair of the board of the American Diabetes Association where I began to learn about disability rights. About half of my commercial practice now is representing children and adults with diabetes.

When I look back I can take great pride in saying that today the Court Security Officers that guard federal judges now can have their hearing tested with their hearing-assisted devices when they were banned for some years.

Special agents now serve in the FBI who use insulin to manage diabetes, as does the IRS.

We now have young men and women with prosthetic devices serving as special agents in our country.

All after jury trials involving discovery issues.

But I want to start with something structural.

I'm a member of bars on both sides of the docket, and I have been getting emails to show up and get my comments in.

The defense bar, my brothers and sisters in the defense bar, of which I am friends, along with groups and corporate counsel have implored us to get our testimony in, because 90 percent of the comments are running against the proposal.

Likewise, the plaintiffs' bar has said you need to make your views known.

I say that because this, as you-all know, the care you have taken and the time you have given, this is not an election for people to get their votes in. This is serious business.

But what we have, my friends who are in the defense bar, they really, really believe this will help their clients, these rules. They really, really believe that proportionality at the gateway will help their clients.

Likewise, civil rights lawyers, plaintiffs' lawyers, consumer lawyers, Professor Miller, believe the opposite, that these rules and moving proportionality up and taking steps with Rule 37 in reducing the numbers of types of discovery will do the opposite.

Now, Voir Dire Magazine, ABOTA, if you haven't read it, talks about the continuing data on the shrinking number of jury trials we have in the United States Federal Courts.

Granted, there are a lot of reasons for it, but the fact is it's a crisis in our country that fewer and fewer cases are actually being tried by a jury.

Yes, it's true that pleading rules, Iqbal, Daubert, experts, all of these have a role, and conceivably the cost of discovery has some role in that, but what I say is that the Courts, you are not about the business that we are.

We're here to help win our cases for our clients, but the Courts aren't our instruments. We should ask ourselves with these rules will there be more jury trials and fewer summary judgments, or will we continue to shrinken the number of trials we have?

Now, I want to talk -- moving a couple of ways about -- a couple of the issues that you are considering.

One is the issue of proportionality.

Having tried cases against the FBI, and being licensed in the Fourth, Fifth, Eleventh, D.C. and Seventh Circuit, and having tried cases in many of those circuits, and then litigated them all the way to the appellate courts, I can tell you in those cases in which the Marshal Service has allowed COSs finally to have their hearing tested as they actually hear instead of banning hearing aids when they are tested, has made us safer.

But at the inception of that case, at the inception of the FBI case, at the inception of the IRS

case, each of those cases at the beginning, our requests were not proportional in any sense of the word, because it was single-plaintiff cases.

These law enforcement officers have gotten better jobs. They are low-dollar cases. We don't know of any policy banning people with diabetes, or with hearing deficits in the Marshal Service.

It would be hard for me to imagine that the thousands and millions of pages that we finally obtained in those cases that showed a greater need, the discovery itself bridged the gap of proportionality.

It would be hard for me to articulate in a single-plaintiff case where we don't know a national policy is at stake that we have to show at the gateway proportionality.

We haven't had that issue.

Fortunately, in none of those cases had any of the defendants ever raised that issue and forced us to litigate on multiple fronts before we get out of the starting gate for discovery.

I can tell you those discovery requests in those cases, Chief Judge Eagan in Oklahoma, Judge Jack in the Southern District of Texas, involved a lot of documents and a lot of expense, but it was those documents that exposed, for example, with the Marshal Service, that when they claimed that people using hearing aids guarding our federal judiciary were a direct threat we found hypertensive obese smokers, morbidly obese smokers with a history of heart attacks that were allowed to work, whereby perfectly healthy people who had improved their hearing were not.

Those kinds of discovery were instrumental, and those cases would never ever have been successful, and reach change in policy in this country to be more accessible than people with disabilities.

I finally want to touch a little bit on something close to my heart as a federal litigator on both sides in courts, and that's the issue of preservation of documents.

Granted, there are a myriad of standards in state and federal courts. I understand that completely. But in my area in trying jury cases, in commercial cases, large commercial cases, everybody sort of knows the rules.

If evidence is important, subsequently determined to be important, and your client didn't keep it, there is going to be adverse consequences. That's the thinking among those of us who are on the ground practicing law in front of state and federal courts.

Yes, there are different standards, but if we reduce in our country the notion of preserving documents to a standard where negligence or inadvertent failure to preserve, or spoliation is accepted, the whole system breaks down.

The Court system is for the search for the truth. These documents -- understandably both sides understand that if we get to a point where it's all right and blessed by the Court that negligent or inadvertent construction of documents or evidence is countenance, our system breaks down entirely.

To prove that the victim -- to show that the person -- the party has lost their evidence is that they did it on purpose or maliciously or in bad faith is fraught with problems, because we have rules in society we have to obey whether we mean to or not.

So, yes, I have had a case where a hurricane in south Texas destroyed some documents.

No, there was no adverse consequences, because it was ferreted out in the process.

But the notion that evidence can -- the parties on both sides can know they don't have to preserve their evidence, so long as it's negligent or inadvertent it's going to be blessed by the Court as something, I don't think that it would be an improvement in our system of justice, which is, at its core, to get at the truth.

And, yes, it is true that preservation of evidence cost money, and it cost money to my clients who are on the defense side too. But the cost to our system and our truth-gathering function would greatly exceed the cost of preserving that evidence under those circumstances.

With that, I see that I have run a little over my five minutes, but a little time for questions. So I'm happy to share the Voir Dire article, or anyone else who wants to read about the shrinking jury trial in the obituary of the American dinosaur trial lawyer.

HON. CAMPBELL: Peter.

MR. KEISLER: I have a question about your discussion on proportionality.

I think it seems to be very much common ground that even in a single-plaintiff case if the issues involved a national policy of a government agency, it oughten be hard to show that significant discovery is proportional to the importance of the issues.

I was struck by the fact that you said you needed large amounts of discovery to determine that there was in fact a national policy.

I would have assumed, but -- you know, please explain why this is incorrect -- that if there really was a policy in the sense of not -- so there are lots of

people acting in the same way across the country, but a memorialized instruction from headquarters codified somewhere, that that would have shown up in the early stages of even kind of normal conventional discovery. And that then you would have had a basis for saying, okay, there is a policy here we're litigating, so this broader discovery that we are now seeking is proportional to that.

When in the course of your discovery did you determine that there was a national policy, and why did it take so long?

MR. GRIFFIN: Because the Marshal Service in the case of the COSs were all getting fired because they needed hearing aids to guard the federal judges, there was no written policy, Mr. Keisler. They had said to us in the informal documents, we gave them an individualized assessment, his hearing was not good enough for us, he had to go.

When we found out -- your question, we found out in about the fourth or fifth deposition of Dr. Chelter (phonetic), in Federal Health Occupational Health in Atlanta, why are you not letting these people test their hearing in the way they actually hear, in the way they actually guard judges, why are you making them hear -- when they're getting older and are former law enforcement officers, when they can hear perfectly fine and normal hearing what they're hearing, and you won't let them use them, why are you doing that?

Well, because we are worried they will fall out.

They will fall out? What about if he fell with his glasses?

In the middle of the case, in the middle of the case we get that, and then we find out that's a defacto policy, yes, it becomes a loser for the defense.

And, yes, after fighting all the way up to the Tenth Circuit with a threatened mandamus we finally got all of the medical records of every CSO in this country protected by HIPAA.

But nonetheless we found out all these -- one of them was 440 pounds. We had people who obviously were much more of a direct threat to the judiciary than our physically fit 40-something-year-old former border patrol officer.

So you had this sense that at the get-go -- at the gateway, we wouldn't have gotten this discovery, Mr. Keisler. It was only during the case that discovery made it proportional.

And when we look back, of course, it's important to our country that the judiciary is better protected.

Of course, it's important that people with type 1 diabetes can serve our country for the FBI.

But those policies were not known at the beginning of the case. All we knew was the FBI says, your man was not physically fit to be a special agent. Even though we offered him the job, he has type 1 diabetes, and he's not controlled to the extent that we want.

It looked to us like it's a single-plaintiff case. Only to find out with the positions of the FBI that they did have a defacto unwritten policy that no one on diabetes injections would be hired by that agency. And today they're serving proudly.

All this has happened in the last ten years. And the fear in my heart, deepest in my heart at its core, is that that element of proportionality be at the gateway instead of in the rule where it now is, because in my life it has not yet been raised to keep us from getting the discovery to help advance the cause for those qualified people with disabilities.

And I agree with my friend who spoke first. If I'm defending a case, I am going to raise proportionality at the outset in a given case, because the plaintiff is not in a position to show what the proportionality is before the discovery is exchanged.

HON. CAMPBELL: All right. Thank you very much for those comments, Mr. Griffin.

Mary Larimore.

MS. LARIMORE: Thank you.

My name is Mary Larimore. I'm a partner at Ice Miller in Indianapolis, and I have been practicing law for 33 years. So if 58 is the deadline for a dinosaur, I'm six months away.

I practice primarily in the area of pharmaceutical, medical device, toxic torts and commercial litigation.

I am active in many organizations, including Lawyers for Civil Justice, International Association of Defense Counsel, National Center for State Court, DRI, and am a fellow in the American College of Trial Lawyers.

My remarks today are not on behalf of any organization or the firm. They're purely personal.

I want to thank the committee for all of the hard work. I am very familiar with the serious work and effort and all of the different interests that come to bear upon the rules process.

I was a part of our rules process in the state of Indiana for our chief justice for a period of eight

years. Four of those years I was chair of the Rules Committee.

And the states really do look very closely to the federal rules for guidance as we move forward as well.

I have given presentations on proportionality at the Seventh Circuit Bar Conference, and I'm a big fan of proportionality, unlike our prior speaker.

Why should proportionality be moved from 26(b)(2) to 26(b)(1)?

I personally don't like the argument that it isn't getting enough attention, or that it is buried, although I'm certain that that's absolutely true. Conscientious and competent lawyers should read and know all of the rules.

The reason that it should be moved is because proportionality criteria are simply common sense appropriate criteria that should be taken into consideration at the outset of each and every case by all of the parties and the Court as we consider the scope of discovery, the needs of the case, the issues and focus in on what is important.

I have had success in arguing proportionality at the outset of a case, but the enemy of proportionality, and the thoughtful consideration of the scope of discovery, is indeed business as usual.

This isn't the way it's done, your Honor.

She can't do that now.

I have never had a motion like this granted at the outset of a case. These arguments have nothing to do with the issues, and has nothing to do with the evidence that should be important to develop the needs of the case.

If the important issues in the case are, for example, the health environment to be a federal marshal, then those are the needs of the case, and let's focus on those.

If the medical records are important, let's do that, but let's not also ask for ERISA records.

The committee has lots of examples -- oh, you know, one of the other things I wanted to mention is, when you look at 26(b)(2) and where it's located, it's located under limitations on frequency and extent.

So it really does make it look as though this is something that a party is supposed to invoke after discovery has gotten out of hand, late in the litigation, a year into it, as opposed to an important part of the process that should be made a part of the initial plan for appropriate discovery on the issues that are important.

I know the committee has heard many different examples of discovery that's out of proportion. You know, I like to give mine.

As part of an MDL team, which I am regularly a part of, you know, I can spend a year defending company depositions, have teams reviewing tens of thousands of hundreds of thousands of depositions, and not only are those deposition exhibits never used at trial, not only are those trial transcripts, or deposition transcripts, never used at the trial, the witnesses by name are never even mentioned.

Thus, the change from deleting reasonably calculated would go a long way, a long way, to focusing on what is important.

The change from relevance to subject matter to relevance to claims and defenses would go a long way to culling out all of these irrelevant custodians whose hundreds of thousands of documents are currently being collected and produced and reviewed by associates across the country.

If the subject matter is a product, and the product has a long history, the chain of discovery that can be pursued electronically is endless.

And yet it provides no more meaningful data or information concerning the issues, claims and defenses in the suit.

You know, the reality is in today's business world, every employee at a company pretty much has an electronic diary of their every day. But if they weren't involved with any of the issues, if they weren't at a level within the company to have addressed any of the issues, then their file is really of no moment, and it shouldn't be pulled into these huge document sweeps.

I would also like to speak on behalf of the changes to Rule 26(c), which I don't think has been the subject of too much discussion. And Rule 26(c) is the -- the aspect that I would like to speak to relates to cost allocation. 26(C) is going to give judges the opportunity once again to put sensible cost allocation in place.

You know, in preparing these remarks I went back and read the advisory committee notes going all the way back to 1970.

In the 1970 amendment it said that the burden placed on the respondent will vary from case to case so the Courts have ample power under Rule 26(b) to protect the respondent against undue burden or expense, either restricting discovery, or requiring that the discovering party pay costs.

This concept has been part of our discovery

rules since I started practicing law in 1980. You know, back in the day, you know, in the good old days, I guess one would say, when associates didn't sit at the computer screens, went out and interviewed witnesses and holds files and talked to plaintiffs' attorneys about how many feet of files you had, and you talked about, you know, the prepared details of indexes, and they actually checked off on the indexes, you know, which of the files they actually wanted.

You know, why did they do that?

Why didn't they just ask for it all?

It was because it was 20 cents a page back in the day. Then as expenses came down, you know, they started making -- they made judicious decisions about how they were going to spend their money, because they paid for copy expenses.

This fiction that the cost is the CD is obviously just that. It is an absolute fiction. I think we need to move away from it.

I would like to give a good example of an MDL, a recent MDL, in which we had argued to the judge that the documents that our client had were not completely, but largely, in the possession of another defendant. The originals had been sold, and therefore had already been processed by another defendant.

While we acknowledged that we probably had other documents in that repository, it did not make sense for us to reprocess this huge collection of documents of over 50 years.

So we asked for a document repository, and the judge put an 8 cent page cost for the plaintiffs to select whatever documents they wanted.

And, you know, that document repository has been sitting for well over a year, and there is not a single lawyer, not a single paralegal that has spent a single day or a single hour looking for a document in that document repository.

I think that that really goes to the issue here of what is the marginal value of the additional 10 or 20 or 30 million documents that end up getting produced in this large litigation.

One of the best ways to find out the marginal value of these document productions is to assess the cost.

Then finally I would like to say that there haven't been many comments about shortening the deposition day, the presumptive limits, but I think it's a wonderful change, it's a modest change. I think it's important.

But when you are sitting with witnesses through a seven-hour deposition day, the reality is that even with lawyers working hard, the number of breaks that occur throughout a day, it can often go until 6:30 at night, and it's tough for witnesses, and I think it's a nice change.

HON. CAMPBELL: Questions?

Richard.

PROF. MARCUS: I want to ask you something about Rule 26(c).

You favor the change. Do you expect then that judges should expect your clients to make some kind of forcible showing to justify an order under 26(c), or do you think judges should simply do it routinely?

MS. LARIMORE: Well, I don't think anything should be routine. I think that one should look carefully and thoughtfully at the discovery requests, and when they're appropriate, they should be responded to.

When discover is asking for, you know, the manufacturing documents and failure to warrant cases, or when they're asking for a scope of discovery from a time frame that is way outside the bounds, you know, then I think that we should be in court, and we should be asking for appropriate limitations when this process results in, you know, turning on a machine that results in legal expense.

PROF. MARCUS: Yes. Ordinarily 26(c) orders are supposed to issue only where there is a pretty strong showing that they will be excessively burdensome, or something like that. Discovery.

MS. LARIMORE: Uh-huh.

PROF. MARCUS: Are you saying it's something different?

MS. LARIMORE: No. I think that, for example, in the example that I gave on the document repository -- I mean, the processing was 50 years of documents, in a situation where those large -- in large part those documents had already been produced by a co-defendant, was a perfect example of adding a huge layer of expense to a client that was unnecessary.

And when nobody has ever even come to look at those documents, I think that's perfectly reflective of why that additional expense was simply not worth it.

HON. CAMPBELL: All right. Thank you, Ms. Larimore.

We're going to break for 15 minutes. We will resume promptly at 10:45.

(Brief recess.)

HON. CAMPBELL: Folks, can we take a seat please.

All right. We are going to resume with the comments from William Curtis.

MR. CURTIS: My name is Bill Curtis. I am the founder of Curtis Law Group here in sunny, warm Dallas, which is not always sunny nor warm. Curtis Law Group specializes in representing plaintiffs that have been injured in some form or fashion.

A good junk of our practice is focused on individual cases, truck wrecks, construction site accidents, medical malpractice back when that was still viable here in Texas, and things of that nature.

The bulk of my personal practice, and what I'm here to talk about today, is pharmaceutical practice. I represent folks who have been injured by dangerous drugs.

I am board certified in personal injury law here in Texas. I practice literally from coast to coast. I have cases pending in Maine, Florida, State of Washington, California, and virtually everywhere in between. Not yet Utah, so I'm glad to hear that the Utah Association of Justice had a representative here for us today.

I would like to focus my comments primarily on the discovery rules that you are talking about, written depositions, oral depositions, interrogatory numbers and requests for admission numbers.

But first I would like to take kind of a step back, because those are the individual trees that we are going to reach out and touch, perhaps tinker with some, but let's view this again from a much higher view, and look at the entire forest.

The concept of discovery is at its core to learn what the case is about, which presumably should be fair to both sides.

I on the plaintiff's side, of course, want to know information about the defendant, the drug manufacturer.

The drug manufacturer, likewise, wants to know information about my plaintiff.

That's fair. In fact, the U.S. Supreme Court described it in 1947 Hickman versus Taylor said, "Mutual knowledge of all the relevant facts by both parties is essential to proper litigation."

That ought to be self-evident, but I fear we have lost that message in the conversations that we have been having about these rules.

Texas, prone for its ability to twist a phrase, in 1984 said, Texas Supreme Court, Jean Paul versus Tuschy, "The ultimate purpose of discovery is to seek the truth so that disputes may be decided by what the facts reveal, not by what facts are concealed."

So let's start with that context again, and go back to the, okay, why are we exactly restricting discovery? What is it that we are trying to prevent one side or the other from doing?

Let's assume, for example, that I file a products liability against Pfizer, one of the largest corporations in the world, and I accuse them of having a lousy drug that harmed one of my clients.

You would think the very first thing Pfizer does when they tell me that I'm full of nonsense would be to say, we are so confident that there is nothing wrong with our drug, you should come on down to the plant, come walk through, talk to our people, come look at our documents, examine everything that we have done, we are that confident in the fact that we have done nothing wrong. They ought to think that way.

They don't.

The reality is that visceral reaction that you folks are listening to on both sides indicates this isn't a changing the way the game is played, this is changing the game.

The rules of procedure are designed to make it a fair playing field for both sides. If you change the rules in baseball one set of teams ought not be jumping up and screaming that that's an unfair change, while the other side is jumping up and saying we love that change, we should do more changes like that.

In this context the Scales of Justice are having their thumb put on it by these changes.

How do we know that?

The V in the middle of plaintiff versus defendant, that V is a visceral difference between one side of the docket and the other.

If this is just a change to the rules, why isn't everybody on both sides saying we like this, we don't like that, we should change this a little bit, we should tinker with that?

Y'all aren't hearing that. You're hearing the defense side and the corporations they represent say, we love it, and the plaintiff side and the folks that we represent saying, you're changing the way the game is played and it's unfair. I think that's a very telling point that we ought to be reminding ourselves of.

Specifically Rule 30. The way it reads right now we have ten depositions of seven hours each for a total of presumptively 70 hours of oral testimony.

The proposal that you guys are considering would cut that by 60 percent down to five depositions of six hours apiece. So from 70 hours we have cut it down

to 30 hours. That's not a little bit of a change. That's a ginormaus change, as my teenage daughters would describe it.

It's a change that favors just one side of the docket. They can't possibly depose my client, nor my client's widow for 30 hours, nor for 70 hours. So from the defense side it doesn't take them long to discover their case.

From the plaintiff's side just the 30(b)(6) representatives to figure out how Pfizer structured this particular drug department could easily take 70 hours of time, and often much more than that.

The similar is true on the written discovery. The depositions on written questions. Presumably they are more efficient and more effective than many of the tools in the discovery toolbox because they can accomplish things at very little expense to the parties, and very little consumption of time for those of you who sit on the bench.

Why would we limit those? Shouldn't we be expanding those to say let's not have fights in front of the Court on that sort of thing?

Likewise, with interrogatories, the current number of 25, reducing it to 15, including the subparts, again, this is one of the cheapest and easiest ways that we gather information. Why on earth would we try to restrict that?

Shouldn't we be expanding that to say, rather than the expensive tools of discovery, let's encourage and expand the efficient and inexpensive rules?

Then, finally, a request for admissions. The purpose of a request for admission is to eliminate the things that we don't need to fight about, because these things are agreed to by both sides. Isn't that exactly what we want?

So by the time it gets to the courtroom and we are resolving the issues in the courtroom, we know the things we don't need to fight about, because they have been resolved by request for admissions.

In reviewing some of the information that you folks have been through already, I have yet to see a truly demonstrated need for why these changes are being suggested.

I hear shrill complaining, as I have heard from others in my practice. I have not yet entered Jurassic Park, but I hear much complaining, as I have my entire career, and as all of you have for your careers as well.

I'm reminded of two things that I'll close with, because my red light has gone off already.

As Professor Arthur Miller said in his comments to this committee, "Rule amendments should be undertaken only with great caution, should respond to a demonstrated need, and should be adopted only in the absence of less Draconian solutions."

We have no demonstrated need yet, none that I have heard apart from partisan complaining. There is no less Draconian solution other than it's not broken and doesn't need to be fixed, and so why are we tinkering with these rules?

The final thought, and I hate to quote Professor Miller twice in short order, but since he cited Chicken Little, I will as well. The sky is still not falling when it comes to discovery.

I'm over time by a long ways.

Thank you, Judge.

HON. CAMPBELL: Questions.

(No response.)

HON. CAMPBELL: Perhaps I can ask you one.

MR. CURTIS: Yes, sir.

HON. CAMPBELL: When we held the Duke Conference that started this ball rolling there were a number of surveys done, plaintiff's lawyers, defense lawyers, in-house counsel, the ABA, which had plaintiffs and defense lawyers, and all of them by substantial majority said discovery is too expensive, discovery takes too long, we are having fewer trials because parties can't afford to litigate in the current environment.

That seemed to be quite an accepted -- now the FJC study, which was a bit of a different kind, producing different results, but the general attorney surveys all said discovery is too expensive and takes too long.

How would you attack that problem, or do you not think it's a problem?

MR. CURTIS: I do agree it's a problem, but I think you are attacking the wrong end of the element.

Rather than restricting the scope of what it is that we're going to look for, let's restrict the fight about the scope.

In other words, rather than having more discovery disputes that go to the courtroom with the defense now claiming, oh, it's not proportional -- I mean, what you are doing is giving them a brand new set of objections that -- how is it going to be resolved in the courtroom?

HON. CAMPBELL: How do you do that? How do you reduce the fights rather than the scope?

MR. CURTIS: If I could ask just one request for production in every case it would be the only request I would ever ask. Give me the 50 documents you most don't want the jury to see.

(Laughter.)

HON. CAMPBELL: Well, obviously you think that rule would work.

MR. CURTIS: I would love to say yes, but honestly not a chance.

HON. CAMPBELL: Well, in the real world how do we restrict fights and not limit or reduce discovery that is almost unanimously viewed to be as too expensive, too cumbersome, too lengthy?

MR. CURTIS: I disagree with the discovery part being too expensive. I agree that the dispute about discovery is too expensive, and they are different.

Here's what I would suggest, your Honor.

I think the proposals to Rule 34 are a very good start, because what they do is they eliminate prophylactic objections.

Texas has a very similar rule in Rule 193, and the Texas Rules of Civil Procedure are probably not a very good model for this panel to be using, but Rule 193 is a good model because what it does is it eliminates unnecessary prophylactic objections.

You have asked for documents that I don't yet have, but I might, and so I'm going to insert an objection, and that leaves the other side wondering, first of all, is there a document. And so we have to have a dispute about that, we have to go down to the Court. The other sides says, well, I don't have anything, but I might someday. Rule 34 helps to eliminate some of that nonsense.

Second, in responding to a request for production, if I have asked for the job description of the current marketing director at Pfizer, I don't need 700,000 pages of documents in response that. That's what I get. So I totally agree. I don't want to look through 10 million pages.

You know, the defense folks that you have heard from today complain that they feel like they are called upon to produce a giant chunk of information.

Back to my hypothetical request for production, don't give me a mountain when I have asked for a scoop of dirt, give me the stuff that I have asked for.

Some concrete examples.

I chair the Reglan Litigation Group, which is a pharmaceutical tort. Thus far in the Reglan litigation we have requested probably 100 categories, very finite categories of documents, and so far I've been given 3 million pages of documentation.

In the hormone replacement litigation that is now a decade or so old, in the process of that litigation over 10 million pages of documents were produced.

There may be somebody in this room that thinks I dig digging through 10 million pages of documents. I know that I don't think that way. So let's eliminate the unnecessary dumps of paper, and truly make the answers responsible.

HON. CAMPBELL: All right. Thank you very much, Mr. Curtis.

Mr. Michael Weston.

MR. WESTON: Good morning.

I'm Mike Weston, a lawyer from Cedar Rapids, Iowa. I've been practicing for 34 years, but I'm only 25 years-old, which makes me the youngest president of DRI in its 64-year history -- 54-year history.

Thank you for your service. DRI, I think, is well-known to you. It is the world's largest organization of lawyers who represent the interest of corporations, insurance carriers, business people and governmental entities.

And I say "represent," because very often now in the areas of commercial litigation, intellectual property litigation, our clients are plaintiffs. So we view this not just as a plaintiff versus defendant issue. We don't see that cassum. We're here to make our system of justice better.

And this group before me, this august group has done just that.

We have about 21,000 members, who as I, in the private practice of law, and represent our various clients in the courts of our country, we provided this group with our written submission on January 14th, and I will not elaborate on those remarks.

You will also be receiving additional submission from our members, and people who are interested in this process as we approach the submission deadline.

I want to talk to you as an Iowa lawyer today, and I'm fortunate enough to practice in a state that is very, very congenial. Our bench and our bar is small. We know one another and we get along.

But even in a state where we get along very, very well, the number of jury trials are diminishing to such an extent that we wonder whether our children, and my son practices with me in our Des Moines office, will ever try a jury case.

We believe that in the federal system where only 1 percent of the civil filings result in a disposition through trial by a jury, that our citizens are not getting the constitutional protection they deserve, to hear from their peers in a jury trial.

We believe that the reason in the federal system, and most of the states who pattern themselves after the federal system, that the number of jury trials have diminished is the incredible burdensome process of discovery.

We commend the committee for moving proportionality up in Rule 26.

We commend the committee for eliminating the words that really, in our view, does not create a standard, a standard that anything that reasonably leads to discovery of admissible evidence shall be discoverable from the rule. Because that -- that standard has hamstrung our courts, has really not given the kind of guidance necessary to limit and control discovery so that the parties can efficiently get a trial on the merits.

I practice in a state and deal with a lot of smaller companies. You have heard from many, many large corporations, some of our nation's finest and largest in submissions to you and in testimony today.

The one thing I would say is it is difficult to explain to an Iowa businesswoman or man the discovery process they are about to go through, how they have to dig through documents and go through computer programs that they have long since put away to mine for documents and material that may never see its way to the courtroom.

It's a horribly destructive process, and the rules that you have proposed are the rules not for the large and the great corporations, but they are the rules for the small business person, the small city, the small community, the township who finds itself in litigation, and has to deal with the standard that really isn't a standard. So I speak for them.

The process that we currently have is very contentious. The meet and confer process under the current standard is one really which is a -- charade is too strong a word, but it's just a step on the way to the courthouse to a motion to compel.

While the parties fight and argue about discovery, the litigation stops, the cooperation stops, deadlines get pushed back, trial dates get pushed back. The result of all that is that the delay costs all of our clients' money.

I want to leave you with two concrete examples of two magistrate judges in Iowa, and how they approach two significant pieces of litigation that I have been involved with to demonstrate what I think would be the promise of proportionately. That is, involvement of the Court as a referee, consultant, discovery master, friend, counselor, to help the parties navigate the discovery process.

One was a class action that was brought against an insurance company for its claims practices in a problem that would have had about 5 to 6,000 members, but a very active magistrate judge in one of our federal district courts who said, I see what's coming, I want to sit down with you and walk with you through the discovery process.

In effect, we went from the inside out. We started with a narrow scope of discovery, a few depositions and reported back. We talked about what the next level of discovery should be. And we did that until both sides knew what the merits of the claims were, and settled the case. Did not try it, settled the case not based upon the discovery process, but on the genuine assessment of risks that both sides made looking at the case through that proportionate discovery prism.

On the other side of the state we had -- I had another case, which was an exposure case, a product liability case, where the attitude of the magistrate judge was, I'm here as a referee to handle discovery disputes, and unless I have a motion before me, I'm not really going to get involved.

That piece of litigation resulted in an enormous amount of discovery requests, very contentious meet and confer conferences, and a very, very lengthy motion to compel process where the judge basically held up his hands and said, well, the standard is will it lead to discovery with admissible evidence, and most of this stuff does.

It also was a case where the plaintiffs served a little under a thousand requests for admissions, and asked us to authenticate documents that had been produced in similar cases around the country, but they didn't produce it back to us to authenticate it in the form that we had produced it.

So they used their requests for admission process in a way to play gotcha, and we had to spend thousands of thousands of dollars in the requests for admission process trying to figure out what combination of documents we were seeing, who the custodian was, who the author was, to be able to respond to those requests.

None of that moved that litigation forward, and our client, who was a foreign company, absolutely could

not understand our system, could not understand how we could not control the Court, could not understand what the Court was thinking about, and really doubted whether they wanted to be in our American system. That's what we confront.

By doing what you have, by proposing proportionality, you have said to the litigants of our country and our federal courts and our state courts, who pattern it, we're going to engage in a cooperative process to try to better target discovery, to get at the issues, to frame the issues, and try the case. That's really what we want.

Those are my prepared remarks. I would be interested in your questions.

HON. CAMPBELL: Parker.

MR. FOLSE: Mr. Weston, like you, my experience has been -- and they tend to be in larger, more complex cases where there are vast numbers of lawyers on the scene, but my experience has been that the meet and confer process, as you said, are just a step on the road to a motion to compel.

Endless amounts of time are spent haggling back and forth, usually by young lawyers, not people like you who are actually going to be trying the case, and has a little sense of what matters and what doesn't, they don't resolve things, they argue. And then it comes to the Court eventually. I do think that is one important element of the cost of civil litigation.

How will any of the rule changes that are on the table today change that?

MR. WESTON: Because I think that the Court will look at the position -- the elimination of any reasonably calculated standard, the moving of proportionality up in Rule 26, and view this as an opportunity to get involved early on at the Rule 16 conference. I think more of them will be held.

I think the magistrate judges will get more involved in the discovery process early on. I think parties on both sides of the V will be more inclined to invoke a court conference early on to discuss the contours of the case, and to discuss a discovery plan that makes sense.

I don't think we have that right now.

MR. FOLSE: Why do you think, for example, that moving proportionality factors up in Rule 26(b)(1) is going to lead to fewer discovery disputes as opposed to more objections and more discovery disputes that will then fall down into the black hole of meet and confer processes?

MR. WESTON: Because I think you have eliminated some really open-range language from the rule, and given some things for the Court to look at and the parties to look at.

Most lawyers who appear before you could make an argument that would make anything discoverable, and I think because you have come up with criteria for the Court to look at, the Court can view its rule differently, and that litigants can ask the Court to view its rule differently than it was before.

HON. CAMPBELL: All right. Thank you for those comments, Mr. Weston.

MR. WESTON: Thank you, your Honor, for your service.

HON. CAMPBELL: Professor Thomas.

PROF. THOMAS: I am a professor at the University of Illinois. Prior to my academic position I practiced for eight years representing both defendants and plaintiffs, four years for a big firm, and four years for a smaller firm. So while I testify as an academic, I come from a perspective of knowing the reality of the difficulties of discovery.

I have two points.

First, that the discovery rules should not be changed regarding proportionality.

And second, that if the rules are approved, they should be amended to account for difficulties in administration.

The advisory committee has said that under the current rules discovery works in most cases, but is out of proportion in a worrisome number of cases. That's what has offered states this worrisome set constitutes 5 to 15 percent of the cases. So the proposed discovery rules focus on this small set of rare, albeit important cases.

The question is should the proposed rules be changed when discovery is proportional in most cases under the current rules?

I believe future empirical evidence make the Court a move away from transsubstantivity for a proportionality rule only for the worrisome cases.

I'm going to come back to this point, but first what I want to talk about is something about what I have written an entire article. That is, that legal change should not occur where atypical cases motivate legal change, and the change affects typical cases. This can create bad law.

The proposed rules should not be changed in the present circumstances where atypical worrisome cases motivate change in the rules, and the changes will also affect typical already proportional cases.

Because the adversarial system and lawyers tend to use the rules, I'm going to say as fully as they can, with the proposed rules we will see lawyers in a typical case not producing discovery that was produced in the past because arguments that discovery is not proportional. I think this is natural lawyer behavior.

In this situation the requesting party will be required to move to compel discovery that would have been produced in the past causing already overworked federal judiciaries to face more motions to compel.

Present and former judges have told me that this may very well occur under the proposed rules.

At the same time that problems are created for already proportional cases, those cases do not advance the concerns of the rare higher stakes cases that are problematic that were the impetus for the rule, and disproportionality problems should be fixed.

Future empirical evidence, including the surveys of federal judges, make the Court a move away from transsubstantivity to a rule for these cases that is similar to the Class Action Fairness Act that provides a different rule for very large cases.

Now, with this said, in the event that the rules are approved, I ask the committee to consider changes.

My first suggestion relates to burdens. There is a concern about who holds the burden on a motion to compel when discovery is withheld on proportionality grounds. Language should be included in Rule 37(a)(1) to state that the nonproducing party bears the burden of showing that the discovery should not be produced. Including this language is consistent with past rule changes clarifying the burden on summary judgment.

My second suggestion is for proportionality laws. Under the proposed rules parties can withhold, either side, and other discovery without giving the other party much information about what is withheld.

The committee has recognized a potential problem by requiring specificity, but it's not clear how much information must be provided.

The proposed rule includes two categories of discovery that can be withheld that are relevant to claims and defenses. Privilege discovery and discovery lacking proportionality in relationship to the needs of the case.

26(b)(5) requires a party to provide a privilege log so that the other party can assess whether to make a motion to compel.

Additional language should be added to 26(b)(5) to require a proportionality log. This practice will promote candor between the parties, and will lead to less motions practice.

The final point I want to make is adding to the advisory committee notes is not sufficient to address any of these concerns.

In Gonzalez versus Sailor Justice Scalia suggested that such notes may not carry much weight because they're not a product of Congress. As a result, we shouldn't rely on those notes.

May I hand you copies of my proposed changes?

HON. CAMPBELL: Yes. Why don't you just start them at the end of the table and they can be passed around.

PROF. THOMAS: Can I answer any questions?

HON. CAMPBELL: Yes, I do have a question.

The premise on which you started was that the rules are being changed to address 5 or 15 percent of the cases.

In the survey of the National Employment Lawyers Association that was done for the Duke Conference 80 percent of the plaintiff lawyers surveyed said that discovery is not proportional in small cases, it's disproportional.

Could you comment on that in light of the sort of premises where you started?

PROF. THOMAS: Yes. I guess the thing I would say the most about that is that I'm primarily relying on the Federal Judicial Center's studies, which -- you know, I have come to very much appreciate, and I know that they spent a lot of work on it. I know that surveys of various lawyers might not be as empirically based. So I guess that would be my comments to that.

HON. CAMPBELL: Okay. Any further questions?

DEAN KLONOFF: Just a little bit off topic, but a number of law professors around the country signed a letter proposed by Professor Siegel at George Washington University opposing the aggregation of the rule and the forms.

I don't see your name on the letter, but I was curious if you had thoughts on that rule?

PROF. THOMAS: Yes. I had intended to submit my own written testimony. I haven't decided whether I'm going to comment on those forms.

I will say that I am concerned about those forms. I have read Coleman's article on the subject.

The concern that I have is because I think that

given the history, that those forms were part and parcel of the adoption of those rules. I'm concerned that that takes away from the meaning of those rules.

HON. CAMPBELL: Judge Koeltl.

HON. KOELTL: First, good to see you.

Even the Federal Judicial Center survey found that for the closed cases there were 25 percent of the lawyers reported -- plaintiff-defendant -- 25 percent of the cases that were closed in that quarter the costs were disproportionate to the stakes involved.

Is it acceptable to have a system where the study that came up with the lowest number still found that a quarter of the cases the cost were disproportionate to the stakes? That has enormous consequences for such things as the impetus to settle rather than try cases that should be tried.

And as Judge Campbell said, all of the other surveys came out with levels of dissatisfaction for smaller cases of -- 80 percent or more, including a plaintiff's survey, the ABA Litigation Section study.

The question is, first, don't we have an unacceptable situation?

The second question is, given your prior practice in the Southern District of New York where interrogatories are substantially cut back, there are about five interrogatories that you can ask, and you are a plaintiff's employment discrimination lawyer, and a very good one, did you find that that was an acceptable way to discover and actually try cases, as you did?

PROF. THOMAS: And I also represented companies, so -- after that, so I want to make sure that I have a broad range of experience.

But, yes, I had the honor of appearing before Judge Cote a lot in the Southern District.

I think with respect to interrogatories, I will say that my focus is about the 26(b)(1) change. I am still looking at the changes with respect to the number of depositions and the number of interrogatories.

I certainly -- from talking to lawyers about this issue, I think that it's possible that it might be better if one or the other wasn't changed, because people have talked about that you need one or the other.

But I am not as concerned about the change of the definition of interrogatories, because I think that there is some potential for telling -- asking judges and working things out.

With respect to the stats, I don't disagree, but I think there is a problem. I think that there is -- even in all the information that I have read that all of you have put out, you have talked about most cases being proportional. That's what I'm relying on, as well as the FJC studies.

So I am concerned about those worrisome set of cases, but I do think that the better course would be to think about a transsubstantive -- moving away from transsubstantivity to something special for some cases.

So -- and if that isn't the case, if we are going to move towards this rule, I really think a proportionality log is necessary here.

HON. KOELTL: Could I just ask one followup? I know it's over time, but doesn't a move away from transsubstantivity concern you, because it would suggest that we have two kinds of rules?

One for what people would come to describe as the bigger, or perhaps more important cases, and others -- another set of rules for other kinds of cases.

Now we have a system where we say we have one set of rules, we don't have different rules for different kinds of cases. Everyone is treated equally. Everyone is treated importantly. Everyone is treated with the same kind of respect. Then in every case we attempt to tailor the general rules to the needs of that case.

PROF. THOMAS: I think we have come to a point in time where we need to really consider a move away from transsubstantivity. I think that even though the Class Action Fairness Act is a different type of animal, I think that that change in some ways helps have us move in this direction with respect to discovery.

HON. CAMPBELL: Thank you very much for your comments, Professor.

Mark Chalos.

MR. CHALOS: Thank you, your Honor.

My name is Mark Chalos. I'm here today on behalf of the Tennessee Association for Justice, and also to express my personal views on the proposed rule changes.

I practice with the law firm of Lieff Cabraser in Nashville, Tennessee, and my views today are not on behalf of my law firm.

I come at this from the perspective of primarily plaintiffs' lawyer. I represent exclusively plaintiffs today.

However, in the course of my career, and I recognize I'm a junior member of this bar, I've been practicing 16 years, I have represented civil -- defendants in civil cases, big corporations, small businesses, and I have represented criminal defendants as well.

So I have been in the room where you have had

those difficult discussions with your clients about why you must turn over certain documents, and the client's concern that those documents may be taken out of context, and have to explain to them why they're subject to civil discovery.

I would like to first start with a discussion of the rule changes that we at the Tennessee Association for Justice support.

First, the proposed change to Rule Number 1 which makes it clear that it's incumbent on the parties, as well as the Court, to interpret and to implement the rules in a way that will secure that justice be an inexpensive determination of every action.

That clarification that is also incumbent on the parties, I hope will be vigorously enforced by the district courts and by the magistrate judges, and I think that can have a positive impact on reducing the cost of litigation to all parties.

Second, we support the proposed amendments to Rule 34(b)(2)(c), which makes it incumbent on a producing party to make it clear where they are withholding documents pursuant to an objection to a document request.

Three concerns I would like to express with respect to the proposed amendments.

First, regarding proportionality, the proposed rule as it sits today is unclear where the burden lies in establishing that the relevant evidence is also discoverable.

The concern that we have is that the rule as it is drafted in the proposed amendment gives yet another battleground, another reason to withhold relevant information, and another expensive -- another motion in a series of motions.

In practice we see in our cases right out of the gate a 12(b)(6) motion in almost every case challenging under Iqbal and Twombly.

We see boilerplate objections to almost every discovery response. We see motions for summary judgment, motions to strike class allegations, Daubert motions, renewed motions for summary judgment, motions to decertify class actions. In individual cases we see the same type motions.

Now, add to that a threshold motion, you're not entitled to any discovery except for the very basic discovery, because it's not proportional, you haven't met your burden that establishes that it is proportional.

Then the inevitable fallback motion under Rule 26(c), well, fine, we will give it to you, but you have got to pay for it. We see those as really driving up the cost of discovery in many cases. We see this as yet another opportunity to slow the process down, and to drive up costs for both sides.

Second, I would like to address the proposed change to Rule 26(c), and this would be the cost shifting of the express power making implicit that the Courts have the power to shift the cost.

We recognize that some courts and some litigants believe that power is already inherent in either the rules or the Court's powers.

Our proposal is that if such an amendment is going to be implemented that makes that power clear, that it also make clear that it also make clear that the American rule -- the so-called American rule that each party bears its own cost is explicitly retained as the default rule, and that only in extreme and unusual circumstances should the opposing party be made to pay for the other side's efforts in collecting and analyzing its own documents, and producing its own witnesses.

And, thirdly, I would like to address the proposed amendments to the sanction Rule 37(d).

I think we all agree that this is a laudable aspiration to have a national standard for dealing with these sometimes very difficult issues of what happens when data goes missing, the documents go missing.

We see in practice this is a fairly frequent occurrence. The nature of the way corporations and others operate these days, we don't see so much the one document missing, where is that letter, where is that memo, you must have destroyed the only copy. Given that almost all commerce is done electronically in emails and scanned and otherwise, we typically don't see just the one document missing, we see big gaps in data.

We see years of emails that are not present.

We see years of product sales, and those are real examples from cases I'm dealing with right now. And the question of why did that happen is a difficult one.

For -- the way the rule -- the proposed amendments are drafted, our concern is that it would make it nearly impossible for a requesting party to ever get meaningful sanctions against a party that allowed evidence to be spoliated, whether it was intentional or negligent or something else.

To prove the state of mind of willfulness, to prove bad faith, as a predicate for getting any type of meaningful sanctions is going to be nearly impossible. And the additional heightened standard of proving that it's essential to your case is even more difficult.

Leaving substantial prejudice aside, when you don't know what you don't know, it's impossible to go to a court and say I have substantial prejudice, or I haven't been able to prove my case because of this missing data, we just don't know what's in there.

For example, in those two cases I mentioned, we don't know what's in those two years of emails.

We don't know the product sales for those three years that they say are now gone.

For us to go in and prove willfulness, bad faith and substantial prejudice, or inability to prove our case because of the missing data would be just nearly impossible.

So our concern is that the proposed amendments, as they are written now, with the burden lying where they do, would inadvertently create a safe harbor for parties that spoliate evidence, either negligently or intentionally, where we can't prove that today, what happened.

HON. CAMPBELL: All right. Thank you, Mr. Chalos.

Paul.

HON. GRIMM: Real quick question.

You said at the beginning of your comments with regard to Rule 37 that pretty much everyone would agree that a national standard would help.

If your respective is that willful or bad faith, willful and bad faith, that is a clone with the other conditions as well is not the right national standard, what national standard do you think would work?

MR. CHALOS: Well, I don't believe -- I don't know that it's not the right standard in that my concern is more with the burdens of proving willfulness and proving bad faith.

There may be more well developed terms that we can use. I mean, willful has a meaning in a criminal context, and I don't think we could ever meet that standard, quite frankly, within this type of debate.

What I would propose is some sort of rebuttal presumption. The data is missing, we all agree on that, and I think that, or maybe something a little bit more, ought to trigger the responding party, the spoliators, to have to rebut the presumption that something bad happened.

They are in the position -- they know the information, they know what happened, they know why it happened, they know what went missing. It ought to be their burden to say, we didn't do this intentionally, we didn't do it grossly negligently, we didn't do it negligently.

You know, sometimes bad things happen, but also the burden ought to be on them to establish that it's a no-harm-no-foul situation, what was lost would have no impact, because they know it was lost.

We, as the requesting party, we don't have any idea what was lost.

HON. GRIMM: So you would favor that the rule be clear that the burden of showing both that it was benign or that it was cumulative, as well as the culpability would shift to the party that failed to produce or preserve to establish that?

MR. CHALOS: Yes, sir. I think that would help the rule.

I think that the -- it may require more study. I don't know that the rule as written, that I would endorse it with just that change, but I think that's a good place to start.

HON. GRIMM: Thank you.

HON. CAMPBELL: No other questions?

(No response.)

HON. CAMPBELL: All right. Thank you very much, Mr. Chalos.

Bradford Berenson.

MR. BERENSON: My name is Brad Berenson. I'm in charge of litigation for the General Electric Company. I appreciate the opportunity to appear before you today, and share some thoughts and some information on these important rule changes that you are considering.

Our company has a really unusual vantage point from which to evaluate these proposals precisely because we are so large. We are in 160 different countries, 3,400 different locations. We are involved at any given moment in time in literally thousands of civil cases all across the world. 40 percent of our significant cases are outside the United States in other systems.

We have the largest Outlook email system in the world. There are 450,000 unique mailboxes across 141 servers in eight global locations, so we know a thing or two about the complexity, difficulty, burden and expense of trying to manage preservation and discovery.

In general, we support the proposed amendments, although we do have some suggested modifications to the proposed changes to Rule 37(e). We filed written comments on Wednesday that provide a lot more of the reasoning and the details and additional examples beyond those that I'm going to provide you with my time here at the podium this morning.

While I'm here in front of you I thought

probably the most useful thing I could do, as compared to the other commenters, is provide you with a somewhat richer factual record by talking about a few specific examples that we have seen in our company, which are not meant to be outliers in any sense, but are fairly representative of large cases.

The first point I want to make is the obvious one that I think the committee has heard a lot about, so I won't belabor it, which is simply the waste, burden and cost of the current regime.

My predecessor back at the Duke mini conference in 2001 went through three specific examples of cases, and one thing that we did in preparation for the comments we filed, and for this morning, was to update those three examples, see what's happened in those cases in the ensuing three years.

The second of the three examples he provided, in 2011 he reported that we had spent $5 million to preserve and collect documents from 250 unique custodians.

Three years later, today, those 350 custodians have become 815 across the EU and the United States where the documents were preserved. Four hundred fifteen of those custodians, there has actually been a collection of documents, and ultimately documents were produced to the other side from only 85, or about 10 percent, of those whose documents were originally preserved.

Of the documents produced there are 340,000 unique documents, 6 million pages. When the case finally reached trial all of the documents fit in a couple of binders that both sides designated and used as exhibits. There were 194 of those.

So .1 percent of the documents that were actually produced at the end of this huge funnel actually found their way into trial, and were documents that one side or the other considered necessary to the accurate determination of the case in a court of law.

The overall cost over seven years of discovery in that case, $22 million.

But the waste and burden and cost, in many ways, is the subordinate problem here. The bigger problem here, the thing that I worry more about, and I suspect many of you worry more about, is the distorting effect that that kind of waste, burden and cost can have on the actual substance of justice, on outcomes in particular cases.

In particular, what I'm talking about, and what the next example I think will illustrate, is nuisance value settlements.

By definition, when you are settling for nuisance value, you're settling not because anybody has made the adjudication of the merits and found you liable, not because you yourself necessarily consider yourself liable, but rather because the cost of continuing to litigate are simply greater than the cost of settling, and as an economically rational act, or the economically rational thing for you to do, is simply pay to make this go away.

So the third example my predecessor provided at the Duke mini conference involved $6 million of discovery cost, 700,000 documents, 15 million pages as of 2011. Today that's $6 million. That case is still ongoing. That $6 million has become $11 million.

Our best most objective good faith assessment of the fair settlement value of this case is $4 million. We have opponents on the other side, who for a variety of reasons I won't worry you with, are unwilling to engage in reasonable settlement discussions anywhere near the level we think is fair or reasonable.

And the point here is that these discovery costs makes settlement of three times our honest assessment of the real value of this case an economically rational and efficient thing to do.

This is not justice, this is not how we want the system to work, and yet settlements like this go on every day throughout the system because of the explosion in cost of electronic discovery that means that nuisance value nowadays can mean multi-million dollar settlements.

The last -- finally, the last portion of my remarks is addressed to sanctions. This in many ways is the bigger problem from my point of view than the scope of discovery. There is a couple of different reasons why it's such a big problem.

The first is that it creates very strong incentives to gin up sideshow litigation and gotcha games, and those incentives are the strongest when someone has a weak case.

If they can take attention away from the merits, divert it to this game tactical litigation advantage through ginning up a spoliation fight, they can often obtain settlement leverage, or an adverse inference instruction that will help a weak case.

So let me tell you the final example I'll offer you this morning, it's what we call our Tale of Two Cities.

We had two roughly comparable cases in our oil and gas business. One in federal district court in Houston here in the great state of Texas, and the other

in commercial court in Paris, France.
In the first case in Houston there was about a $55 million claim. It went all the way through to trial, a one month long trial, we prevailed with a defense verdict, and the total cost for that case for us was $7 million in fees paid to a really outstanding and very efficient local boutique litigation firm.
In Paris the claim was both larger and more complex, a $130 million claim. The evidence was distributed across the EU and the CIS countries. We won that case as well in the Paris commercial court, and then there were two levels of appeal. It was affirmed on appeal, and went all the way to the highest court.
The total cost for that litigation, $671,000 for a top flight household name local firm. All the way through the final appeal to the Supreme Court of France.
About half the total cost of the federal district court in Houston was discovery, and of most interest given that we're talking about sanctions and spoliation, is that as the other side saw their case was weakening, they made a spoliation claim very late in the case.
The Court ordered additional discovery, additional depositions and fact witnesses and experts, and the total cost of litigating the spoliation claim alone was almost equal to the total cost of the Paris case end to end.
The second thing about sanctions that I think is so damaging, the current sanctions regime, is that without requiring that there have been specific intent to frustrate the other side's discovery effort, without bad faith, you can actually be ordering sanctions remedies that corrupt outcomes and distort justice in yet another way.
After all, if the loss of data was not intentional, and was not intended to deprive the other side of evidence that it needed for its case, there is absolutely no reason to suppose that the evidence lost would have helped them rather than you.
When there is an inadvertent loss of data we are as unhappy about that -- in many ways more unhappy about that -- than the other side. So to order punitive sanctions, particularly those that come in the form of a jury instruction or adverse inference, may actually cut directly against the right outcome in terms of an accurate verdict according to law.
With that, I'm happy to take any questions.
HON. CAMPBELL: All right. One quick question.
MS. CABRASER: Which of the two cases in the Tale of Two Cities came first?
MR. BERENSON: You know, I don't know the exact sequence of timing, but they were roughly contemporaneous. They all occurred recently within the last five years, at least the trial proceedings were all within the last five years.
MS. CABRASER: Well, one was not completed before the other?
MR. BERENSEN: No, I don't believe -- well, one must have been completed before the other, but I don't think there is a sequencing issue, at least not that I'm aware of.
PROF. MARCUS: One of the things that we have been asked to do is define "willfulness and/or bad faith" as part of 37(e) changes.
The American College of Trial Lawyers has suggested a definition that the standards of bad faith, which they define as, "taken with the intent to destroy or delete potentially relevant evidence, or in reckless disregard of the consequences of that party's actions."
Could you live with that definition?
MR. BERENSON: I think that gets very close to the right answer. We prefer the Sedona Conference's suggested language.
I think the main difference, if I have got this right, is the question of whether "reckless disregard" is included.
The concern that I would have about "reckless disregard" is that in actual practice and operation it could evolve very easily into a negligence-type standard.
Having seen what I have seen now, I know how unbelievably difficult it is, even for the most scrupulous litigant in a large company, to do all this exactly right, particularly as against a hindsight-driven criticism.
PROF. MARCUS: Would you agree that the finding of an intent to destroy is something that can be inferred even without direct evidence?
MR. BERENSON: Of course.
PROF. MARCUS: Would you agree that "recklessness" is relevant to making that determination?
MR. BERENSON: Yes. I think "recklessness" probably is relevant to that determination.
PROF. MARCUS: I appreciate that.
Thank you.
HON. CAMPBELL: All right. Thank you very much, Mr. Berenson.
Michael Harrington.

MR. HARRINGTON: Good morning, your Honor.

My name is Michael Harrington. I'm general counsel of Eli Lilly & Company. Eli Lilly is a global pharmaceutical company that discovers, develops, manufactures and markets innovative human pharmaceuticals and animal health product around the world.

It's my pleasure to be with you today, and I thank you for your work.

I want to begin by expressing my personal and my company's respect for the federal courts. Like General Electric, we litigate every day in state and federal courts around the country. We litigate in courts around the world.

It is always my preference when we have a material piece of litigation that that litigation is venued in federal courts in the United States, precisely because I believe that when it comes time to a merits determination I have great confidence that the federal courts are going to get it right. So I would like to be in the federal courts.

It is precisely because we have this respect for and admiration for the federal courts that we think that the rules that you propose are so critically important.

This committee has recognized that excess discovery occurs in a worrisome number of cases, particularly those that are complex and involve high stakes and generate contentious adversarial behavior.

These are the cases in which we operate every day. We have a full docket of these cases. We are both the plaintiff and defendants in roughly 4,000 such cases, and we agree with your concern about excess discovery.

Our experience as a global company has led us to support the proposed rule changes, particularly proposed Rule 37(e) and 26(b)(1).

Specifically, like Mr. Berenson, I think the best value that I can offer today is to share with you what our experience has been over the last five or six years in administering discovery for federal courts.

Specifically, I would offer the following:

Since 2008 it's been my observation that of our total global litigation spent, over 60 percent of that spent is driven by costs related to -- directly related to preserving, processing and producing documents for U.S. litigation.

We have spent in that same time period over $40 million on a system to preserve email documents.

In the last three years we spent over $50 million to review and produce documents for litigation in the United States.

But the key point, of course, is not the absolute dollar that we have spent. The key point is that too much of that spent has been spent on producing and processing documents that have no bearing on the ultimate outcome of the litigation.

For example, we recently tried a product liability case where we reviewed over 20 million pages of documents. We produced 1.2 million pages of documents, and 200 documents were chosen by both sides from that universe to be used at trial.

We were recently the plaintiff in a patent case where we produced -- where we reviewed over 6 million pages of documents, produced 1 million pages of documents, and 140 documents were used at that trial.

While this is interesting antidotal evidence, pharmaceutical companies understand that in order to demonstrate causation, you need to control a clinical study.

Like General Electric, we conducted controlled clinical studies in this area. We have recently tried three patent cases, one in the United States, and two involving the identical patent in two other developed English-speaking countries at substantially the same time.

In the United States we produced 1.4 million pages. In the other two countries we produced 600,000 pages and 20,000 pages respectively.

In the United States approximately 150 documents were used during the trial. In the other two countries approximately 150 documents were used in the trial.

Substantial overlap, as you would expect, because these are the documents that all sides knew were ultimately going to be relevant to the claims and defenses at stake.

Interestingly, all three courts came up with the same determination on validity and infringement in the public patent. So it's these experiences that have led us to support the proposed rule changes.

Specifically, we propose -- we support Rule 23(b)(1) (sic) without reservation. We think it will not have an impact on the merits of the litigation, but will significantly decrease wasteful and unnecessary discovery.

There has been a lot of discussion about proportionality today. The greatest benefit, I think, that we find in 26(b)(1) is the changed language to get

away from the old standard, which I think is very broad, and leads to excessive discovery.

We also support Rule 37(e). We think it's an improvement, albeit an imperfect improvement over the rule today, and we endorse the changes that have been proposed by LCJ.

In closing I want to say that the proposed rules enjoy overwhelming and widespread support in the corporate community and by general counsels.

There is a letter being prepared that we will receive next week from a small, medium and large general counsels, from general counsels of for profit and not for profit companies, over 250 general counsels that support the proposed rule changes.

So we thank you for your work, and I'm happy to take any questions that you have.

HON. CAMPBELL: Questions?

Richard.

PROF. MARCUS: I am asking you, but might be relevant to others as well, could you tell me in terms of preservation, focusing on 37(e), how adoption of the proposed rule would affect and perhaps improve your handling of preservation issues?

MR. HARRINGTON: It's a good question.

Some of the concerns we have, if the language about "willfulness" remains in, and (b)(2) remains in, immediately what we would do, frankly, is monitor the development of the law and the use of factors.

We would not be any less meticulous in our preservation, nor would we immediately be any more narrow in our preservation.

My hope is that as the law develops around those factors over time, we would be in a position to begin to change the way we operate our preservation.

Specifically, one of the questions that's very hard on our preservation is when it ends. Right? When can you stop?

I'm hoping that the articulation of factors in 37(e) will allow law to develop that will let us rely, and that we will be able to make some of those determinations without fear of post-docket sanctions.

PROF. MARCUS: Well -- so You like the factors in 37(e)(2)?

MR. HARRINGTON: Well, I like that there are factors. I don't think they provide the kind of perspective guidance that I would like to see, but there is things that -- if that's the way the rule comes out, those are what we will look to to change the way we operate.

HON. CAMPBELL: Other questions?

Paul.

HON. GRIMM: Just a followup on the same question I asked a moment ago.

If we were to do as some have urged us to do, which is either to eliminate the "willingness" instead of making it disjunctive "willfulness or bad faith," and make it "bad faith or willfulness and bad faith," would you agree that either as a definition similar to the one that the -- that the American Collage of Trial Lawyers suggested, that specifically define "bad faith" to include "reckless disregard," would you agree that if the definition didn't have that component, that "recklessness" was relevant to determining whether or not "bad faith" could be inferred?

MR. HARRINGTON: I do.

HON. CAMPBELL: Let me ask one other question, if I can.

You gave us statistic, as others have, about the fraction of a percent of documents produced that actually wind up at trial.

When I was litigating it was before the advent of millions of pages of production electronically, but the truth was of the 900,000 pages I got, as opposed to 9 million, only a small fraction ever got to trial, because most of them weren't relevant, I asked broadly, and got broadly, and because the practical reality is you can't use that many documents in a trial.

So what are we to make of these statistics?

I mean, are they really reflective of a problem in discovery, or are they simply reflecting the fact that there are now millions of documents preserved that can be produced readily that didn't used to exist?

MR. HARRINGTON: Well, it's certainly the latter, right, the promulgation of electronic documents. You know, our company probably adds to its electronic archives and ULs hundreds of thousands of emails every day. That certainly exacerbates the problem.

But I think the current rule, the breadth of discovery doesn't make it any easier. I think the proposed language will improve that by narrowing the scope.

HON. CAMPBELL: All right. Thank you.

William Hangley.

MR. HANGLEY: Good morning.

I am here speaking for members of the leadership of the ABA Section of Litigation. We are, of course, the largest section of the American Bar Association.

Within the section I chair the Federal -- or co-chair, the Federal Practice Task Force of the

association.
When I say I speak for members of leadership, it is because of the arcane protocols of the ABA that I can't say I speak for the ABA Section of Litigation. I'm sorry about that. It's not my fault.
I should give you a little bit of my personal background and credentials, because I think it's relevant to the testimony.
I am a past member of the Advisory Committee on Federal Rules of Evidence. I am a fellow of the American College of Trial Lawyers, and recently became the regent, or what my wife calls the Grand Raccoon to the states of Pennsylvania, New Jersey and Delaware.
(Laughter.)
MR. HANGLEY: I am -- through the college have been a member with former Justice Becky Kourlis' organization, she testified today on the IAALS, our joint task force on discovery in the civil justice system.
We, frankly, view ourselves as the parents, or at least the grandparents of what ultimately became the Duke Conference, and led to many of the proposed changes that this organization is discussing today.
And I have practiced law since before dinosaurs walked the earth.

(Laughter.)
MR. HANGLEY: Now, I think the novel thing about the organizations with which I have been -- and the efforts which with I have been associated, and with my own law practice, is that there is no sidedness to it.
On the enterprise with IAALS and the American College we had long, long sessions of plaintiffs and defendants lawyers sitting together and saying we have this wonderful justice system, we have the most perfect set of rules designed to uncover all relevant information that one could imagine, and nobody can afford to access the thing.
Or for those who must access it, it has become so frightfully important that they do, as witnesses that testified earlier today, settle for nuisance values at absurd numbers.
That was not a plaintiffs' or defendants' enterprise. The group which put together our responses to the proposals was not a plaintiffs' or defendants' group, the Federal Practice Task Force, and the Council of the ABA Litigation Section, and the section itself were peopled by people from both sides of the aisle, both sides of the V. And so I think we are objective.
As you know, we have participated step by step in commenting on the development of these rules, both the Duke subcommittee protocols, and the spoliation rules. And, generally, we favor and applaud them. We hope we had something to do with their current shape.
In Don Bivens' letter of February 3rd we have run through those things that we strongly endorse, and we mentioned a handful of things on which we still have concerns.
First, with respect -- my yellow light is on so I am just going to talk about areas where we disagree.
First, we see no point in reducing presumptively the number of depositions, although we agree with cutting down on the hours, because believe me, at 7:00 at night a witness is really tired. But we think that you don't have a problem with the number of depositions such as sufficient to justify cutting from ten to five.
We think that with respect to Rule 37, spoliation of documents, that the standard should not be "willfulness," it should be "bad faith."
We have given you as an exhibit to our letter a variated list of definitions of fee cases of what "willfulness" means. We think we are going into a tar pit if we go there.
We also -- as mentioned in the letter -- and my red light is on -- we discussed various other aspects of Rule 37(e)'s enumeration with which we disagree, in our view, contrary to, I think the last witness was, we do not think the enumeration rules ultimately will be useful.
Although, of course, all of the factors, and probably others, are very important to be taken into account.
I apologize for overstepping my time. I would be delighted to answer questions.
PROF. MARCUS: I haven't had a chance to look carefully at the comments you made, that the organization made, but, again, if we were to follow your advice and make it "bad faith," do you agree that -- I don't want to put one organization that you're a member of in conflict with the other, but since you're a member of both the ABA and American College, they point out to us that if "bad faith" is the intent to destroy, that the relevance of that determination, since that may have to be inferred, is "recklessness."
MR. HANGLEY: I certainly think that measuring the level of the conduct, of course, is critical, and that a consideration or finding of "recklessness" could go towards a determination of bad faith. But I think -- and this will really make me

sound lawyer, your Honor, but I think that "recklessness" stand-alone should not be the standard.

Thank you.

HON. CAMPBELL: Other questions?

MR. BARKETT: Mr. Hangley, could you comment on -- I notice their concern expressed that sending preservation letters, particularly prelitigation, kind of causing a number of problems, and I'm interested in the section's view, and the leaders of the section's view, on that specifically.

MR. HANGLEY: The leaders of the section thought that section that -- in particular, we are troubled with all, but we really don't like the one -- don't like most of all is (c), because it presumes, the way it's worded, that a party, or a nonparty, who doesn't respond to a request for document preservation, that that nonresponse is a factor.

As a lawyer whose firm -- and who personally represents plaintiffs and defendants, and the joy of not being associated with either camp full time, let me tell you that you get requests for preservation of documents that are not worth answering. You get demands that are so broad that they really are not entitled to a response.

Now, if it turns out that the response was a reasonable response, that's one thing, but the mere fact of not answering, or presuming that you have to answer every request, particularly for larger corporate parties, I'm sure, is just, I think, unjustified.

By the way, the other one that we did not like was (e), which sets up the same sort of indirect inference that when you're requesting the documents you should seek guidance from the Court.

The people from whom documents are requested often are nonparties. Even the parties often are nonparties because the lawsuit hasn't been brought yet, and they should not have particularly the unilateral burden of running into a court that doesn't want to hear it because there is no case, or they are not parties in that case, and saying I want some sort of protection.

HON. KOELTL: With respect to the issue of the presumptive number of depositions, changing the number from ten to five would mean that the parties in the cases where they wanted to take more than five, but not more than ten, would be the party affected, because ten is already the presumptive limit, and it would require that they either agree on taking the depositions, or be able to explain why they should have that number with an instruction to the judge that the judge must grant more if the judge finds that the greater number is consistent with the rules.

Why is it an unwise rule that parties should have to explain why that number of deposition is in fact the appropriate number, why taking those depositions are merely consistent with the rules, particularly when we know that this is going to affect that band of depositions?

MR. HANGLEY: Judge, here's what I think about that.

I think that when you get to the Court and you get the Court's attention, when you get the Court's attention on this issue, having spent some money and put your position together, we must presume that the Court will make the right call. But just as a presumptive limit of ten creates a certain mind-set, so too would a presumption of five create a certain mind-set.

It's relevant here, I think, sir, that -- that these battles become not battles between senior trial lawyers discussing things between themselves, but often you find yourself dealing with a less experienced lawyer in the firm, always a discovery lawyer, not -- having the benefit of coming from that early age when cases were actually tried -- and they are afraid not to invoke every possible position to frustrate whatever it is that you want to do.

I can tell you from past experience, sir, that change to ten depositions as a presumptive limitation, that cost my clients money. It cost myself and my lawyers time. Not in so much the litigating, in the true sense of the word, but in the bickering, and in the responding to the letters and back and forth of this and that and the other thing.

Now, we have -- I don't think ten is a bad number. I think five is almost always a good number, but I really don't want -- and lawyers don't want to have it be a mindset where the young insecure litigator on the other side is going to get locked in and say you got your five and that's it. Of course, that's what we use. It happened once and it's going to happen again at a lower level.

So that's what I think, Judge.

I would like to thank Judge Koeltl for serving on our task force even though he's never been able to participate in any of our deliberations.

HON. CAMPBELL: All right. Mr. Hangley, thank you very much.

We will break until 1:00.

(Lunch recess.)

HON. CAMPBELL: We have got Mr. Cook, I presume, at the lectern, so we will go ahead and start.

Then, Mr. Moor, we will take you after Mr. Cook so we can hear from you before you have to leave.

All right. We have at the lectern Gregory Cook. Please proceed.

MR. COOK: Thank you, your Honor.

My name is Greg Cook. I'm a lawyer at Balch & Bingham in Birmingham, Alabama, and I speak today on my own behalf.

My practice focuses heavily on class action defense work, and therefore I'm going to concentrate my remarks on Rule 37, which I believe will have the greatest impact in a class action area.

First, I would like to endorse and compliment the committee's work on Rule 37. As the committee is aware, the cost to litigate class actions have escalated significantly, and those costs are especially true in the ESI area.

In addition to the costs, there is the risk from ancillary litigation over ESI disputes, so both the cost and those risks can sometimes force defendants to settle cases that they would either win on the merits or win in class certification. Both sides are aware of those costs, and the potential leverages they can create.

And it is true that an asymmetry of cost is going to be true in any case between a single plaintiff and a corporate defendant, but that asymmetry is particularly amplified in the class action context.

I believe that the committee's proposed Rule 37 changes will promote a uniform national standard, and help curtail this ancillary litigation.

As Rule 1 has said, the goal should be the just, speedy and inexpensive determination of disputes. The goal should not be perfect discovery.

I have had the opportunity to practice before ESI really happened. Back when I started practicing, as you know, when discovery came in you would go talk to the company, you would get their file, then you would go talk to the key employees and ask them for their documents, you would go to the warehouse and you would find the index and you would provide the index to the plaintiff's counsel.

What you did not do is go through every single box in the warehouse. And what you did not do is rifle through your employee's desk looking for their Post-It Notes. Or when you heard that a lawsuit might get filed, you didn't tell them that they needed to keep their Post-It Notes.

I think the discovery in the ESI world should parallel discovery in the old paper word, because I would argue that discovery in the old paper world was an effective way to find speedy, inexpensive and just results.

My law school civil procedures teacher was Arthur Miller, and I remember very clearly in my first year of class when he told us that the Xerox machine was the greatest lie detector ever invented, because you could never be sure that if you were the wrongdoer that you had destroyed every copy of that document.

The same is even more true with ESI. There is no way that anyone can be sure that every text message and every copy of that email had been deleted, and they should assume just the opposite.

Now that I have endorsed the rule I will make a couple of friendly suggestions.

First, I agree with LCJ that it should be "willful and bad faith," not "willful or bad faith."

Second of all, I would argue that the irreparably deprived exception should be deleted, or in the alternative, that it should be limited to physical evidence where it's much more likely that you have had true irreparably deprived -- either truly or irreparably deprived plaintiff of evidence.

Lastly, I would suggest that the factors be deleted. They risk the bad faith standard, they are vague, and I would, as a cross-action lawyer, be particularly concerned with the anticipation litigation language in those factors.

It's particularly hard at the beginning of a class action to determine the scope and the class, it's often pled too broadly, but at least in those cases I have got a complaint to look at. Before the class action gets filed it's going to be very difficult for me to determine what the true scope is, whether it's national or it's confined to a particular state.

So, therefore, I would argue that that factor is particularly difficult, but I would just argue that all of the factors that you brought to this point --

And I do want to talk briefly about the risk, and I mentioned it earlier, the risk of ancillary litigation.

Mr. Bradford (sic) from GE this morning mentioned that there is a perverse incentive on risk if there is in fact no case to the plaintiffs, or their case is weak, that's when you find the ESI spoliation motion being made. That's another strong reason why I would endorse this committee's changes to Rule 37.

Thank you very much.

HON. CAMPBELL: All right. Thank you.

Are there questions from members of the

committee?
PROF. MARCUS: On the (b)(2) factors, which it is your recommendation that we eliminate, I'm struggling with finding how it is that -- what factors you think, if those factors in their entirety are unhelpful, would guide courts?
If courts are going to look at this rule and try and figure out how to interpret it if it's adopted, it strikes me as being anomalous to say that they should consider all relevant factors, but give you no guidance at all. If you were arguing to a court whether factors that you think they should consider, and if so, why is it that you feel that it's better to have nothing than to have factors?
MR. COOK: First, I do think there can be some development of the case law, and everything is factually specific often in these ESI disputes.
HON. GRIMM: Well, what right now, given the status of the law right now, if you had to make that argument and there were no factors to go on, would just stand up to the judge and say, Judge, I'm doing everything that's right, Judge? You would surely come up with something that you think would be guidance. If what we have is wrong, what are the ones that should be there, in your opinion?

MR. COOK: I guess my concern is that there are any factors, Judge. I think that those --
HON. GRIMM: So we just flip a coin?
MR. COOK: No. What I'm suggesting is that the factors, as they are today, would be seen as a guidepost and as an exclusive list, I believe, by judges. Even -- whether they treated it that way -- whether it was explicit in the rule or not, they would be treated that way.
And these ESI disputes are so factually intense, and -- furthermore, I would say that those factors apply both to the willful and bad faith portion of the rule, and also to the other portion of the rule talks about curative measures.
So I would argue that those factors are -- could be treated as exclusive, and also are being applied to try -- they could be applied to determine what bad faith is. And I would argue that when you're talking about reasonableness in those factors, that shouldn't be applied in determining bad faith.
HON. GRIMM: So reasonableness is irrelevant to whether someone can do that in good faith?
MR. COOK: No, your Honor, I didn't mean that. I meant that it would be -- that would be equated to whether or not they had acted in bad faith.

HON. GRIMM: Thank you.
PROF. MARCUS: I don't remember if you said where your practice is. We have heard many say that the standard of culpability is handled quite differently in different parts of the country.
Could you tell me where your practice is, and whether you see ancillary litigation more prominently in places with different culpability standards?
MR. COOK: My practice is in Birmingham, Alabama.
PROF. MARCUS: And that's in the Eleventh Circuit?
MR. COOK: Eleventh Circuit.
PROF. MARCUS: What is the culpability attitude of the Eleventh Circuit?
MR. COOK: The Eleventh Circuit tends to be closer to the Seventh Circuit. It hasn't expressly said that, but the District Courts in the Eleventh Circuit have moved towards a bad faith kind --
PROF. MARCUS: And you have ancillary litigation problems with that standard?
MR. COOK: I believe we have less ancillary litigation standards -- fights than other circuits have.
And I can't -- all I can do is look at the disputes and the case law. I can't give you a comparison otherwise.
HON. CAMPBELL: Other questions?
(No response.)
MR. COOK: The Eleventh Circuit follows the Fifth Circuit standard under the Byers case after the split, which is a bad faith standard. Bad faith is bad faith.
PROF. MARCUS: So adopting the rule as you would have it be would not change anything in the courts where you litigate?
MR. COOK: I don't think so.
HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Cook.
We're going to take Mr. Moor, who is listed as witness 35, out of order, and hear from him next.
MR. MOOR: Thank you so much for the consideration. I appreciate that.
Good afternoon. My name is Karl Moor. I'm a senior vice president and chief counsel for Southern Company. In that capacity I'm responsible for writing legal advice and policy guidance on environmental matters affecting the Southern Company system, which is a fleet of about 43 megawatts of generating capacity based in Atlanta and the surrounding states.

We serve about 4 million customers, and we also have operations in about a dozen states elsewhere in the United States.

Today I would like to talk about a few examples of real world impacts that the electronic discovery rules have had on us.

I would like to address two of the proposals that have been made. One would be Rule 37(e), the preservation sections, the foreign sections, and when a party acts with willfulness or bad faith, and the loss of information causes substantial prejudice.

The amendment to Rule 26(b)(1) are also of interest, limited discovery to information relevant to claims defenses proportional to the needs of the case.

I didn't know it until today, but I'm actually standing here before the counsel -- my counsel in this case that I'm about to speak about. I don't think it in any way prejudices what I'm going to say, but I was fortunate enough to be represented by one of the lawyers at the table. And I can tell you that these were -- the cases that I'm about to talk about were one, two and three of a very unusual claim.

There was a claim that essentially said electric utilities and other admitters of ScO2 were responsible for climate change and damages to -- damages to individuals and to villages as well as to communities as a result of climate change.

Those cases caused us, obviously, to put into place litigation holds of significant proportion. In fact, we issued a hold over 1,500 employees. We issued it to our IT departments, to our records management groups and to facilities where we maintain our records really throughout the south.

Obviously, this hold has been in place because this was a very, very broad set of allegations. It ranged not over just the question of whether or not individual employees, what they had done about climate change, what they might have done, but the very essence and operation of the electric system over the course of 100 years, but more specifically in time since the litigation had been brought. But prior to that with regard to claims that we had engaged in a conspiracy to hide climate change from the world, and as a result our system had been managed in a way that had increased the harm to the individual plaintiffs' clients.

So with those allegations we did what we thought we felt necessary to do. We charged all of our employees under all of the appropriate guidance that they had that they had a heavy responsibility to maintain these documents, and to maintain it in an electronic form all that they had that could in any way be relevant to the cases.

And our normal 90 day auto delete function was turned off for about -- in the end 1,100 employees, really 1,200, and our normal company retention system practice was terminated with respect to those employees.

But due, as I said, to the large and sweeping nature of these claims, we also took the step of preservation efforts to say, okay, look, the scope of these claims, it cannot be handled by simple auto delete.

The operation of the system has been called into question, and so we took all of our emergency backup tapes, which essentially recreate our systems across the company, and maintained those over the course of five years of litigation.

Now, there was never a single item produced in discovery. Fortunately, all three of these cases were handled on motions to dismiss that were ultimately successful, but the appeals went on for a significant length of time.

As a result, in some instances between five and seven years in these cases, we incurred about three and a half million dollars worth of expense in preserving all of the data that we thought was relevant.

We also put ourselves in a position, frankly, where we were, if you will, custodians for the plaintiffs in explaining to our clients internally why it was that we had to disrupt the functioning of the system at such a high level.

They say, well, the cost, how could it possibly be?

One backup tape alone is $75,000. Over the course of time we accumulated 40,000 of these backup tapes, and then we had to find a place to securely store them, and make sure that we could show custodianship of them.

The duration and length of that process that led us at the end of the day to impose these costs on the system to disrupt our working relationships and to tell our employees that basically they had an obligation to the plaintiffs to preserve this because of the depth and breadth of theories that were very difficult to explain to our employees.

Now, that is a burden that comes with all litigation, but it does seem to us that when you look at what we might have been able to do in response to that, I think over time we took a very cautious approach, and it was a very sensible approach from a corporate standpoint.

Which is, if we're told to preserve the maximum, and then anything that we do after we preserve the maximum is going to be presumed to be bad behavior if we alternate it, if we turn back on auto delete for some significant portion of employees, or we decide after a while that the burden of those tapes is simply too great, and we start picking and choosing among the systems that we're going to allow to back up, system planning comes off, maybe our long term economic planning goes off, our government system which tracks all of our activities stays on, we start to make choices like that.

But I will tell you we were paralyzed over that period of time, because we were at a point where we were looking at the development of this case law, and being advised by great attorneys that anything that we did might put us at greater legal risk because it could lead to the allegation, particularly in a conspiracy claim, that we were essentially creating a discovery tool, and that we were compounding the problem and the perception that we were wrongdoers.

As a result, we did the responsible thing, we did the difficult thing, we did the expensive thing, whether it was the right thing, whether or not it was a good thing, I would suggest leads to this question, which is at the end of the day who paid the $4 million?

Obviously, the corporation did its parts, and obviously we paid for the services, but at the end of the day those $4 million worth of additional costs flowed through to our customers.

Many of our customers are low-income customers. They can scarcely afford the electricity they buy now.

And even the increment of $4 million, which in the context of large system sounds small, is not a small thing. It is an important thing. And our ability to steward for our customers these kinds of costs, and make sure that they're not incurred in a way that -- in a way that imposes upon them something that shouldn't be, I think is a part of this process.

So looking at it, I would ask you to think about what it is, and I pretend to be no expert on these rules, but I would say anything that would give corporate -- corporate counsel greater latitude to allow outside counsel to give the advise you can pare back, you can change and alter, you can take reasonable steps without it automatically being presumed that you're taking willful or wrong conduct toward the preservation of this material would be very useful for us.

I thank you.

HON. CAMPBELL: Mr. Moor, have you given thought to how your behavior would have been different if our proposed Rule 37(e) had been in place at the time?

MR. MOOR: I have. I have talked about it with a number of folks that are involved with this process.

I think that what I had at the time was very good, sound legal advice. The case law was popping up all over on a range of activities.

And these cases, by the way, were in California, they were in Mississippi, and they were in New York. So we were dealing with a range of jurisdictions.

I think every bit of advice that I got was steered toward the conservative.

I think there is, at least in these rules, the possibility where they -- a willful and -- a willful test that looks at our behavior, specifically, I would have felt more comfortable at some points in paring back the scope of this.

And I think I also would have done some things with those disaster recovery tapes, because I would have felt that I could have reasonably made a case to the judge that we made some very careful searchable decisions, we reduced the scale of it, and as a result, could I have saved a million, could I have saved 2 million out of 4 million, I think anything that I would have done like that would have been suspect as I felt the law was being advised to me at that time.

I think with these rules, as I have -- as has been suggested to me, and so I have tried to understand them myself, I think I would have felt more comfortable making decisions to let certain things go.

HON. GRIMM: Followup on that.

Since you have given some thought to that, and that's very helpful to get a sense of the before and after, do you have a view as to whether the factors in (b)(2) that deal with proportionality and good faith efforts, and those things, would have, if you had those factors, been helpful to you, or if they're the wrong factors, do you have others that you would suggest to us?

MR. MOOR: Again, pretending -- not even pretending -- telling you I'm no expert in this, but here's the one thing that I have thought about.

One of the difficulties you have in a case like this, is you have to imagine for the plaintiffs the largest scope of their case imaginable, and so you have to pretend with them that everything that they're saying is not only true, but that it can be proven with your

own documents. So you do become their spokesperson.
I think that if I had been armed with my right set of lawyers in a proportionality test, I could have gone in and made some reasonable arguments about how we were going to limit the reach of this within the system, and we are going to reduce these burdens.
The difficulty that I have, and the difficulty that I think I will have in the future is, the more that I go in and tell about what we are doing and why we're doing it and how we're doing it, I'm helping them make their case, because I'm teaching them all of the systems and mechanisms that the system uses to manage our business.
The more I do that, the greater the likelihood that I am going to increase their knowledge the next time that they pursue a case like this.
So there is some risk here, but I would have taken that risk. If I had felt that the case law had been a little more steered toward our way, I would have taken that risk.
Because I will tell you as a legal officer with a corporation making decisions that impose millions of dollars of obligation on the corporation month after month, hundreds of thousands of dollars month after month, over $5 million, you want to talk about being the unpopular guy in the executive hallway, that is the guy.
And I tell you at the end of the day that there is -- the corporate officer who is trying to serve a legal function, a need and a sense of need with respect to electronic discovery that is pressing on us in a way that really can only be answered as you move a little more in the direction you're going now, I'm not sure what you're doing now is going to get us there, but I do encourage it because I think we have to get American corporations to the place where they can feel secure about making these kinds of decisions.
PROF. MARCUS: So if you knew at the time that you could argue to the judge that you had done a reasonableness analysis of what you had chosen to preserve and a proportionality analysis, based on what you knew then, do you think that that would have helped you?
MR. MOOR: I do.
PROF. MARCUS: Thank you.
HON. CAMPBELL: Thank you for your comments, Mr. Moor.
Mr. Smith.
MR. SMITH: Thank you, your Honor.
Members of the committee, my name is Michael Smith. I'm a lawyer in my hometown of Marshall, Texas, which is a little town about two hours east of here. I practice almost exclusively in federal court.
I was chair of the Eastern District of Texas Local Rules Advisory Committee for nine years.
I have edited the O'Connors Federal Rule Book for 15 years.
I'm immediate past chair of the Texas Bar Section of Litigation.
I'm here today -- I was asked to sub in a couple of days ago to represent the Texas Trial Lawyers Association, and I kind of -- I have to explain to you that I'm kind of an odd duck to be doing that, because while I started out representing individuals in traditional personal injury and product liability cases, it's been four years since I have had one of those trials.
What I do for a living these days is primarily representing defendants in complex patent infringement litigation. So the last trial I had as a personal injury plaintiff was four years ago. I have had 14 trials since then in federal court representing generally defendants, and sometimes plaintiffs in patent cases.
I'm only going to talk about one issue today, and that is the change to the scope of discovery in 26(b)(1).
I oppose that. The reason why is because I believe it's going to interfere with the trial court's ability to rule on proportionality disputes, because we're going to bury trials courts with motions raising proportionality in every case.
I'm going to explain to you why that's going to happen, but let me back up to when I have worked with the rules committee in the Eastern District.
When I did that, what we were always trying to do in facing the budget cuts at the clerk's office was come up with the best default that would take the least judicial time, the least clerk's office time, and keep the case moving.
I believe the rule that you have in place now does that because it puts the burden on me. I'm usually the party producing documents. It puts the burden on me to determine under (b)(2) when to file a motion raising proportionality.
Proportionality is not in the standard right now. It's something I have the option to raise if I think it's necessary.
But what the rule doesn't allow me to do is to simply unilaterally decide I'm not going to produce relevant documents because my client and I think that

the needs of the case and the scope of the case, that it's not proportional to that case. That's an awful -- that's something I can't do now.

What the rule change would do is flip it to where I could do that, to where I could unilaterally -- well, not -- well, I'm getting ahead of myself.

I can force the other side to have to file a motion to come after me for those documents, because I no longer have to file a motion to withhold them. I think that's going to result in massive motion practice, and it's going to stop discovery dead in its tracks.

I would like to use the rest of my time to respond to some of the good questions I have heard today about that.

Let me start with -- there was a question about would I raise proportionality as a defendant in the cases.

Absolutely, I would raise it, and here's how I would do it.

I would not just object. I would unilaterally withhold relevant documents based on my client's subjective evaluation of whether the documents are proportional to the kind of case we're in.

Now, that works great for me in patent cases, because patent cases, in my experience, are unique in that you have early on such diametrically opposed evaluations of the case.

It's not unusual for the plaintiff to think they have got a several million or tens of millions dollars case, and my client is looking at saying there is no way this patent is valid, there is no way we infringe. And even if we do, we can't figure out the Federal Circuit's law on damages, but it looks like we only owe 20 or $30,000.

I get to use that standard under this rule and say, okay, here's a product data sheet, that's all that you get.

The second question, Mr. Keisler, you said what if the burden was straightened out to where the burden is still on the party that's producing.

I think that would be helpful. That would keep it the way it is now, which is it puts the burden on the party that has the ability to explain why it's not proportional.

But the problem is it doesn't fix the problem that the scope of discovery has been changed so that I can still withhold the documents until the Court rules.

Previously, I have to turn over the documents until I get a ruling. This would allow me to not do that.

Dean, Lonnie Hoffman emailed me and said he wanted you to know that on the academic letter that was submitted to the committee, that was only signed by the academics that worked on it, it was not circulated for signatures. He wanted me to point that out.

DEAN KLONOFF: That was referring to a different letter that had over 100 signatures.

MR. SMITH: Oh, I apologize. There is one that's coming that is signed by seven or eight academics. I misunderstood.

PROF. MARCUS: You haven't read the one that's coming.

(Laughter.)

MR. SMITH: Finally, Your Honor, you asked the hard question of my law school classmate, Bill Curtis. You said, well, what would you do to reduce discovery costs?

And let me tell you -- let me tell you what we have in the Eastern District. It's kind of the secret sauce that especially since I have been on the defense side I found to be very effective.

We have some language in one of our local rules, CV-26(d) that was written by a former chief judge, Bob Parker, back in 1991.

What that says is, it tells parties in looking at whether something is within or without the scope of discovery, one of the things that you consider is that it is, quote, "what reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense," close quote.

If you can't tell, I use that language a lot. I found that to be very effective, because while it sounds like the rule equivalent of a what-would-Jesus-do bracelet, what it actually does for you is it forces you to make the other side -- it forces you to look at can I go to the judge and get away with saying that this is not something that reasonable and competent counsel does, it would be what one would actually need.

The last thing I will say before I close, and see if there are any questions is, I believe that this would be a way that I can shut down document discovery in a case, bring it to a screeching halt by using this rule, and just saying, under my definition of proportional within the rule, this is what we think is relevant, now go get the Court to get an order.

Now, with apologies to both Woody Allen and Professor Miller, as stop signs go, that's a pretty good one.

HON. CAMPBELL: Comments or questions? Paul.

MR. BARKETT: So the assumption in your conclusion is that a judge would allow you to get away with that?

MR. SMITH: Yes. Because that's -- if I did it right now they would throw me under the jail.

But under the rule that is here I have a good faith belief that the proportionality of this case where I have got this patent asserted against my client that's already got problems in the Patent Office, I have a good faith belief that this is what is proportional to this, and that we don't need to get into expensive or far-reaching discovery until either the Patent Office looks at the patents on reexam or something else. It has given me control over what gets produced instead of the Court having it.

MR. BARKETT: And your belief is that a judge will just accept your argument, and not look at the allegations in their complaint. And that you, representing your client, would be in a position to take that risk and not offend a judge?

MR. SMITH: I have only represented clients in 4 or 500 patent cases in the Eastern District. So there are others that are more experienced than me, but that's something I think I can be very effective with, because I will be -- what I'll be very happy to come back in with is a detailed explanation to the Court of here are the problems with this case, here is the shape that this patent is in at the Patent Office, here are the problems that it's got, here are the issues, this is what is proportional to this case at this point, and only when we get further down the road should something different be done.

This rule, I believe, allows me to do that, and it protects me when I do that.

MR. BARKETT: There are a number of courts with local rules that allow discovery in tiered ways. You start with certain amounts of discovery, and then you proceed from there.

That's also presumably a potential outcome of the argument that you're presenting?

MR. SMITH: Yes.

MR. BARKETT: Is there something wrong with that?

MR. SMITH: No. I like phased discovery like that. It slows the case down, I have to admit that, but I like the phased discovery because it allows me to kind of limit the cost as we go into the case.

It does drag the case out further. I mean, I have to be clear about that, but we can't get the cases developed under the current schedules that we have if we split discovery out like that. But that certainly could be done.

HON. CAMPBELL: Gene.

HON. PRATTER: A number of patent lawyers have encouraged the aggregation of Rule 84. I know you haven't spoken about that.

Have you any view on that?

MR. SMITH: I was going to say I can respond to any of these proposals. I do -- I can understand why patent lawyers would say that, because there is a lot of controversy over form 19, and whether that's -- I don't think there is a need to aggregate it for the simple reason that in the Courts that hear patent cases frequently, within 30 to 60 days after the answer comes in we're required to provide -- the plaintiff is required to provide detailed infringement contentions that take care of the issues, so the issue becomes moot.

MS. CABRASER: So form 18 doesn't do anything one way or the other?

MR. SMITH: It does for the initial motion to dismiss, because with respect to claims of direct infringement it provides a much lower standard, but it becomes moot very quickly because so much detail is required -- is provided in the court ordered infringement contentions very quickly after the answer comes in.

HON. CAMPBELL: All right. Thank you very much for those comments, Mr. Smith.

Thomas Kelly.

MR. KELLY: Good afternoon, your Honor, members of the committee.

Thank you the opportunity to be here today. I'm pleased to offer additional comments on behalf of Pfizer today.

My name is Thomas Kelly. I am the vice president, assistant general counsel of employment law at Pfizer. We are responsible for the company's domestic litigation docket.

I have been an employment lawyer for about 28 years, half of those spent in private practice on the management side for the defense, and half spent in-house.

Pfizer, as you know, devotes substantial resources to litigation across our civil docket. We devote considerable effort and resources to electronic preservation and discovery.

Today I would like to talk to you about our efforts in electronic preservation and discovery, give you some examples of what it is that we do, the lengths

that we go to, and to talk to you as well about Rule 26 and Rule 37, both of which we support.

The amount of electronic information that is available today is staggering. It has driven the problem that we face right now with respect to preservation and discovery and spoliation.

Pfizer is no different in terms of what it preserves than some of the other companies that you have heard from today and on prior dates.

Let me give you some examples of what our most recent review of electronic discovery has shown.

We have 300 active legal holds in place, and that's just for litigation and government investigations, not including regulatory and administrative matters.

We have over 80,000 people, that's both employees and contractors on some type of legal hold.

We have 5 billion emails in our email archives, and that number grows about 1 billion emails every year.

We hold an additional 1 billion emails in legacy email archives from companies that we have acquired over the recent past.

We have 250,000 boxes that contains 750 million pages of documents, all of which have exhausted their retention period under our retention schedule, but which we are continuing to hold because of our concern over our obligation to preserve.

We also create or image over 2,100 hard drives and laptops each year when colleagues leave Pfizer at a cost of approximately a million dollars a year.

All of those data points are a function of the fact there is a lack of certainty on the current standard for preservation, and the sanction for spoliation.

We are required to place significant numbers of employees on legal hold, which in turn requires their time and diligence to monitor their electronic databases and make sure they are preserving documents. We are required to archive huge volumes of emails daily.

All of this is driven by the fact that there is not a consistent standard in place for us to react and to respond to. As a result we save all because we are concerned that that which we get rid of becomes the motion for spoliation sanctions.

Let me turn now to Rule 26, and our support for Rule 26.

We applaud the effort by the committee to move the existing reference to proportionality from 26(b)(2)(c) to 26(b)(1). We think that is the appropriate place for it because it gives primary consideration to proportionality in terms of the scope of discovery rather than simply as a limitation on existing discovery.

Contrary to the views expressed by many here, we don't think the proposed amendments will frustrate the purposes of discovery, and we think that the proposed amendment will provide clarity around what the scope of appropriate discovery is.

We also think that this change will not bar plaintiffs at the courthouse door, and we think it will not shift the burdens that are available right now.

Much has been said about burden shifting and barring the doors, particularly in the employment law and the civil rights practice. We reject that contention. We don't think that this change in proportionality will lead to that kind of a result.

With respect to Rule 37 we also believe that the proposed amendments to 37 are appropriate regarding the grounds for the imposition of sanctions, and a company's obligation to preserve information. We believe that those are appropriate.

We support the change from "or" to an "and" with respect "willful and bad faith." We think that's the appropriate and proper solution.

We think that solution will enable companies to operate appropriately, and to make proper reason and responsible decisions.

The way it stands right now, without having an articulated standard that applies across all of the country, we have to save everything in the hope that we don't get caught up in some kind of spoliation sanction.

One final word, if I may, on presumptive limits, and the change in presumptive limits. Much has been said about that by the plaintiffs and plaintiff bar as well.

Having practiced in the area for a number of years, it is my view that the change in presumptive limits will not result in a wholesale change in the employment law practice. It will not result in changes to a plaintiff's ability to get justice, to have their claims adjudicated, to get the discovery they need.

What will happen is that the parties will sit down and have an appropriate discussion about proportionality and about what needs to happen and how discovery should be leveraged, rather than to simply go off and ask for everything and fight about it later.

So let me stop now and thank you for your time and ask for your questions.

HON. CAMPBELL: Thank you.

Questions?

Parker.

MR. FOLSE: Mr. Kelly, we have had testimony from you as well as others today, including Mr. Berenson and Mr. Harrington and Mr. Moor, about the tremendous cost that -- huge amounts of money that have been expended by the companies such as yours in specific cases.

Is it a fair inference, in light of the support that you have expressed for the change in Rule 37(e), that as a result of the proposed changes that there would be deliberate decisions made at Pfizer in the context of specific cases not to preserve information that would be preserved in those cases today?

MR. KELLY: I think -- I think the answer is yes, but when we make those decisions deliberately and responsibly and reasonably based on the facts and circumstances before us.

As it stands now we save everything. If a standard is articulated, then we can going forward, as others have said, as case law develops, and as the body of law develops in this area, we can start to make those reasonable and responsible decisions.

MR. FOLSE: And that's really kind of what I was driving at, which is whether or not you believe that the amendment as it is currently drafted is specific enough and definite enough to give you the comfort to dispose of information in specific cases that you would preserve today?

MR. KELLY: I think the standard gives us the ability to make those decisions.

As it is articulated in the proposed amendment, it gives us the ability to make reasonable and responsible decisions going forward.

HON. CAMPBELL: Solomon.

HON. OLIVER: Do you see a problem in your cases today regarding the presumptive limit of ten depositions? Is that a problem in your practice?

MR. KELLY: In the employment practice, sir, I do not. And over the years I have to say I have not seen a problem with those presumptive limits. Whether they be ten or five, most cases are disposed of at below that five-deposition limit.

They are sort of straight garden variety employment discrimination cases. They typically resolve with less than five depositions in my experience. I think the change is not going to have an impact on the way that docket is litigated.

HON. OLIVER: Do you think that change is necessary?

MR. KELLY: I think it's good, because it fits with the overall approach of these rules to deliver civil justice reform, and to deliver amendments to the rules that make discovery more efficient, more appropriate, that force the parties to sit down and have the discussion about proportionality.

HON. CAMPBELL: Any other questions?

Paul.

HON. DIAMOND: Your position is on the spoliation sanctions it should be the conjunctive, not the disjunctive, "willful and bad faith"?

MR. KELLY: Yes, sir.

HON. DIAMOND: Can you act in bad faith without acting willfully?

MR. KELLY: I think you can. I think you can do so negligently.

HON. DIAMOND: That's your position?

MR. KELLY: (Nodding head up and down.)

HON. DIAMOND: Okay. I understand.

MR. KELLY: Maybe I misunderstood your question?

HON. DIAMOND: Maybe I misunderstood my question too.

(Laughter.)

PROF. MARCUS: Can I try a rephrase, please?

What if it only said "bad faith," would that be different?

HON. DIAMOND: Thank you.

MR. KELLY: I think it should say "willful and in bad faith." I think --

PROF. MARCUS: Why is that different?

MR. KELLY: Well, because one goes to state of mind, the other goes to intent.

HON. DIAMOND: Which is the state of mind? What's the difference between "state of mind" and "intent"?

Mr. KELLY: I guess "intent" goes to the reason you act, and "bad faith" goes to why you have undertaken the action.

HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Kelly.

John Martin, please.

MR. MARTIN: Good afternoon.

I am the first John Martin that you will hear from today. And a clarification, I am the John Martin from Dallas, Texas where I have practiced law for, hard to believe, nearly 40 years with the firm of Thompson & Knight, and my practice is exclusively civil litigation.

The main area of emphasis in recent times has been representing commercial airlines primarily in mass

accident cases. And also pharmaceutical and medical companies defending product liability cases. And, finally, defending law firms. So a fairly wide variety of different types of cases.

I'm a past president of both DRI and Lawyers for Civil Justice, a fellow of the American College of Trial Lawyers, and the International Academy of Trial Lawyers.

What I really want to talk to you about is some of my experiences with the rule-making process with regard to the Texas Rules of Civil Procedure.

I served for a number of years on the State Bar Committee on Court Rules that deals with proposing rule changes to our Supreme Court, and then I followed that with six years on the Texas Supreme Court Rules Advisory Committee, which is effectively the Texas counterpart of this committee.

So I was involved with the rule-making process for 15 years, and was heavily involved as chair of the Discovery Subcommittee of the State Bar Committee when Texas went through a very similar process in the late 1990s to dramatically amend our Texas rules of discovery to address the same concerns that you're dealing with now, and that is, what everybody agrees is the extensive cost of discovery, to try to reduce something to reduce the cost of discovery.

Now, Texas tackled the problems in some different ways, but there are some similarities and some things that I would like to take a few minutes to point out just to give you an idea of how some of these issues you're talking about have played out in the laboratory of the state courts of the state of Texas.

I have listened and I have read the prior hearing transcripts and I have listened to all this discussion today about moving the proportionality language from where it's sort of buried at the back of the rule up to a more prominent place.

So I went back into those long deceased brain cells to try to remember how we dealt with that back in the late 1990s in Texas. When we amended our rule on the scope of discovery, is Rule 192.3 and 192.4, we had a very long, a two-column long rule on scope of discovery. It's titled in big black letters, Scope of Discovery, and it's followed immediately by a fairly short section, two paragraphs long, entitled Limitations on Discovery.

The primary limitation on discovery that is discussed there is verbatim language out of Federal Rule 26(b)(2) at the time, it was imported in there.

So it's been right up front in a very prominent way in our rule for a long time. And 15, 18 years ago is a very long time, but I honestly don't remember any complaining about it at the time, and I have not seen any problems with it since.

I will tell you that these predictions, these dire predictions that it's going to greatly increase the motion practice simply has not been the case in Texas.

Texas requires that you file a motion if you're going to invoke proportionality, and I do not believe that I have ever signed my name to a pleading -- a motion raising that issue. It's probably been discussed far more often in negotiations and discussions with opposing lawyers trying to resolve a potential discovery dispute.

I think when you're writing rules, one thing that I always thought was important when I was involved in the process is to write rules not only to deal with issues that -- as they come up before the Court, because I think all of us would prefer to resolve discovery disputes beforehand.

I think rules should also give clear guidance to lawyers as to what's important and what matters so that those matters can be addressed in the negotiating process, the meet and confer process that's required before going before the Court.

I certainly agree that it is advisable to have the gray-haired lawyers talking to each other. My long-time adversary, Mr. Slack, and I over here probably had cases against each other since both of us started practicing law. And I can tell you that we do a lot better resolving these things, Mike Slack and I talk about them, than if we had somebody younger.

And I see Mike nodding his head.

I also want to talk about the Texas experience very briefly -- and I see my time is running out, but two other quick points.

Texas has a lot of juris prudence on what the word "willful" means. It goes back to the Texas Constitution of 1869. It contained the word "willful" to keep alive wrongful death cases since those were not recognized in common law, and it was over 100 years later that our courts finally settled on a definition of "willful."

I don't want to beat to death this "or" or "and" issue. I favor "willful and bad faith" for the reasons that others have stated far more eloquently than I possibly could do.

But if you going to use the word "willful" in there, please define it.

Then another thing -- another good thing about

our rules, and then I'll stop, is there was discussion this morning from Mr. Curtis about how our rules have gone a long way towards eliminating boilerplate prophylactic objections.

What we did, instead of what this committee has proposed of requiring a statement that they are withholding documents with regard to any objections, is the Texas rules limit that to where a privilege is asserted.

I think that's worked well, and I think that should be considered. You don't even have to file a motion. You just say you're withholding documents based on usually the attorney-client privilege. Often that ends it, because nobody wants attorney-client privilege documents.

Then if somebody wants a privilege log, you give them a privilege log within a few days, and take it to court if necessary.

But our rule there, I think, works very well.

Did you have any questions?

MR. FOLSE: In looking at the Texas rules, and these changes came about after I left Texas and moved to Seattle, but the way I'm looking at the rules is that they are more closely parallel to the current federal rules than they are to these proposed amendments in that the proportionality language, the factors that are discussed in the Texas rules come up in the context of a rule on limitations on the scope of discovery, which begins with the preamble, "If the discovery methods permitted by these rules should be limited by the Court if it determines on motion or on its own initiative and on reasonable notice," and so forth, rather than, for example, having the proportionality factors imported into the definition of the scope of discovery.

Am I misunderstanding how this works?

MR. MARTIN: I think, Mr. Folse, you are reading it correctly.

As I pointed out it is in the limitations section, but it is far more prominent than it has been in the Federal Rules where it's buried down in some subdivision number.

MR. FOLSE: I guess the reason I want to get clarity about it is because you were commenting on the fact that there has not been extensive practice under the Texas rules, and that that might be a reason to give pause in considering the claims of some people, but the proposed amendments here would lead to an increase in motion practice.

MR. MARTIN: I don't believe it will lead to an increase in motion practice. I just don't see that happening.

I think it is interesting that -- as you commented on it, I meant to mention it -- the Texas rules actually seem to encourage judges addressing this on their own motion with notice to the parties so if somebody wants to respond to it, they can. I have actually seen that happen.

HON. CAMPBELL: Other questions?

(No response.)

HON. CAMPBELL: All right. Thank you very much, Mr. Martin.

Leigh Ann Schell.

MS. SCHELL: Good afternoon.

Thank you for the opportunity to address you today to talk in favor of some of the proposed rules to the Federal Rules of Civil Procedure.

My name is Leigh Ann Schell. I'm a lawyer from New Orleans. I have practiced for 25 years. I'm a partner in the firm of Kuchler Polk Schell Weiner & Richardson.

My 25 years of practice have been devoted almost exclusively to civil litigation on the side of defense, and the cases vary from -- everything from a slip and fall for Petco to the deep water horizon incident off the coast of Louisiana, but is still in the Gulf.

Also, toxic tort cases, oil and gas cases of all different kinds. I'm currently spending a good bit of time working on the land loss cases that were recently brought in Louisiana.

I would like to focus today first on the question of the scope of discovery in Rule 26. And by illustration note the importance of eliminating the reasonably calculated to lead to admissible evidence requirement, which is not intended to be the scope of discovery, but which has involved -- evolved into the scope at issue by the courts.

I endorse moving away from relevant and subject matter involved in the action moving toward what the committee has proposed, which is relevant to the claims or defenses.

I'll do that by referencing the land loss litigation, which some or all may have read about in the national press, which is a suit brought against 97 oil and gas companies. It's pending in the Eastern District in New Orleans, and the case asserts that the land loss, the loss of the wetlands in Louisiana is the fault of the activities of these 97 oil and gas companies.

The suit references activity from 1930 forward,

so some 84 years and counting, and a host of drilling-related activity.

So the written discovery that was propounded in the case that came with the petition when the case was still in state court, now it's been removed to federal court, the first request for production, 41 requests for production, asked for documents related to all activities.

Then there is a long string of them related to drilling from 1930 forward, and the land that forms the basis of the lawsuit, which is basically the land from east of the Mississippi River all the way to Mississippi, and from south of Lake Pontchartrain all the way down to the Gulf of Mexico.

So what's worst is the next request asked for every document produced in response to that broad request, produce the associated files that were associated with that document.

So I ask you to play judge today, and for many of you that's not a stretch at all, but to think about those requests from the current rule, which is reasonably calculated to lead to the discovery of admissible evidence, could there be in all the files that have existed since the beginning of time something that might be admissible, or lead to something that's admissible?

Maybe.

But if we look at it from the proposed frame of reference, which is relevant to the claims or defenses, I think that we take a more narrow and more reasoned and more measured look that I am in favor of, which is to eliminating that broad, broad scope, and bring it down to what's relevant to the claims or defenses in the case. I think that that's a very important change to the rule.

Using the same case as an example, there are 86 requests for admissions. They -- probably all of them need a Ph.D. in something in order to be able to answer them.

And so for that reason I think the requirement for the presumptive limits limiting the number of requests for admission to 25 would at least have the parties look at what questions they would like to ask with a more surgical focus, and to narrow that. Of course, if the need arises for more, that can always be addressed.

In the course of my practice I have had in most instances very good cooperation on both sides of the V to agree on what the scope of discovery should be.

And I'll make one final point, and that goes -- for example, in the deep water horizon case there were multiple tracks of depositions running at the same time for an extended period of time, and because of the severity of the spill, and the number of companies involved, those were needed. It wasn't argued about. It was agreed on at the outset about how the scheduling would run.

HON. CAMPBELL: All right. Thank you. Solomon.

HON. OLIVER: You would agree then that this is not just a change of language, the language that talks about reasonably calculated to lead to discovery, getting rid of that, and going to what's relevant in the claimed defenses?

It's not just a language change. You're saying that it's a change in the standard, change in the law. You would admit that?

MS. SCHELL: I think it's a return back to what was intended in the first place. That language has been overused and overblown from what it was originally intended to do, which was to make it clear that the evidence that was requested didn't necessarily have to be admissible.

So for -- in the example of hearsay, but that it has been expanded to the point of where the scope of discovery is now defined by that broad term.

So, yes, I do think that there would be a material change, but I think it's just to get back to what was always intended.

HON. CAMPBELL: Art.

HON. HARRIS: The case where there was 86 requests for admission, did you respond to them, or did you challenge them on proportionality or other basis?

MS. SCHELL: They will be challenged, your Honor. We haven't gotten that far yet, because now that we are in federal court we will have the Rule 26 requirements. So they will be challenged.

But so far initial discussions have not led to an agreement to reduce them, so it's more likely than not that that will be something for judicial intervention.

JUDGE CAMPBELL: So you agree that the rule as now written allows you to make that kind of proportionality argument?

MS. SCHELL: I think so. I mean, I think we can make the argument not only -- that there are too many of them, so it's disproportionate, it's harassing, so it's not reasonable. We can make the argument that it's just not reasonable.

We can also make the argument that the subject

matter is not appropriate for requests for admissions, because they are the subject of expert analysis, and have been, you know, some of these issues have been studied for many years.

HON. CAMPBELL: All right. Any other questions?

(No response.)

HON. CAMPBELL: Thank you very much, Ms. Schell.

MS. SCHELL: Thank you.

HON. CAMPBELL: David Werner.

MR. WERNER: Thank you for allowing me a little time this afternoon.

My name is David Werner. I'm a managing counsel, and part of the global litigation team for Shell Oil Company based in Houston, Texas.

I also manage the Shell Global Litigation Information Group, and participate in the nuts and bolts of discovery across the globe every day.

As you will see from the shake in my voice, I am not a trial lawyer, but I have practiced with Shell for about 13 years.

And, in fact, my job is the result of Shell trying to get ahead of these kinds of issues even before line of cases and the 2006 amendment. So I thank you very much, and my colleagues, for the opportunity to comment on the proposed rules.

Shell applauds the difficult work of the committee to do this. In Shell's view the new amendments will advance the interest of justice, and will help to secure determinations of actions on the merits where they should be in a speedy, proportional cooperative and expeditious manner.

Discovery under the rules should promote resolution of the cases quickly, and shouldn't be used as a tactic to increase our cost as a defendant, or to increase the chances for settlement. We think the proposed changes will advance that goal.

With technology and data systems and the information that they store changing more rapidly than ever before, the opportunities for mere mistakes have grown exponentially since 2002 when residential funding was decided.

The scope of discovery allowed by the rule should be narrowed as the committee has proposed. At present the rules contribute to at least shelves over preservation, and I have heard that from other corporations today.

The rules have not kept up with the corporate use of technology systems, and the proliferation particularly of corporate communication devices.

Each time technology changes for us, larger data stores are created in more remote places. We hope that the amendments will position the rules to reduce wasteful over preservation and return the focus of litigation to the underlying merits.

Shell's global litigation team was formed in 2001 to manage the company's litigation matters globally. Our largest litigation is beyond U.S. borders.

Everything that we are required to do concerning preservation and collection of content here in the U.S. can and does have an impact on all of Shell's litigation.

Shell is operating in 99 countries, has over 9,000 litigation matters pending in those countries.

Shell U.S. litigation alone comprises 2,500 matters and spans 50 states and all 12 federal circuits with varying standards of practices.

Shell is happy to see that the amendments will serve to bring some clarity, and more uniformity to Shell's discovery obligations.

A significant part of Shell's litigation expenses are for discovery, and specifically preservation and collection activities.

Although we continually strive to preserve, collect and produce material efficiently, and in a manner that promotes the underlying goals of the judicial system, we think the current rules and applications are overly broad because of the response that we have to take, and require our over preservation and over collection.

This is so because we need to be ready. We're told by counsel we need to be ready just in case we require some ESI in one of the jurisdictions where negligence is a sufficient showing of culpability.

In this situation the cost of discovery, as opposed to the facts of the case too often drive the results.

Shell currently has more than 7,000 individual custodians on hold for U.S. disputes alone.

We routinely send and track preservation notices across all of our 2,600 U.S. matters.

We cascade notices in each and every U.S. matter through our businesses to applicable custodians, and to a continually updated list of business contacts to support Shell's preservation action.

This effort involves our lawyers, business managers, records and information management professionals, and IT and system specialists, who work

hard to identify and preserve potentially relevant ESI.

As a precaution, often long before our lawsuits are filed, millions and millions of pages of electronic information, as well as the email boxes of each custodian likely to be involved, are put on permanent hold to assure that information will be available when and if the time comes for the development of the matter, and ultimate collection and production.

Yet only a fraction, certainly well less than 1 percent, is ever produced in any matter, let alone actually used in trial or on summary judgment. The volume of preserving collected content just keeps growing and churning with each new matter of notification.

I am personally involved daily in advising our IT specialists, both here in the U.S. and in the Hague, and our developers on the inexact discovery requirements around identification, preservation, collection, processing and production of information as part of their development of new Shell information systems, and communications technology and devices.

For giving such advice I am often accused of stymying their creativity, and the efforts they can bring to being innovative. They see our effort to comply with preservation as stifling their ability to quickly develop communication and collaboration capabilities for Shell folks who find the power we live by.

Let me give you an example.

Three years ago one of our major software suppliers made the decision to no longer support one of their principal large project tools. The tool had reached the end of its functional, useful life, and was no longer stable.

The tool was a very successful collaboration tool used by many businesses across the world in major projects, including Shell, to plan, structure and implement projects of all sizes.

Think of big rigs in the Gulf.

Think of huge refineries in Saudia Arabia or in Port Arthur.

We have had the system well over ten years as our primary project tool, and it contains terabytes, millions and millions of pages of information.

The decision to decommission the system, which is a decision we have to take, because the vendor is not going to support it, carries with it expense, enormous migration efforts on the part of the business to get active content and their records out of the existing system that they need for the business to operate transferred into the new platform.

And then decisions what to do with the content that is no longer actively needed by the business. These are business decisions.

As part of the risk analysis counsel advised that some unknown part of the no longer needed content could come into scope in the future for litigation under a reasonably calculated to lead sort of argument, and that this unusable -- the business has made the decision that its unusable business content should be archived, and a process designed to search it just in case.

This has a real financial consequence. 20 to $80 million is the estimate for this archive, depending on the term of years it is kept, from 5 to 20 years, and we're moving forward with that project.

We have seen the cycles of technology replacement compressed over the years. In 1995 the cycle was about every ten years. Then it became every five years. Now, one to two years is the cycle of major corporations having to replace their technology with some of the newer communications technologies being changed every six months.

Preservation and how to do it are major financial considerations for us.

The result of all this effort is not necessarily a better outcome of litigation when our trial lawyers ultimately visit your courthouses, but an annual expenditure of enormous sums, the interruption of routine IT system maintenance and decommission, enormous people resources, just in case the information would ever likely be needed.

Productive hours that should be spent focusing on providing oil and gas and efficiency to the energy -- global energy markets are instead focused on mothballing obsolescence.

Technology is not the answer to the problem that technology has created. There are no software systems in the market that fully manage our preservation holds. They must be managed individually, system by system, which results in further costs and loss of productivity.

Additionally, there are no keyword search tools that you will routinely search across distinct unlinked servers, independent systems numbering in the thousands in most corporate environments, including Shell's IT infrastructure.

While I have no estimate of the millions of dollars a year that this cost our Shell business, I can tell you that Shell has invested millions of dollars on my signature in hold notification and tracking systems,

collection devices, and ESI processing systems to assist our preservation and collection activities.

And we have to constantly support, maintain, update, ultimately decommission and replace these systems with each technology advance.

I'm just a mechanic. I don't go to trial and defend these rules. I live in the rust and weeds of discovery, and its results and solutions.

But I can say without hesitation that unless there is some sort of reasonable narrowing of the scope of preservation, particularly collection, processing of content, all counsel, defense, plaintiff counsel, and most importantly, litigants in court, will be significantly and negatively impacted.

HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Werner.

I think we need to move on to the next speaker. Michael Slack.

MR. SLACK: Good afternoon.

I thank my colleague, John Martin, for handling my introduction.

My name is Mike Slack with Slack & Davis, Austin.

It seems like everything these days by way of introduction has passed.

I'm a past president of the Texas Trial Lawyer, and I'm a past chair of the American Association of Justice Aviation Section.

I came here to offer a few comments about this proportionality discussion, but before doing so I want to elaborate on what John said about the Texas rules.

I would agree with him 100 percent that the Texas rules have functioned like I believe a lot of people envisioned the Federal Rules functioning, but I think that's -- the context is important.

First of all, I think the language, as you point out, is more aligned with the current language, that it is informative to the parties and the Court, but it doesn't have that primacy that is now injected in the proposed change with the term "proportional" in the conjunctive with "relevant."

The other thing is, the context is important, is the fact that, first of all, we don't need the rules with John and I, occasionally, but we by and large work by agreement. But the rules are there for the parties and the Court when agreement escapes reason.

And so in state court in Texas we have access to the judges. We have the ability, as I did in Tarrant County yesterday, to have relatively wide ranging discussion about what the scope of discovery is going to be, where the parties' thoughts were, very collaborative discussion.

The problems I have in discovery, primarily written discovery, and numerical limits on discovery occur in federal court. I'm not going to take any time discussing the whys and wherefores of that other than the -- those that want to take advantage are going to take advantage where -- when the teacher is out of the room, and where there is the opportunity for long periods of time to go by before the teacher comes back into the room.

In Texas state court if you have a status conference every 30 days by phone call or show up at the courthouse, it is visible, it is transparent. It doesn't -- it doesn't get in the way.

I like phrased discovery. I just made a deal yesterday to do some phased discovery because it will not slow things down. I'm not going to make that same deal in some other cases I have pending right now in federal court. It won't work. It will slow the case down.

So I think context is really important. So I am very concerned about the proportional aspect being introduced in the conjunctive in 26(b)(1) in federal court.

One thing I will put in a plug for. Occasionally I sue somebody other than one of John's domestic airlines, which has a large operating headquarters somewhere in the vicinity of D/FW.

(Laughter.)

MR. SLACK: I will sue a foreign manufacturer.

By the way, I rode in with them today, John.

Also, a foreign manufacturer. And the ability to get service of a foreign manufacturer, when you play by the rules, takes a while.

And occasionally when I launch one of those lawsuits I will get a nasty gram from the federal court that I hadn't gotten service done.

That takes time. Usually a distraught paralegal calls me somewhere where I am across the country, we have run out of time, judge so and so wanted to know why we haven't gotten service on that defendant.

We need time to get service on a foreign -- and we are a global industry now. John and Bob will both tell you, we are a global -- our litigation now is global. We'll be more so with whom we involve in our cases. There is a lot more offshore manufacturing, so we have foreign defendants. We need that time.

So I know it's just a one-liner in there, just

the one number, but please, please, please don't take that time away from those of us that need that time to perfect service using treaties and relatively -- I mean, arcane and very detailed treaty requirements to obtain that service.

I want to talk about deposition limits.

Other than to say that in federal court so goes the limit, so goes the deal. You drop the limit -- I just made a deal in a federal court across the Pacific for 15 -- and the case settled -- but 15 depositions, nonexperts, nonrecords, noncustodians. It was 15 fact witnesses.

I don't make that deal with these limits in play. I just don't get that deal. I get six or seven on the best day. So you tell me the environment, you tell me the context, I'll tell you what agreements we can reach.

Now, John and I are going to have that problem, because he and I both probably mutually dislike the discovery process the same, and we both would like to get out of discovery and get to the merits and get the case resolved.

But when we do -- it's incumbent upon me to make my case since I have that burden, I have got to engage in discovery, and let me assure you, the key documents in that case are not in the first thousand, they're in the last thousand. They're not in the first deposition, it's going to be in the last two or three.

So those are my concerns. I'll be happy to take a question or two.

HON. CAMPBELL: Questions?

John.

HON. KOELTL: Your concern about getting before a federal judge is a concern that all of us have had. We have -- in the proposed changes we have promoted a live simultaneous -- or a live communication conference with the judge in a Rule 16 conference, eliminating the possibility of a mail Rule 16 conference.

We have included in the possibilities -- in the case management order the possibility of having a conference with the judge before making a discovery motion, so the judge continues to get involved.

We have promoted with the Federal Judicial Center judicial education in order to help judges understand their -- the importance of their involvement in the entire case management process.

What else would you do in the federal system, particularly with the rules, to make the system better, as you're saying?

If the parties can go quickly to the judge, the issue of whether you're going to get seven or ten or twelve depositions could easily be worked out. Just tell us why you need them.

MR. SLACK: I'll be happy to respond.

HON. KOELTL: Sure.

MR. SLACK: It depends. I have a couple of federal judges that are essentially as accommodating and accessible and interested in seeing the case flow as any state judge I encounter in Texas or New Mexico or Oklahoma.

It doesn't matter what the rules say. It doesn't matter what the conferences -- the judicial conferences say. It doesn't matter.

It's the environment. The environment in federal court is different. It's formal. It's rigid. It does not flow like a state court.

In state court you're dealing with judges, you're not going through law clerks, you're not going through a hierarchy, you're dealing with judges.

In Texas we deal directly with judges. Many times the judge comes out, as the judge in Tarrant County did yesterday, sat there around the table with all the lawyers and visited, do I need to make a record, probably on one issue, made the record, then came back to the table and sat down and we visited.

It's not accessibility. It's a collegiality. I think if I was going to say one thing about where I have been in the almost 40 years of practicing law, like John has, we start on a slippery slope by putting technical things in rules, and once we get on that slope, we start tinkering with it, it becomes more technical and more technical and more technical.

I think that the problem we have today is we're already technical, now we're ratcheting down further. We are making it -- and I hear the corporate types -- let me respond to this about the expense of document production.

I have problems in federal court with this scenario. I take a -- the first time defect case, and I get the core discovery, 50,000 pages. That's the core discovery. And there's a protective order that says, "return or destroy."

Next crash happens, same defect, they relitigate, and you wonder why do they want to relitigate this. They want to relitigate me getting my hands on those same 50,000 documents.

It's the occasional judge that says, all he wants are the 50,000 you produced in case A. I'm relitigating that.

Now, if you are concerned about cost, why do I have to do that five times in five different cases?

And why are they making me give the documents back? Why don't they just let me keep them, because they know I'm going to get the next case. So it's too rigid, and I can't break that pattern.

In state court I go into state court -- and I had one of these defect cases 30 miles south of Austin -- I said I would like all the documents in the Jones case.

Judge looks at the defense lawyer and says, why does he have to ask you 100 requests for production?

Well, you know --

He says, give it to him.

Yes, sir.

That's the difference.

HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Slack.

Steven Puiszis. I apologize for the mispronunciation.

MR. PUISZIS: My name is Steve Puiszis. I'm a partner with Hinshaw & Culbertson in Chicago.

I'm secretary-treasurer of DRI.

I'm a member of the Seventh Circuit's Electronic Discovery Pilot Program Committee.

I'm a trial attorney. My practice focuses primarily on civil rights, class action and commercial litigation.

Although about five years ago my firm asked me to assume additional responsibilities as deputy general counsel of the firm. So in that regard I get involved in providing ethics, professional responsibility, and risk management advice to our lawyers.

I'm also a member of a practice group at our firm that provides ethics, professional responsibility and risk management advice to other law firms. So it's with that experience and background that I want to talk to you in connection -- and I want to focus my comments on 37(e).

"Willful" or in "bad faith." You have heard a lot of comments about that, and I'm not going to beat a dead horse. I believe it should be "willful and in bad faith."

Otherwise, you're going to make it easier to obtain sanctions than you can in the Seventh Circuit, which is my home base of operations.

In the Seventh Circuit -- I think it's the Voss versus the Sears Roebuck case -- in order to get an adverse inference you have to have information intentionally destroyed, and there has to be evidence that it was done in bad faith.

The Seventh Circuit has defined "bad faith" as for the purpose of hiding adverse information.

Now, Judge Grimm, going to your question about recklessness, and the American College definition, I could not support including "recklessness" in a definition for "bad faith," nor would I agree that "recklessness" raises an inference of bad faith.

The reason why I say that is -- again, returning back to Voss, the Seventh Circuit says the crucial element is the reason for the destruction.

So I don't think whether or not it was done negligently or recklessly goes to the reason for the destruction.

The other reason why I could not support recklessness, and I would ask your Honor to think twice about considering that, is the definition of "recklessness" probably had -- you could probably find as many definitions of "recklessness" as you can "willful."

A common definition of "recklessness" that I see is the failure to exercise reasonable care in the face of a known danger, which is essentially a quasi negligent standard.

And we all know that a known danger of failing to take certain steps can result in the loss of information.

So the argument we are going to face with "recklessness" is you failed to do A, B or C. You failed to exercise reasonable care in the face of a known danger, information was lost, and essentially we're incorporating a quasi negligent standard, which I thought this was trying to move away from in the definition of 37(e).

So I -- my suggestion is to steer clear of "recklessness," or define it in a away that it does not include a quasi negligent standard.

I would also recommend, if we're going to keep "willfulness" in, I believe it should be, "willfull and in bad faith." That we have a definition of "willfulness," either in the rule itself, or in the committee note. That would be an intent to deprive a party of material evidence relevant to the claims or defenses of the parties.

That's similar to the Sedona, and it's similar to the LCJ definition that goes to "willfulness." I think that would be a material improvement of the rule.

Now, one issue that I see that I haven't heard anyone else discuss today deals with the topic of curative measures.

We can call it curative measures, but the impact on our clients, and the effect on lawyers where the curative measures are the same, whether we call it a sanction or we call it a curative measure, the client is going to have to pay for that -- the cost of that additional discovery. The client may have to pay for the attorney's fees involved. So the label doesn't make a difference. The impact on the client is the same.

The impact in terms of the professional and ethical responsibilities of the lawyer who gets hit with that type of motion is the same, whether -- irrespective of the label.

So one of my concerns from that perspective is looking at curative measures, and as I read the rule -- and if I'm misreading it, tell me -- there is no requirement for prejudice or harm for a curative measure to be imposed, and there is no consideration of relevance or materiality of the information lost before a curative measure could be imposed.

So we will take a situation where you believe you have preserved information from key players, but all of a sudden you are aware of someone else who may have relevant information. The information is lost. And as I read it curative measures could be imposed in that scenario.

Because, again, there is no requirement of prejudicial harm, and there is no consideration of relevancy or materiality of the information lost.

I do think in terms of (b)(2) factors, I agree with the comment, the one from the ABA about taking out whether or not you consulted with the lawyer who sent in the preservation letter, because frequently they are overbroad, they ask for everything under the sun, and they're really not worth responding to, because with that type -- you're not going to have a collaborative discussion, because they want everything, and they're going to accuse you of not properly preserving relative evidence if you don't turn everything over to them.

So I see my red light is on. I'll be glad to take any questions.

HON. CAMPBELL: Mr. Puiszis, I would like to ask you about your example, and then go on to curative measures.

If I were litigating against you, and you, under our current rule negligently lose some significant portion of discovery that in all likelihood would contain information relevant to my client, but I can't show, and I can't argue that I can show, willfulness and bad faith, is it your view that I should -- and let's say I have to do ten additional depositions because of that loss, or backup tapes have to be restored, are you saying that curative measures like restoring backup tapes, paying for the cost of the ten depositions that I have to take because you lost information, should not be borne by you unless I can show willfulness and bad faith?

MR. PUISZIS: Well, I'm not saying willfulness and bad faith. I think there has to be some standard, not substantial harm or prejudice like you have in (b)(2) -- I'm sorry -- in (b)(1).

But there has to be at least a threshold showing of some harm or prejudice, because then otherwise we are just preserving information for the purposes of preserving information.

We know the case law out there says you don't have to preserve every piece of information. So if you understand that we don't have to preserve every piece of information, or every piece of paper, and there isn't some type of threshold showing that the evidence that was lost was somehow relevant or material to one of the issues in the case, and it somehow harmed the opponent, I don't believe I should be sanctioned for that.

HON. CAMPBELL: Well, but don't you think a judge would ask those questions before imposing on you the cost, why is it relevant, why do you need it?

MR. PUISZIS: Well, I don't see it written in the rule, your Honor.

And while I would trust your Honor's judgment, I can't say I would do that universally throughout the country.

HON. CAMPBELL: Parker and then Paul.

MR. FOLSE: The proposed language on curative measures authorizes certain curative measures to be ordered if a party failed to preserve discoverable information.

And discoverable information, I think, would refer back to Rule 26(b)(1), which requires -- talks about information that is relevant to the claim or defense in the case.

So doesn't that at least import the notion of the information being relevant to a claim or defense?

And the second point is, isn't the notion of some showing of harm implicit in the very word "curative"?

MR. PUISZIS: Not necessarily. And I would ask that if we agree that it's going to tie back into Rule 26, why not make it explicit rather than implicit?

What's the danger or the damage or the harm of saying that in order to have curative measures the

information lost has to be relevant or material to the -- one of the issues or defenses in the litigation?

HON. GRIMM: Well, I'll followup on your comments with regard to whether recklessness should be part of the definition of bad faith.

You don't have any quarrel with the proposition that bad faith may have to be inferred circumstantially with the totality of the circumstances, do you?

MR. PUISZIS: No.

HON. GRIMM: Do you agree that reckless behavior can be relevant to the totality of the circumstances?

MR. PUISZIS: Well, I think it's how you define recklessness, and what the reckless conduct amounts to.

As a broad proposition, I would have to disagree. I could not concede that point with your Honor. Because --

HON. GRIMM: So it's relevant if it's reckless. That should not even be -- when the Court sets out to decide whether someone has acted in bad faith, and there is not an email where somewhere says let's get rid of those videotapes because they will kill us if we go to trial, then when you're trying to figure out in the absence of that kind of evidence what happened and whether or not there was a decision made to destroy evidence, the fact that someone may have behaved recklessly is, in your mind, categorically irrelevant to the question? Is that what you are saying?

MR. PUISZIS: Well, if you go with the definition that the failure of exercising reasonable care in the face of a known danger constitutes recklessness, I think we're right back into the residential funding standard.

HON. GRIMM: I would like to see the source of the authority that you have that failure to exercise due care constitutes recklessness.

MR. PUISZIS: In the face of a known danger, that's a commonly understood definition of recklessness that I have seen in my practice, your Honor.

HON. GRIMM: Thank you.

MR. PUISZIS: That's why I said if you are going to include "recklessness," include a definition.

HON. CAMPBELL: Thank you very much for your comments, Mr. Puiszis.

Megan Jones.

Mr. Puiszis, come back to the lectern. There is a question. There is a question.

MR. PUISZIS: Uh-oh.

HON. SUTTON: I want to offer a perspective that maybe will help a little bit.

Of course, records are relevant to bad faith.

Of course, good faith and lots of good things that the defendant did is relevant.

So I guess I'm struggling with this.

Every single thing that was done is relevant to bad faith, including something that happened to the records, but it doesn't mean the recklessness proves, establishes for sure bad faith. But all the good things the defendant did, and all the bad things the defendant did are relevant. I just think it's yes or no.

MR. PUISZIS: I don't believe it's a yes or no, because I go back to what the Seventh Circuit says that constitutes bad faith, which is the crucial purposes is the reasonable destruction.

HON. SUTTON: Don't you want to be able to put in evidence the good things that the defendant did?

MR. PUISZIS: Of course, I do.

HON. SUTTON: Okay. If you can put in all the good things, the utterly non-negligent, the utterly nonreckless things, why couldn't you both put in the negligent reckless things as part of totality to show bad faith?

MR. PUISZIS: I'm not arguing that the plaintiff couldn't. I'm arguing the standard by which after all of the evidence is introduced and presented to your Honor, what is the appropriate standard for determining whether or not curative measures should be imposed?

Is it a quasi and negligent standard, is it the failure to exercise reasonable care in the face of a known danger?

HON. SUTTON: Okay.

HON. CAMPBELL: Thank you very much for that clarification.

Mr. Jones, thanks for allowing us to interrupt you.

MS. JONES: My name is Megan Jones. I'm a partner at Hausfeld LLP, which is co-lead counsel for plaintiffs in over 30 antitrust class actions on behalf of plaintiffs.

I'm here to testify on behalf of COSAL, which is a membership of class action law firms who primarily represent plaintiffs in class actions.

I come to you today not as a scholar of the civil rules, but as a practitioner. I use them. I have been a member of Sedona Conference since 2007, and even

there I'm on the practical RFP committee, which deals with interaction of vendors with lawyers.

My career spans 14 years, and it's about as old as a 9th grader, about 14 -- you know, ninth grade. It's about as old as the ESI. It's from that unique vantage point that I testify today.

I graduated from law school in 1999, and I actually took notes on paper. I checked an email about once a week, and I was the first class in my law school that had training on electronic research instead of books.

One of my first jobs as an associate in 2000 was supervising the paralegal who actually had an ink pad and a stamp and stamped the word "confidential" on documents.

I can now press a button and have that word populate millions of pages in less than ten years.

In 2001 to 2004 my primary case involved electronic discovery, and what that meant in 2001 is that I sent the vendor down to North Carolina, and I had them image the 700 boxes of paper and bring it back up to D.C. By the end of that case in 2004 the technology existed that I could actually search those documents, but it didn't in 2001. In less than three years the technology evolved that quickly in one case.

In our members' experience in class action lawyers, who are in enormous complex litigation, ESI really became a part of our cases less than ten years ago, and our members' concern is that some of the proposed rules changes do not necessarily encompass the fact that what technology created, technology can solve, and it is on its way to solving.

But as a point of reference, by 2014 mobile connected devices would feed the number of people on earth. Phones and tablets outnumber us, both, pretty soon.

And taking less discovery seems like a blunt instrument sometimes in order to streamline this highway to do discovery, and that's our concern with some of these changes.

Let's assume that in my -- like in my case, major innovations that streamline discovery occur in three years. In the case I mentioned earlier, it took three years from paper to electronic searching. It happened that fast.

And I wonder if we can all envision being back here in three years saying we actually need to raise the limits of discovery because it's easier now.

I don't think so.

If you can't, you can't envision that scenario that it is cheaper to take discovery because we have more tools and we have figured it out, we spent more time in the lab, and we have actually figured out how to do this, perhaps it's premature to put the limits into play.

Because as you have heard from other people here today, and I'm here as an adversary for my membership, limits are meaningful. They affect negotiations.

Rules should not be enacted with the presumption that, oh, we can get around them, because that's not always the case.

Case in point is the seven-hour deposition limits. Much the same argument was made when we imposed the seven hours. Oh, if you need it, you can get more time. That is not the case in practice.

A case in point is foreign language depositions where it literally takes twice as long.

What is your name?

Chinese interpreter. Chinese answer. English.

The typical accommodation for a foreign language deposition, two hours. I get two hours more time. I get a nine-hour deposition instead of seven.

So this is besides the fact that there are often three groups of plaintiffs fighting for those seven or nine hours.

And because these limits are meaningful, I also believe that the proposed rule changes may have some unintended effects, which I will briefly outline today, but will followup with written comments.

I think that from our prospective these rules changes show that discovery needs will increase, while the amount of discovery provided decreases.

What I mean by that is that the proposed rule changes could increase the need for discovery of what is proportionality.

What is the amount of controversy?

You can imagine telling -- an advocate fighting over that.

What is the burden?

What is the issue of importance?

What is the importance of the issues at stake?

What is willfulness?

Was there bad faith?

While simultaneously producing the amount of discovery available, less depositions, less interrogatories, less RFAs, unless I'm negotiating where I get a judge to side with me.

It seems like not only is the bull's eye getting smaller, you get less discovery. But we also

have less arrows to shoot at the bull's eye.
So it could be a significant one, two punch, in that we have these additional burdens that we need to get discovery, but we have less discovery to prove that we need the discovery.
Why -- and I also think the intended effect, I think we have come a long way in cooperation, and it could have a deterrent effect on that.
For example, why would someone voluntarily provide me the names of their employees, the dates that they worked, and their job description when they could make me burn a fourth of my interrogatories on this question? It may have an impact by limiting the cooperation.
I also think insertion of proportionality to the scope of Rule 26(b)(1), it is intended to narrow the scope. The problem is how.
The amount in controversy, the importance of the issues at stake, the parties' resources, all of that is provided to the Court.
But imagine the following scenario.
Plaintiffs state they want discovery that cost $50,000, but our case is worth 50 million, so it's proportional.
Defendant states that long-term contracts actually moot most of my case, and that my alleged conspiracy only really applies to 5 percent of their customers, and their sales is $100,000.
Well, now I want discovery of those contracts before the Court rules on the papers. Defendants want discovery of my damage assessment, and we're off to the races.
I just wonder how this is going to play out if every discovery request becomes a mini trial on the merits or class certification.
It could be -- this could have a significant lag on the time from completion of our case. It could take eight months before the documents are produced, we review them, and we're back to the Court with a record upon which a decision like that could be made.
The last example that I will raise is the proposed rule changes to Rule 37(e)(1)(b) 1 and 2. I question how that would work in practice.
I'm an antitrust lawyer, I focus on cartels. And an example is I have an employee who in an interrogatory has disclosed to me he had from time to time talked to a competitor.
And it was not until -- that's all the information I got. It wasn't until his deposition that I confronted him with his documents that I found out this time-to-time communication was actually 25 times, and it actually was for price increases ahead of schedule to this person.
Now imagine that those emails weren't preserved, and all I had are the interrogatories from time to time, and this witness' memory.
Where do I go from here? How do I prove substantial prejudice when I don't what I have lost?
I can hear the defense bar pulling back their chair and saying the word "fishing expedition" when I say I want depositions of the IT structure and his secretary and his coworkers to see what I lost because I don't know.
And how do I answer the question from the Court when they say, Ms. Jones, what are you after?
I don't really have an explanation other than I want to see if I lost something.
You can imagine I might not always win that argument, and that's my concern.
I commend the committee for its hard work, its willingness to hear from diverse members of the bar, and all of the stakeholders in this process. I think the committee has moved the needle just by proposing these changes. It has started a conversation.
My members are going to submit, you know, practical solutions that we think will help move this along.
Judge Francis' suggested language is an excellent example of how this has generated discussion.
And on behalf of COSAL members I want to telegraph loudly that the plaintiff's bar is willing to talk about change in discovery that is more effective, less costly, and reduces unnecessary advocacy, because we're paying for it too.
Most of our members are contingency law firms, and every deposition we take, every document we review is coming from our pocket as well.
Thank you very much for your time.
HON. CAMPBELL: Bob.
DEAN KLONOFF: Did I understand you to say that in your large class actions you're being held to the current limitations?
Because we have heard a lot of testimony from people that in big class actions the parties either work together, or the Court is very liberal in granting excess discovery.
MS. JONES: I will say that I'm -- as a general rule the answer is, no, I am not held to the limits.
However, 2013 was a banner year for me in that

I did have a case where the defendants stuck to their guns and we got ten per party.

So I think everything is part of a negotiation, and where the ceiling is matters. So when I'm asking to -- for more than the limit on depositions, I have to give up something else. I think it's a factor of the negotiations.

HON. CAMPBELL: All right. Thank you very much, Ms. Jones.

Professor Hubbard.

And we will all take a break after Professor Hubbard.

PROF. HUBBARD: All that stands between you --

HON. CAMPBELL: That's not what I meant. We are going to pay very close attention.

(Laughter.)

PROF. HUBBARD: Good afternoon. It is an honor to be here.

My name is William Hubbard. I'm an assistant professor at the University of Chicago Law School where I teach civil procedure. I have a background in private practice, and I'm trained as an economist as well.

At a mini conference here in Dallas in September of 2011 I presented to the discovery subcommittee results from the pilot phase of my Preservation Cost Survey.

The Preservation Cost Survey is the first, and to date, only empirical study of the nature and cost of preservation activities, a cross-section of companies. The full survey is now complete, and I will discuss my results today.

I will also submit a written final report on the Preservation Cost Survey before the end of the public comment period.

The Preservation Cost Survey was commissioned by a group of large companies called the Civil Justice Reform Group, and to be clear, I've been compensated for my time spent designing, implementing and completing the Preservation Cost Survey.

No one other than myself, however, has directed the survey, nor has anyone other than myself had access to the data.

The data was provided by individual companies subject to assurances of strict anonymity, and today I speak only on my own behalf.

One hundred twenty-six companies completed detailed surveys.

The respondents range in size of company with as few as 18 employees to some of the largest companies in the United States.

I also conducted extensive in-depth interviews and collected litigation matter level data sets on the extent of litigation hold activity from a subset of companies.

A more complete summary of my findings appears in the handout that I just distributed to you.

I will now highlight three main findings.

First, preservation obligations are not just a problem for big corporations. Nearly 80 percent of the companies reported a great extent, or a moderate extent, of preservation problems. And for categories of claims like employment discrimination where cases for smaller companies and cases for larger companies tend to look the most similar, the answers of smaller and larger companies looked indistinguishable from each other.

Why is this?

Unlike other stages of the discovery process, preservation requires extensive activity that are internal to the company.

Yet smaller companies do not have full-time in-house legal IT or discovery staff.

In fact, 17 of the companies in the survey do not have any litigation attorneys in-house at all.

Nor can smaller companies afford the high fixed cost of technological solutions to preservation challenges.

For example, among the smallest companies in this survey, only one out of 31 has an automated system for tracking litigation holds.

In contrast, among the largest companies, 14 out of 17 do.

Smaller companies which have fewer cases simply do not have the economies of scale to justify expensive but often effective investments like these.

As a consequence, I believe that smaller companies are, in this respect, more vulnerable to the risk of sanctions in the context of preservation.

Second, a small fraction of litigation matters generate a disproportionate share of preservation cost.

From the companies from which I gathered data, 5 percent of matters account for more than 60 percent of all litigation holds. So 5 percent of matters account for more than 60 percent of all litigation holds issued.

I emphasize this because a rules change that may end up affecting perhaps a small share of cases may nonetheless impact a disproportionate share of all preservation activities.

Third, most preserved data is never collected and reviewed. On average across all surveys respondents

a little less than half of all preserved data is ever collected, processed and reviewed. Among larger companies the share is even smaller.

This suggests that reducing what some people today, and in the comments, have referred to as over preservation, may not have an adverse impact on the scope of production, on the scope of documents that are produced or used in litigation.

Thank you for the opportunity to discuss my research, and I would welcome any questions that you may have.

PROF. MARCUS: From your research for your extensive familiarity with what we have been doing, can you tell us if there is any way to know, first, whether adopting a rule like the one we have proposed would change what you described?

And second, how much of what you have described might have to happen anyway because of regulatory or other preservation requirements?

PROF. HUBBARD: So let me begin by saying that in my own view the rules that have been proposed by this committee are -- reflects to my eyes a deliberate and modest step in terms of changes to the rules.

And, of course, my empirical study focuses almost exclusively on preservation rather than other aspect of the discovery process.

PROF. MARCUS: I meant 37(e) and only 37(e).

PROF. HUBBARD: Right. And I would say that as a modest step in terms of clarifying the nature of sanctions, you would expect there to be small but potentially meaningful reductions in the scope of what some people call over preservation.

I think some of the people who have spoken here today have indicated that they may be very cautious before changing their practices because they want to see how courts interpret what is not a strict set of guidelines.

So I would say that this looks like a modest step. The cost reductions I would expect to be modest.

At the same time, any concerns about detrimental effects in terms of the downside of these changes, I think is going to be almost nil precisely because we have a situation where the scope of preservation is so much broader than the scope of whatever even gets looked at by the producing party, let alone after being subject to review gets looked at, and perhaps eventually used by the requesting party.

HON. CAMPBELL: Gene.

HON. PRATTER: You said it teaches figures. I notice you are not a signatory to the Rule 84 protective letter from law professors.

Did you have that opportunity, and did you decide not to sign it?

PROF. HUBBARD: I actually don't even recall if I was asked to sign it or not.

HON. PRATTER: It's a form.

PROF. HUBBARD: Yeah. I actually don't have any -- I feel I don't have any intellectual stake in that decision. In my practice experience I never used the forms.

HON. PRATTER: Are you aware of anybody who ever has?

(Laughter.)

PROF. HUBBARD: No, your Honor.

HON. CAMPBELL: We're not either.

Elizabeth.

MS. CABRASER: I just had a very basic question. Perhaps I missed it in your summary.

How does this differentiate between information preserved for potential litigation or regulatory activity, and information preserved in the normal course?

In other words, is the first baseline?

PROF. HUBBARD: That's a great question. Actually I neglected to respond to that aspect of Professor Marcus' question.

The survey here does not -- does not in most respects distinguish between those two types of preservation. I think realistically it is accurate to say that most of what is being preserved today is going to be preserved anyway regardless -- regardless of what the preservation standard is.

You know, you could change the rule and say sanctions will never be issued, and the realty will be most of everything that's being preserved today will be preserved anyway, because there are other overlapping obligations to preserve.

And, frankly, there are business reasons to retain records for business purposes for sometimes years, many years on end.

So the question here is not about to the core records of the company, or the core records that are subject to the statutory retention requirements.

Rather, we're talking about the data information that's at the margin of what's being preserved.

And the question is to what extent is that data at the margins going to be affected by changes in preservation obligations.

So I think in terms of the total level of preservation, a lot of that is going to be preserved -- going to be preserved anyway.

The question here really is outside that core of documents and data, you know, what is and what should be preserved or not preserved?

MR. BARKETT: So where do you put day-to-day emails in that categorization?

HON. HUBBARD: Well, I think that would depend both upon the business. Some businesses have requirements to archive their emails under federal statutes. Others do not. I think it also depends on the needs of the particular business.

My survey -- to be clear, my survey did not ask companies about -- to distinguish between documents that are being preserved subject to other obligations -- and preservation obligations themselves.

Rather, the questions focused on the extent of litigation hold activity, and the distribution across cases, which reflected a lot of cases where there just aren't a lot of holds, and a few cases where there are a lot. And subjective reports of the extent of preservation burdens.

And the subjective reports, while of course they should be taken with a grain of salt, because I can't independently verify, you know, if a company says I have a great extent of problems, whether that's true or not.

The subjective reports, I think in a sense, better captures that marginal effect of preservation obligations, because the obligations that companies are complying with anyway aren't going to be perceived as a problem associated with preservation. It might be a problem associated with some statutory obligation that's separate from the preservation obligation.

HON. CAMPBELL: All right. Thank you very much for your comments, Professor.

We will take a break until ten minutes after 3:00.

(Brief recess.)

HON. CAMPBELL: We still have a long way to go. We have 18. If we take ten minutes each that's three hours, so that will push us past the 6:00 hour, even being on schedule.

What I plan to do is an hour and a half, two hours in, take a two-minute break for everybody to stand and stretch, but not take another long break.

That means that if you-all need -- anybody on the committee or in the room needs to take a break and step out, just go ahead and do it as we move along. But I think we need to keep this moving so that we get everybody on at a reasonable time.

So, Mr. Sullivan, we start with you next.

MR. SULLIVAN: Thank you, your Honor. It is an honor to be here. I appreciate the work this committee is doing very diligently, because this, as we all know, is extremely important to our profession. Maybe that's where I should start, just give you a little background.

So I am John Sullivan. I have been practicing law as a trial lawyer for 27 years. I started at Fulbright & Jaworski in their trial department in 1987, and we had a litigation training program. I was under the tutelage of some really great trial lawyers, and had the fortunate -- good fortune to get experience trying cases first, second chair, but then doing a lot of tort and insurance defense work.

Then just kind of moving as that became more -- moving into commercial, IT and really all types of litigation toward the end of my career at Fulbright, and I switched -- and I'll tell you about that in just a second -- but I was doing pharmaceutical defense work for some of the big companies. But I saw a lot of MDL, and a lot of huge amounts of discovery associated with that.

The entire law firm was just dedicated to just dealing with preservation and processing the documents and, you know, organizing the ESI. Then feeding it around the team to prepare witnesses for depositions.

Then while I was doing that, though, I was still doing commercial cases, wrongful death cases. So quite a variety.

I left Fulbright in 2007, and joined a colleague of mine at a smaller litigation oil and gas boutique firm called Walk Beckwith Thomas Henry & Sullivan. I practiced there for six years, and that was a great experience.

The great thing there, is I was able to do a lot of -- the trial work I had kind of done when I first started my practice that -- and I won't go into detail why -- I was able to have a broader type of trial practice, but there I was doing some plaintiff's work as well. So I got to see, you know, the discovery burden on both sides of the docket, so to speak, and the preservation burden on both sides of the docket, and how it could be essentially exploited if you were the plaintiff, and how difficult it was oftentimes if you were the defendant.

Then most recently I moved over to the law firm of K&L Gates, it was about three months ago, and I am in

their commercial dispute, so just kind of getting my legs under me there. And then I had this opportunity to come and speak before you on the proposed rule changes.

I guess my motivation for making myself available to come before you is, I really, you know, feel like this is my profession, and always has been, to be a trial lawyer, but sadly -- it's not only because of rules, but it may have a lot to do with it -- we don't even call ourselves that anymore. I mean, it's not even encouraged to really call yourself a trial lawyer.

Now you're a commercial dispute lawyer, and you do maybe some trial work if it goes that direction, but now it's arbitrations or ADR. The business people are putting arbitration clauses in everything because of the expense associated with discovery. It's just keeping clients out of the courthouse.

When they do get into the courthouse, and I have seen it on both sides, including mom or pop shops I have represented where they have such a burden that it's just -- they're going to settle the case long before the merits are ever decided because it's such a burden. They might even go out of business.

I have one client in particular that sold heavy metal high pressure vessels to be used in the Gulf, and they could not afford to defend the case just because of the associated discovery pressure.

Then I was on a big oil and gas case on the flip side of that, and we were able to exploit pressure on the defendant -- corporate defendant because they had failed to preserve -- you know, I don't know if it was intentional or unintentional, but they had failed to preserve what we thought could be relevant information that -- you know, in that situation I saw they had to squirm. They got out of it. It was a very good judge.

So I guess what I would -- first of all, compliment this committee for coming up with these proposed rules which I think are going to invite people back into the courthouses, the federal courthouses of the United States of America where, you know, 50 years ago, even when I started practicing 28 years ago there were great trial lawyers. And people felt good about getting into a forum and having a jury and a judge decide it.

Now it's really litigation and paper shoving and ESI and over preservation and the risk of sanctions that is really affecting everyone.

So that's my motivation.

The two things that -- I know I don't have too much time, but I want to talk about -- I think the rules are great. It should be adopted. I think it will get us back to where we want to be, or go a long way toward that.

The Rule 37(e)(1)(i) that the committee has already heard a lot about, it really needs to be tightened up so that it can't be used by some courts to still punish the defendant, which would then have the ill effect of causing defendants still to have to over preserve -- just kind of carte blanche over preserve all their documents at great expense, the way it is right now.

There should be a methodical way that they can deal with preservation without the risk of being sanctioned just because of a willful -- if you have the conjunction "or," then you could have a judge follow the rule and say, well, you intended to get rid of this group of documents, and therefore, you know, I'm able to sanction you for that.

But if you add the conjunction "and," obviously, it cures the problem.

Or if you define "willful" to have some scienter, some bad faith component to it, some intention to deprive a plaintiff, or a would-be plaintiff from relevant information that a claim could result. But I think just adding the conjunction is probably the easiest thing.

Then I would just commend the Court for doing what it's doing on Rule 26(b)(1), which is to have a tighter standard there, instead of the hugely open-ended standard we have always had. Which if you are a plaintiff you can always say, you know, if it's relevant or it could reasonably lead to discovery of admissible evidence, well, that's everything. And that, of course, just leads to over preservation.

Frankly, even the plaintiff lawyers I know and talk to, they don't like that. It's not the fun part of practicing law.

The fun part of practicing law is getting into the courtroom and trying the cases. And if the clients want to settle it during the trial because of the merits, and the way that's coming out before the jury or the judge, so be it, but it shouldn't be because of the paper and the electronic discovery obligations.

So with that, I'll rest and let the committee ask questions, if you have any.

HON. CAMPBELL: Solomon.

HON. OLIVER: There would be more trials if the rules were changed consistently with what we propose. I am just curious as to why you think that.

I mean, there are a lot of possible options. You could have more summary judgment motions, you could

have more voluntary dismissals, you could have more settlements even at lower rates if you follow the logic some people talked about.

So why is it that you think that trials will increase, and that will be the norm?

And if it becomes the norm, will that be enough time for judges to manage cases?

MR. SULLIVAN: I think the answer to that is, yes, the judges will have time to manage the cases, because they won't be wasting a lot of time on the peripheral discovery motions, and that sort of thing.

But your earlier point, sir, I do think that will lead to more dispositive motions as well, summary judgment motions so you can get to the dispositive motion on the merits without having to spend, you know, a half million dollars, or a million dollars in discovery.

That's fine too.

You know, my point is not only that we have trials. The point is that the litigants have a confidence in the system that the system is going to fairly determine the merits of the dispute, and not have the thing resolved on a collateral issue, which is, you know, paper and ESI.

Now, obviously, if someone is intentionally hiding the ball, that would fall under 37(e) under the right definition, and they could be sanctioned appropriately.

But other than that, you know, we need to encourage people to use our courts again. We have got good judges. We just need rules that allow the judges to do what they want to do, and what the litigants want to do.

HON. CAMPBELL: All right. Thank you very much for those comments, Mr. Sullivan.

MR. SULLIVAN: Thank you.

HON. CAMPBELL: We will hear next from Lee Mickus or Mickus. I apologize for the mispronunciation.

MR. MICKUS: Good afternoon, Mr. Chairman and the committee.

My name is Lee Mickus. I'm an attorney from -- a litigator from Denver where I practice with the firm of Snell & Wilmer. My practice primarily involves defense of automobile manufacturers in product liability suits during the discovery and trial phases. My practice has taken me to courts all across the country, both in the federal system, as well as in the state courts.

I'm here today on my own behalf.

Similar to what we have just heard from Mr. Sullivan, my experience as a trial lawyer has caused me to develop a deep belief in the integrity and the fundamental fairness of the American jury to determine the merits of legal claims and defenses.

The jury trial has been and must continue to be the background bone of our justice system where parties with legitimate and viable claims and defenses are deterred or prevented all together from reaching a jury, or resolution on the merits by other means, as a result of the expense or burden of the discovery process, or because of the cloud of pending motions for sanctions that may be dubious in nature, the integrity of the system suffers. We all suffer.

I'm here today to express support in general for the proposed amendments. Overall I believe they are likely to sharpen the focus of the discovery process on the real needs of the parties, allowing both sides to develop their relevant evidence required to present the case to the jury, while reducing, at least to some extent, excessive costs and burdens relating to discovery.

Mr. Chairman, I do have concerns about the details of the proposed amendments to Rule 37(e).

Implementation of uniform standards identifying sanctionable conduct will go far to narrow the filing of motions for sanctions to just those cases where truly problematic actions have occurred.

However, use of the word "willful" in Rule 37(e)(1)(b)(1) as a stand-alone basis for imposing sanctions, I believe is inconsistent with that goal of having a uniform standard.

Courts have demonstrated that "willful" is a standard subject to tremendously widely and varying interpretation, and as such, that word is simply too nebulous to consistently identify conduct involving the degree of culpability justifying sanctions.

I'll give you just one example of a complete disconnect in the interpretation of "willfulness" from my field of automotive product litigation that I think is right in the core of what the committee is considering.

This committee's report accompanying the publication of proposed rules identifies and interprets the Silvestri versus General Motors case as imposing sanctions, quote, "in the absence of a finding of willfulness."

Fair enough.

In contrast, District Judge Brown, from the District of Oregon in the Erlandson versus Ford Motor

Company case, another products liability case in which the vehicle in question was destroyed before or during litigation. In that ruling from the Erlandson case on a motion for sanctions Judge Brown described that very same Silvestri case in this way.

Quote, "Plaintiff's failure to preserve the allegedly defective vehicle was determined to be willful."

So even the committee and a sitting federal judge have a divergent view of whether or not that same case demonstrates willfulness. Obviously, a completely divergent reading.

These varying interpretations of whether those very same facts constitute or did not constitute willfulness indicates to me that using that as a stand-alone standard risks imposing sanctions for simple negligent conduct in a failure to preserve. This is also likely to invite additional motions for sanctions, and will lead to inconsistent rulings on that standard, and detract from the goal of developing a uniform standard of what conduct should be sanctioned.

Given the enormous breadth that has been used to interpret the willfulness standard, I would urge the committee to simply drop the word "willfulness" entirely from a proposed rule.

Alternatively, I think using the "and" as opposed to "or" would get us there, but as Judge Diamond pointed out earlier, going that direction, I'm not sure "willfulness" adds anything to the bad faith that would be part of that standard.

But dropping that, or going to an "and" would reduce the ambiguity, and will clearly establish the necessary degree of culpability justifying the imposition of sanctions.

Mr. Chairman, I also have concerns about the language proposed in Rule 37(e)(1)(b)(2). I understand that this provision is intended to preserve the line of cases represented by Silvestri as well as the Flury verus Daimler Chrysler case. Both of those were product liability cases where dismissal sanctions were entered after allegedly defective vehicles were destroyed.

Such treatment of core evidence, to be sure, is very troubling and problematic. And as an automotive product liability defense attorney, I encounter that situation on a -- unfortunately too regular basis.

In fact, I'm handling a case right now in the state court involving those circumstances. So you may find it surprising to hear me urge the committee to drop proposed Rule 37(e)(1)(b)(2).

I urge that because I believe that the irreparably deprived standard as proposed would eventually sweep far beyond the very narrow circumstances of Silvestri and Flury.

The proposed rule would set up a home run situation that I think is absolutely going to invite motions for sanction in any case in which it comes to light that relevant and significant evidence has gone missing.

Irreparably can be interpreted as simply meaning that the evidence is just gone, and the importance of evidence to a lawsuit is always subject to characterization and argument.

That open door presented by the irreparably deprived proposal can only lead to more motions and inconsistent results.

The committee notes suggested this proposal would apply only in very rare instances, and Silvestri itself describes its fact base as involving peculiar circumstances.

This narrow band of unusual cases intended to be addressed by this provision in (b)(2), I don't believe justifies its own -- having its own rule.

The district courts have other means to address the cases involving these kinds of circumstances. Perhaps by invoking the curative measures provision to do things like limit expert testimony, limit other evidence based upon the missing article, in this case the vehicle, potentially or by allowing the jury to hear and consider the circumstances under which the evidence went missing, and make their own determination as to the significance of that evidence going gone.

Lots of other possible remedies exist, and in my experience district court judges are particularly adept at grafting remedies to address circumstances -- to address peculiar circumstances that may arise out of a particular case.

But in my view the disadvantages conveyed by the uncertainty and the potential expensiveness of this irreparably deprived standard outweighs the need for this proposed rule.

Although, I do have concerns about the provisions that I discussed in Rule 37(e), I would like to end my remarks by again recognizing that I believe the proposed amendments as a whole will better the litigation process, and allow its focus on the merits of the claims and defenses, and better enable the justice system to resolve cases on the merits.

Thank you, Mr. Chairman.

HON. CAMPBELL: Questions?

Peter.

MR. KEISLER: I would like to ask a question about the willfulness and the bad faith.

It's a question of how the rule should be in the following scenario.

Imagine the head of a small unionized business, suggest a size that as a general matter here he or she doesn't want to implement the kinds of protocol that I'm sure all of your clients implement, couldn't hold and take care of things.

Not a specific intent to deprive any particular party of anything, just a general intent that this whole thing is too expensive.

And so cases come up, and if one had to show that that business owner had a specific intent to deprive a particular plaintiff of information, one probably couldn't meet that standard, but certainly what they have done is more than negligence, not really gross negligence either, it's something else. It's recklessness maybe, but not everyone likes that either.

Do you think that kind of failure should be sanctionable within the bifurcation that 37(e) has between curative measures and sanctions?

MR. MICKUS: It should.

MR. KEISLER: Is there -- do any of the existing words capture that? Is there a different word, a definition of "willfulness" or "bad faith" that would or should capture that?

MR. MICKUS: I believe that description -- that circumstance you're describing preferably falls below the level of out and out sanctionable conduct.

That being said, is that a circumstance the district court can address through recognizing what has gone missing, perhaps by letting the jury consider the conduct of the corporate officer in that instance, and allowing discussion of the types of materials that were not preserved under that circumstance, I guess that's how I would see that coming down.

HON. GRIMM: I would like to follow that line, if I could, sir.

MR. MICKUS: Sure.

HON. GRIMM: As currently stated in (b)(1) the sanctions that would include an adverse inference instruction can only be given on a showing of substantial prejudice, plus as currently is drafted "willful" or "bad faith."

If we follow your suggestion and we eliminate "willful," and if the type of conduct that the last question is focused is something that falls below sanctions, then I take it from the comments you just made that you would not have a quarrel with the judge allowing plaintiff's counsel to introduce evidence at trial to show the circumstances under which they tried to get the evidence, but it wasn't available.

The defendant would then offer the evidence as to what they did to try to preserve it or what they did or why it was nonproportional or wasn't relevant or was an accident or an act of God, or whatever it may have been, and for the judge to just give what's oftentimes referred to as missing evidence instruction, that would not be a problem in your eyes, would it?

MR. MICKUS: That would not be a problem in my eyes.

In fact, I have encountered judges doing exactly that in a number of cases, and I think the quality of justice meted out in those cases has been appropriate.

HON. GRIMM: So you would not look at that -- what I'm calling the missing witness instruction, as a sanction as opposed to the adverse inference sanction that is predicated upon a showing of bad faith under (b)(1).

Is that right?

MR. MICKUS: If I'm following and understanding what you are characterizing as the missing witness instruction appropriately, yeah, I would characterize that more as a curative measure type deal.

HON. CAMPBELL: Thank you, Mr. Mickus.

We need to move along.

Donald Lough or Lough.

MR. LOUGH: Good afternoon.

I'm Donald Lough. I'm an assistant general counsel for Ford Motor Company. I manage our product liability, class action, asbestos, discovery practice.

I speak here today on behalf of approximately 200,000 men and women who work at Ford Motor Company. I also keep in mind I have a very heavy responsibility to several hundred thousand other families that are retirees, shareholders, dealers and suppliers who rely on us for their livelihoods.

Because of the nature and scope of our business, we have about 10,000 new disputes each year at Ford Motor Company, and several hundred thousand since 1980 when the committee first amended Rule 26 to deal with the problem of over discovery.

Like every business, we need to have a fair and efficient system for resolving those disputes. We believe very much in our jury system. We think it can be fair and efficient. And like many of the speakers here today, we really trust juries to do the right

thing, to be fair and impartial.

We have tried well over a thousand cases to jury verdicts in the last 20 years. We wish it was more. We think that number should be a multiple of what it is.

Discovery is a very important part of the process. It's necessary to having jury trials, but discovery should be a way of getting cases ready for trial.

Unfortunately, too often discovery causes delays, drives up costs, and actually impedes trials.

Proof that discovery is a problem today can be found in the opposition comments to the proposed rules. They describe a status quo where relevance is not the standard, where proportionality is not the norm, and where parties routinely presume the worst in their opponents and file contentious motions just as a matter of course.

Ford's experience is consistent with that description, and with the data submitted by Professor Hubbard and Lawyers for Civil Justice.

It's quite common for us to preserve, collect and produce millions of pages of documents in a typical case to see only a few dozen marked as exhibits at trial.

We also expend disproportionate resources opposing discovery motions that seek to keep us from juries through sanctions that limit evidence, that strike witnesses, and even strike pleadings in some cases.

We are very proud of our record. We have been sanctioned very rarely. Almost at a Six Sigma rate.

Achieving that performance does very little to advance the merits of our cases. Yet every year diverts tens of million of dollars of resources away from our business, and that's money that could be much better spent doing research into automotive safety, paying employee benefits, and the like.

The root of this over discovery problem is the reasonable calculated clause in Rule 26. The advisory committee has made prior attempts to encourage district courts to rein in discovery. Those attempts have failed because district judges are reluctant to curtail discovery, and the parties really have no incentive to limit their requests.

The problem continues today because the reasonably calculated clause is misconstrued, and the (b)(2) limitations are not implemented with the vigor that was contemplated by this committee.

When you look at the comments and opposition to the proposed revisions, many of them state incorrectly that the reasonably calculated language is the core standard of relevance, as opposed to an explanation about the difference between relevance and admissibility for discoverability purposes.

Many of the comments in opposition have characterized proportionality as something new, when it appears expressly in Rule 26 already.

So the comments show that the relevance of proportionality requirements of Rule 26 are ignored or misapplied, and are in great need of strengthening and enforcement.

The proposed changes to Rule 26 will strengthen the existing requirements. Some have already made these concepts go too far, because they're too vague, and they shift the burden.

Well, our experience in cost sharing jurisdictions is quite the opposite. When we are able to present a bill to our adversaries for their fair share of the cost of discovery, they very quickly can make a decision about what they need, and what they don't.

We also find that the documents used at trial very rarely go beyond the core documents that we produced with no objection whatsoever at the outset of the case. So this idea that there is more discovery that needs to be done, and you don't know what you don't know, it just doesn't hold water in reality.

In the thousands of cases that we have very, very rarely does anything beyond the core discovery ever get used at a trial.

But we do find that courts too often delay the most critical relevance decisions until it's too late. We often have to produce excessive discovery, the Court punts on the relevance issue, then at trial time we talk about relevance, and all those documents that we produced were excluded. Nothing can be more wasteful than that.

The burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof. In practice courts very fairly, as the rules contemplate, request both parties to discuss proportionality.

Discovery disputes tend to get decided in a format where the rules of evidence are not strictly enforced in a much more informal environment.

But in any event, the proposed provisions say nothing about shifting or changing the burden of proof as it exists today under the rules.

Rule 1 asks us to aspire to this just, speedy and inexpensive resolution of disputes. I think

implicit is that is on the merits.

The proposed amendment will facilitate more resolutions on the merits, whether it's by summary judgment or through trial.

Parties will still have the evidence that they need to prepare their claims and defenses for trial. They can redirect their energy from wasteful discovery motions to trial preparation. Courts can redirect their energy from managing excessive discovery to ruling on motions in limine, motions for summary judgment and really getting cases ready for trial.

Cases will be more likely to settle based on the merits of the case rather than a lopsided ability to impose costs.

The time from commencement to disposition will probably shorten, and our civil justice system will become known for trials on the merits, and not trial by ordeal.

It's even quite possible that cases will start returning to our civil justice system, and we'll see fewer cases being diverted off to arbitration.

During the initial breaking period I do think there will be some more discovery motions, but once it becomes clear what the rules are, and that they will be enforced, the parties will have no incentive to move off in discovery, they will have no incentive to file motions that are going to be unsuccessful. They will know excessive discovery will not be permitted. We will get down to the business of preparing cases for trial, and I think in the long run you will see far fewer discovery disputes than we have today.

Thank you very much, and I welcome your questions.

HON. CAMPBELL: Questions?

(No response.)

HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Lough.

Gilbert Keteltas, if that's the correct pronunciation.

MR. KETELTAS: I'm Gill Keteltas. I'm a commercial litigator and co-chair at Baker Hostetler Discovery Advocacy and Management Team.

I serve on the advisory board of the Georgetown Advanced Ediscovery Institute, and I contributed to the Sedona Conference proportionality principles.

Today I speak on my own behalf.

If I were a proportionality under the current rules I would be feeling pretty down right now. A lot of people don't think I exist. Other people think I am out there to deprive them of information. Others think that when I'm finally noticed I'm going to unleash a torrent of motions practice.

Why am I so misunderstood?

(Laughter.)

MR. KETELTAS: I think document proportionality is misunderstood. The comments that incorrectly suggest that this committee is proposing to alter obligations that exist today are the best evidence that the proposed changes are needed.

This morning one commenter stated his fear that the train had already left the station.

I have a different fear.

The train left the station eight years ago, and a lot of people seemed to miss it. I think it's time to put those people back on the train.

In my practice I see a recurring scenario. An antitrust consumer employment class action with 100 or more custodians under legal hold. Data sources just as numerous. And there are questions about the need to preserve or search a variety of backup media. A terabyte or more of electronic information is in play routinely in these cases.

In looking ahead, even these complex cases are likely to come down to a dozen or so key players, and a handful of important issues.

Meaningful information will be measured in a few binders on counsel table, or attached to a summary judgment motion. Not in gigabytes and not in terabytes.

You have heard predictions that the mere invocation of the word "proportionality" will be used to stop discovery in its tracks.

My experience has been different. I think that that complaint presumes that proportionality is raised for the first time in an objection to a discovery request.

I think that's wrong.

Consider the complex commercial case. If my client simply collects that data, starts processing it, they have spent a few hundred thousand dollars before looking at a single document.

I tell my clients, though, that today's proportionality principles allow them a different course, but it requires a commitment on their part. They can't just say proportionality. They have got to be willing to get into a room and talk to their opponents about what matters in the case, who matters, what are the topics in dispute.

If you want proportionality you have got to be willing to have that discussion. To me, that doesn't delay getting to the relevant information. It doesn't

delay getting to the binders. It gets to them quicker, and everyone should be pleased with that result.

The clients sometime say, well, what if my opponents don't agree?

Then, of course, often I face the geographical objection, it's just not how we do it around here.

It's important to be able to respond to this.

What I do is take out my rule book. I walk people through Rule 26. I tell them they are required to discuss and propose subjects of discovery, and whether it should occur in phases.

I point out that requests and objections are subject to and limited by the proportionality factors. I'm armed with case law and the Sedona proportionality principles.

But it's harder work than it should be to have the discussion I want to have. This process hasn't unleashed a title wave of emotions in my experience.

In fact, it's reduced the disputes among the parties because of the discussion that's necessary to make proportionality work.

In a multi-defendant antitrust class action we met with sophisticated plaintiffs' lawyers on multiple occasions, and discussed the issues and people that mattered most, back and forth discussion. But at the end of the day out of a few hundred people on legal hold we agreed to start with 16, and go to more if needed. We only went to two more, and it wasn't because of a motions practice.

The point is we also left room to revisit our agreements as the process went forward.

A lot of the fight about proportionality today assumes that the answer to a proportionality objection or question is a yes or no answer. And I don't think that assumption is right.

In reality a lot of proportionality issues and objections will be addressed iteratively. Why don't we start small and get bigger? Maybe we don't know the answer today. We can work through it.

I do, however, suggest one change to the list of proportionality factors. The resources of the parties seems to me to be an outlier in that list, and it's unclear how it would or should be weighed when discovery is not important to resolving the matters in dispute, or when the expense and burden outweigh likely benefit.

It also doesn't appear to allow consideration of the resources of a law firm that is financing an action, and has a significant stake in that action, but has a couple of named plaintiffs whose resources are quite low.

Litigants shouldn't be deprived of the benefits of proportionality simply because they have resources.

I appreciate the committee's work, and I hope you will help my friend "proportionality" regain the status you envisioned for it eight years ago.

HON. CAMPBELL: Questions?

MR. BARKETT: Could you respond to the concern that has been expressed that folks on the defense side of the table simply now object on the basis of proportionality?

MR. KETELTAS: It will replace vague over broad, burdensome, and it will just generate more motions.

MR. BARKETT: We have heard that primarily from folks that represent plaintiffs, but actually we heard it more today from those that represent defendants that says that's the first thing they will start doing.

I'm wondering what your reaction is to that?

MR. KETELTAS: Well, in my practice the word -- the use of the "cut and paste" and the "word processor" put a vague objection in doesn't really get me very far.

There is not going to be a motion, or an opposition to a motion, I presume, unless I have met and conferred about the various proportionality factors.

If there is, I have read case law from some of you that would send me back to have that discussion with the other side. And then I have got to decide if it's a motion I want to pursue, and I'm not going to pursue a motion that I don't think I have got a good chance of winning.

The other thing is I think Rule 26(g) disciplines the behavior you're talking about.

You know, I can't just say the word "proportionality" for the fun of it. In theory I'm supposed to have looked into whether that is a reasonable objection.

I'm also supposed to have looked into whether it's being posed for a proper purpose, or in fact is simply there to delay or to prevent somebody from getting the meaningful information.

So I don't think the objection you have identified is a reason to do away with proportionality provisions. I think there are other ways to deal with them.

HON. CAMPBELL: From your last comment, would you omit resources of the parties from the list, or would you rewrite it?

MR. KETELTAS: Well, I would omit it, because I don't think it focuses on what all the other factors focus on, which is the discovery and the reason for it.

Simply, you could have a different answer. If all the other factors were identical, you could have a different answer depending on the resources of the party, and I don't know where you're going to draw that line.

HON. CAMPBELL: Peter.

MR. KEISLER: But is it really possible if one of the things you're considering is the burden to meaningfully assess the burden on the party without thinking about its -- the extent of its resources?

MR. KETELTAS: I think -- I don't think that that's a fair assumption, because -- you know, you look at a party's litigation budget. You don't just look at this company makes a lot of money. Then you're taking money away from shareholders to have the litigation process.

The burden versus the benefit weighs the burden of conducting that particular discovery activity versus the benefit of that discovery activity.

If it's a $50,000 burden, we don't say, you know, even though there is very limited benefit, because this party has 50,000 or more, let's make them do it.

I think there are other ways to discipline, again, that particular problem.

HON. CAMPBELL: All right. Thank you for your comments, Mr. Keteltas.

David Rosen.

MR. ROSEN: Thank you and good afternoon.

I'm David Rosen. I have been practicing over 30 years, always on behalf of plaintiffs in toxic exposure, environmental and employment cases.

I'm with Rose Klein & Marias in Los Angeles, which has been representing plaintiffs and claimants in all manner of tort and worker compensations claims since the 1930s.

I want to thank the committee and the chair for your hard work, and for your willingness to consider varying experiences and varying viewpoints.

I would like to call to the committee's attention especially the letter from the Los Angeles County Bar Association Litigation Section dated January 15th of this year. I participated in drafting that letter, and I cite it now because this is, I believe, one of the few submissions to the committee that is completely bipartisan, or from a completely bipartisan group.

The litigation section is made up of plaintiff and defense lawyers, tort and business lawyers, attorneys and judges, and yes, even democrats and republicans. I thus urge your careful review of that three- or four-page letter.

I would like to turn next to an example of discovery in action. I offer asbestos exposure litigation, a now mature litigation which began in our federal courts in the middle 1970s when documents first came to light showing that some members of the asbestos industry had actual knowledge since the 1930s of the serious health hazards for people who are exposed to asbestos, and yet those corporations chose not to disclose those risks.

Years, actually decades of discovery and discovery battles have brought to light the fact that concealment of this knowledge, again, that asbestos exposure causes illness in people for decades. Have caused illness and death affecting hundreds of thousands of individuals and families. Hundreds of thousands of Americans out of the millions who were exposed to asbestos during the '40s, '50s, '60s and '70s.

Steadfast persistent discovery of corporate documents, including minutes of meetings, witness depositions by notice or subpoena, corporate medical libraries, and simply discovery of all matter, yes, reasonably calculated to lead to the discovery of admissible evidence, has resulted in the removal of asbestos from the market where it had become, by the way, unnecessary but remained profitable. And fair and just compensation to those damaged by historic concealment.

The proposals -- the committee's proposals before us today, as more fully set forth in the many letters that you have received from all corners, would have prevented the truth from being disclosed, would chill the ability of our civil justice system to root out this type of institutional and cultural conduct.

After all, many cases settle, not because of discovery costs, but because of what is revealed in discovery.

Now, I would like to turn to the preverbal elephant in the room, and it's not me.

I understand that it's the view of some on the committee that the proposed rule changes do not actually change the standards for discovery, and I accept that this is a good faith reading or good faith view of some, but not all counsel are reasonable.

The federal trial judiciary across this country consists of many, many bench officers, not all of whom

bring to the decision making good faith, detailed analysis, unfettered by political, economic and social agendas.

Thus, these proposed changes, most notably the highlighting of proportionality in Rule 26(b), and the limits on enforcement of misconduct as to electronically stored information in 37(e) would create, in my view, a path for protection of corporate interest at the expense of the rights of individuals damaged by corporate malfeasance.

Trial is important, but trial and dispositive motions on the evidence is critical.

Yes, document preservation, searching and production generate costs and high hourly attorney fees, but so too does being fired illegally, being injured in an exploding Ford Pinto or contracting cancer because you were continuously exposed to a carcinogen about which the actually knowledgeable supplier of the carcinogen concealed its knowledge of the health risk to you.

Thank you very much for your time.

HON. CAMPBELL: Questions?

(No response.)

HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Rosen.

Stuart Ollanik.

MR. OLLANIK: Good afternoon. And thank you to the committee for your hard work in dealing with these difficult issues.

My name is Stuart Ollanik, and since 1990 I have been representing badly hurt people in products safety actions. Mostly car design cases.

I have come across some of the people who are in the room today who testified.

I got into this work after the tragic loss of two of my own family members at a young age showed me how devastating injuries in car accidents can be.

Now, since 1990 the automotive industry has made a lot of progress in safety.

SUVs are staple now.

Car roofs strength has doubled.

Better restraints cut accidents forces experienced by accidents in half.

Death rates have come down 10,000 each year.

Injury rates proportionally so.

This is due to the good auto engineers, but it's also due to discovery processes that bring to light product dangers and fixes. That's why we have safer SUVs and safer roofs and safer restraints, at least in a measure.

Twenty years ago I co-wrote this book. Also, 1994, 20 years ago. It's called Full Disclosure. I think West Thomson Publishing still carries it, but it's dated, but it's about how in product safety cases, toxic tort cases, employment discrimination cases, these sorts of cases, they wouldn't even exist without the discovery scheme that we're talking about amending today. They couldn't exist.

The book talks about two kinds of discovery abuse, overuse and evasion. And as Professor Miller has discussed with the committee and provided in his comments, the rule changes over time focused on cutting overuse of discovery. But over time that has been at the expense of aiding those who seek to evade discovery.

And seeking to evade discovery is a real thing, and something I need to talk to you about and express my views on today.

Now, I submitted written comments co-authored with Paul Bland at Public Justice, on behalf of Public Justice. Public Justice is a public interest law firm devoted to keeping courts meaningfully open to regular people seeking justice.

That provides a lot of details on a lot of the specific provisions, and I don't mean to repeat those, but I did want to discuss kind of a contrary view to some of the views that we have heard today. Big picture views that are known to people who litigate on behalf of individuals hurt by the misconduct of larger and more powerful entities, who really need the discovery rules, or we will not get facts we need to prove our cases.

Big picture thought one, these cases -- and there has been a lot written on this -- involved an asymmetry of wealth and assets. A rational plaintiff's lawyer does not try to bring a major company like Ford, who we have just heard from, to its knees by wearing it down financially. Hasn't ever worked for me. Doesn't work for anyone.

Second, empirical data show discovery is proportional to needs and value in most cases.

Big picture issue three, and this may be the most important point that I have to make today. I think it is. Discovery costs are driven by the costs of avoiding discovery, not the cost of making discovery.

That's the experience people like me see in case after case. Cases such as when -- where one defendant refused and spent thousands and thousands of dollars before the magistrate and the federal judge fighting discovery of books of information that had already been produced in other cases that details its views on rollover safety.

At least three instances that I have known of where they fought discovery of foreign testing of similar products. Arguing it was due to cost. Same thing about prototypes. Same thing about other designs.

Then when you finally get through and get the documents, you see it wasn't about cost at all. It's testing that showed that in another country they tested the similar product and it failed. In prototype, they tested it and it failed.

In other models they tested them, and what did they find?

That their product was not as safe.

Changing Rule 37 will create disincentives to preserve damaging evidence by making the risk of sanctions remote, eviscerating its deterrent effect.

If changes are needed to effect the over preservation problem, I think those need to be better tailored to that problem per the comments of Judge Francis.

Finally, and most importantly, Rule 26(b). It stood for decades for the principle that discovery gives every man access to relevant information, not just the wealthy and powerful, as was the case in this country before these Federal Rules of 1936.

Let's not backslide. Let's not go back and limit Rule 26 to all the truth you can afford at a low price, or all the truth you -- all the truth you can get at a low price, or all the truth you can afford.

Proportionality is too subject to manipulation, and if we make the burden -- the plaintiff explain both the cost and the discovery and -- the cost of the defendant making the discovery, and the value of what it's going to show. The plaintiff just doesn't have that information available to him. It's too easy for defendants to manipulate, misrepresent, inflate those costs, and hide very important relevant truths, and that's what we're trying to get at here from seeing the light of day.

Thank you.

HON. CAMPBELL: Questions?

MR. BARKETT: You mentioned don't backslide from -- I understood you to say from the original rules.

MR. OLLANIK: The intent of the original rules. I know it's been amended a number of times.

MR. BARKETT: Are you a supporter of -- that we go back to the original Rule 34?

MR. OLLANIK: I'm not sure what that said in 1936 that's different.

MR. BARKETT: Well, it said in 1938 that you could only get documents upon motion and a showing of good cause.

MR. OLLANIK: No, I like our self-executing system much better. It's less burdensome from the Courts.

I should say that I like the current proposed change to Rule 34 that requires parties -- if you are going to withhold something under the color of an objection, simply state what it is so that everyone knows what's going on.

MR. BARKETT: The point I make, though, the original language on the scope of discovery was related to depositions, and we now live in a very different world. And that's why I was just curious as to whether -- condescendingly you were actually trying to go back to the way the original Rule 34 was written.

MR. OLLANIK: Rule 26(b) is really the focus of what I am talking about where we have 60 year-old language that's been clearly interpreted --

MR. BARKETT: We scrapped originally -- Rule 26(b) originally just related to depositions. It didn't relate -- it's now been expanded, but there's a long history here. I just wanted to know where you stand.

MR. OLLANIK: I'm sure you know the history better than me.

HON. CAMPBELL: Other comments or questions?

(No response.)

HON. CAMPBELL: Mr. Ollanik, thank you very much.

Bernard Alexander.

MR. ALEXANDER: Good afternoon. Thank you, Mr. Chairmen and the committee.

My name is Bernard Alexander. I'm at the firm of Alexander Krakow & Glick in Santa Monica.

I am the president of the California Employment Lawyers Association, and a group of approximately 1,200 individuals that represent plaintiffs in employment cases. I have been practicing for approximately 28 years. I practice in both state and federal court.

I am going to be talking to you basically about the consequences of the ratcheting down of discovery with regard to depositions and requests for admissions.

Briefly, with regard to discovery, the purpose of discovery is to figure out what the case is about.

When a case comes in the door we know a little information, but we need additional information to assess the liability, the damages issues and prospects of a settlement.

Then the next issue is discoveries to allows us the ability to oppose a motion for summary judgment.

Then ultimately to get to trial.

I heard someone say that we all like to go trial. I love going to trial, but I would like to be able to prove my case when I get that.

In order to be able to get there, I have to be able to beat the motion for summary judgment.

Now, with regard to request for admissions it's ironic that with regard to those, which allow us to pare down the case, we end up being limited to 25.

I have never had an instance where I have served a motion -- I'm sorry -- a request for admissions where there has been an issue where they have gone to the judge and asked for the judge to cut the number of requests for admissions. That's one of the ways that we whittle down the case, and we can try a case.

With regard to interrogatories, reducing the number of interrogatories is also kind of intuitive to me, because when we serve interrogatories, oftentimes that does give us some information, but as a practical matter, because it's filtered through counsel, it's generally not very informative, but somewhat informative.

So really what it boils down to is we get most of our information from depositions, because depositions give you the opportunity to actually deal with the individuals who are making the decision.

So when you propose -- and the proposal is to reduce the number of depositions from seven -- I'm sorry -- from ten to five, and from seven hours to six hours, that's very significant.

Because in our cases, employment cases, we have to prove a motivating factor. And typically in our cases there is not direct evidence of discrimination. It is always -- most always indirect evidence of discrimination.

One of my colleagues, one of the individuals earlier was asked a question about how many depositions do they generally take.

In the cases that settle, five depositions is probably plenty. But in the cases that don't settle, we have to prove motivating factor, we have to prove pretense.

Typically, in my cases, and I have tried approximately 35 cases to trial, typically in my cases I'm going to take at least a dozen depositions, because you take the HR person, you take the decision maker, you take the supervisor, you take the ex-supervisor. By the time you add up that list it turns out to be a lot of people.

If you start with the base of, let's say, five depositions, the problem is when you are negotiating with the other side that base acts to keep the number down.

Typically, with the number now at ten depositions, that tends to work out, and I can negotiate with the attorney on the other side and get what I need. But that base is what helps me to get to where I need. And that purse string that occurs is possible now with the ten.

But when you reduce it to five, and it means that there are other things that we have to horse trade in order to get to what we need.

It's seldom the case that there is direct evidence of discrimination, and it's seldom the case that I can prove motivating factor based on anything that I get in writing. So written discovery is very important.

In most -- in all of my cases, and most of the cases of my colleagues that I represent, we work on a contingency basis. So there is no incentive to overwork the case, to have excessive discovery.

Really, the fact is we need the discovery in order to prove -- meet our burden of proof.

There was another comment that I wanted to get to.

The rules are not really for the circumstances where you have an attorney on the other side that's cooperating. In the cases where I have counsel that are cooperating on the other side, it is not difficult at all to get to what I need.

In the cases where the attorney on the other side is someone that I don't have dealings with, or something like that, oftentimes the rules are the only thing I have to help.

The rules allow a minimum. When the rules shift so that the other side has more to bargain with, I have to bargain away other things.

So I would ask the committee to consider the consequence of the people that are low-income earners, which are people that I represent oftentimes, who don't have the ability to come into court and already know the facts, already know who the decision makers are.

With regard to those cases, which is what we typically deal with in employment cases, we need to do initial discovery to figure out who the witnesses are, where the evidence is, and then we need to do followup discovery to figure out all the details.

Someone said that where there is thousands of

documents that are produced as a result of discovery, but only a small handful come into trial, well, that is the way discovery is supposed to work. You are supposed to get all that information, shift through it, figure out what is important, and then present that nugget of information to the jury.

But if you don't have an opportunity to get that universe of documents, and then whittle it down, the consequences, when you go to trial you are asking questions for the first time of witnesses that you have never had that opportunity.

Or perhaps you don't have the opportunity to go to trial, because you don't have the admissible evidence that you need in order to oppose a motion for summary judgment.

One final comment.

Oftentimes the individuals that you need this information from are employees of the employer.

When they are employees you don't have the ability to get a declaration from them, or to get information you need in order to oppose the motion for summary judgment.

So these depositions that we are asking for that they are whittling down are essential in employment discrimination cases, because sometimes in order to get

to those witnesses, you literally do have to take the deposition.

Those may be depositions -- I have oftentimes taken ten depositions in a day, one hour at a time, to get to 20, 25 deponents, because I don't need seven hours, I need one hour with multiple people.

Thank you very much.

If you have any questions.

HON. CAMPBELL: Questions?

John.

HON. KOELTL: Well, you had mentioned that interrogatories are not generally informative, and there are some views that interrogatories are often drafted by lawyers, to be answered by lawyers.

Do you have any resistance to lowering the number of interrogatories?

MR. ALEXANDER: I'm sorry. I probably overstated it.

It's not that they're useless, it's just they don't quite get to the essence of what we're after. They kind of provide -- they narrow the issues, they narrow the scope, they provide some information, but they're an initial step. So the interrogatories are helpful, but they aren't dispositive.

Requests for admissions come closer to being dispositive, but most of the time they are not.

In my practice, in a case that doesn't settle, the depositions are the key.

PROF. MARCUS: You have spoken mainly about numerical limitations, and I infer from that perhaps that if those are not changed, you are much less concerned about the proportionality change in 26(b)(1) than about numerical limitations.

MR. ALEXANDER: Well, in terms of the -- in terms of the numbers, I was talking about the number of depositions, but the hours are important too.

PROF. MARCUS: No, I would -- yeah, that's a numerical limitation.

I'm asking whether I'm correct in understanding that that is your major concern, and the Rule 26(b)(1) change is not a similarly major concern?

MR. ALEXANDER: Well, if I could, I tried to focus on the other issues, but proportionality is an issue.

In most of my cases proportionality does come up when we are asking for a lot of information. The defendant does raise that issue. It is already addressed.

PROF. MARCUS: The current rule already puts it front and center.

MR. ALEXANDER: Exactly. The current rule, I think, is ample to serve its purpose.

I think that the shift that the committee is making to move it to the forefront has a consequence of letting the defendant say, now, look, proportionality is a big deal.

In my cases, at the beginning of the case I don't know enough information oftentimes to be able to address why I need this information in detail. I don't know what a smoking gun is, or a needle in a haystack, so I need to get the discovery first.

I often gets objections of vague, what have you. Proportionality is just another arrow on the defense side that's going to defeat my ability to move forward.

I think that -- I think the current rule -- I have heard proportionality, it is addressed, judges address it if it's that burgeoning issue, but I don't believe that it's an issue that is necessary and helpful. I think it's harmful to the plaintiff, particularly in contingency suits.

HON. CAMPBELL: All right. Thank you very much, Mr. Alexander.

Conor Crowley.

MR. CROWLEY: Good afternoon.

Conor Crowley, Crowley Law Office.

I have been litigating since 1999. I now have a law firm that works exclusively advising corporations and law firms on ediscovery and other aspects of information and governance. So I serve as ediscovery counsel, I serve as special master, I serve as an expert witness, so I know from where I speak.

However, I'm not here today to speak on my own behalf, or on the behalf of any clients. I'm here to speak in my capacity as the chair of the Sedona Conference Working Group on Electronic Document Retention and Production.

We have made a number of submissions to the committee, so let me clarify that those submissions do not necessarily represent the consensus of the entirety of the Working Group.

They do, however, represent a consensus of the drafting team that put them together, and the steering committee of the Sedona Conference Working Group on Electronic Document Retention and Production.

Individual steering committee members may have different viewpoints with respect to some of those, and they will articulate those, and have done so over the course of the various hearings.

Given the limited time, I'm going to try to focus on the high points here.

First, with respect to Rule 16, we think it's a tremendous -- the proposed changes are a tremendous step in the right direction. However, we think there are some additional changes that should be made.

For example, with respect to Rule 16(a), it should improve preservation.

With respect to Rule 16(b)(3), privacy issues should be included in there.

Privacy, we have more and more rules and regulations domestically addressing privacy. It is an increasing issue in the context of electronic discovery, and should be addressed squarely.

We fully endorse the committee's proposal for Rule 16(b)(3)(v), Roman V, with respect to encouraging courts and parties to meet in federal court before filing discovery motions. We think that improves efficiency, and reduces the burdens on the Courts.

For the same reasons we recommend committee notes Rule 16(b) include language to the effect that judicial intervention is appropriate only after the parties meet and confer with faith.

With respect to Rule 26, we endorse the narrowing of the scope of discovery to any matter that is relevant to a party's claim or defenses, eliminating what has turned into a giant loophole with respect to recently contemplated lead to discovering admissible evidence.

With respect to preservation on discovery scope and limits, we think that the amendments to Rule 26 should explicitly address preservation. Failing to do so is going to continue the problems we have seen with respect to preservation burdens.

Preservation, thus -- a reference to preservation should be added to both the preamble to Rule 26(b)(2)(c) and to Rule 26(b)(2)(c) Roman I.

I should also make clear that the Courts are empowered to limit preservation under 26(b)(2)(c) Roman III. I think that it's important that preservation be addressed in the same fashion.

With respect to protective orders, and I think this is something that perhaps has not been fully considered, under 26(c), I think we should have a specified term for "preservation" at the beginning of 26(c)(1)(b).

We should also have the words, "limiting the scope of preservation," inserted in 26(c)(1)(d).

Now, moving on to Rule 37(e).

We appreciate the intent of the committee with respect to the proposed amendments to Rule 37(e).

However, we believe that the bifurcation of sanctions and curative measures does not achieve the committee's stated goal of a uniform national standard. That's also some of the problems that we have seen.

There is two reasons for this.

The first is that in practical terms the consequences of curative measure and sanctions may not be that dissimilar, both with respect to that particular litigation, and with respect to the consequences for the attorney that's actually dealing with this.

So we would suggest that the committee look at our submission language from October 3, 2012 that begins with the preface, "that absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, ESI or tangible things relevant to any party's claims or defenses if the party acted in good faith."

We think that's where you begin.

Also, important to note, that when courts do use Rule 37, use those remedies absent exceptional circumstances, they should be required to first find that the party to be sanctioned fails to act in good faith, the requesting party was prejudiced.

Now, with respect to the willful and bad faith standard, we think that that is likely to lead to

increased motion practice.

"Willful" was in a certain context previously taken out of the rules because it is so subject to a broad variety of interpretations. We believe the same problem exists with respect to "bad faith."

We think the appropriate standard is rather the absence of good faith. I believe that that is the standard to be actually employed here.

We would also note that if the committee is unwilling to go with the absence of good faith standard, and is sticking with "willful bad faith," or "willful and bad faith," that there should be a finding required that the alleged spoliating party acted with a specific intent to deprive the opposing party of material evidence, while that the claims entered by the matter was prior to the imposition of sanctions and/or any curative measures that would be tantamount to a sanction.

With respect to defining substantial prejudice, we believe the rules should make clear that substantial prejudice means that a party has been materially hindered in presenting or defending its claims in the case.

Thus, in summation, our proposal provides that the Court may only impose a sanction if the party seeking sanctions has established, A, the party against whom sanctions are sought did not act in good faith; B, relevant information was lost; C, no alternative sources exist for the lost information; D, the party seeking sanctions is materially prejudiced in its ability to prove or respond to the claims and defenses; and E, considering all the circumstances the sanctions for motion was timely.

We also note that this should not limit the Court's ability to attempt to remedy or cure problems using the tools available under Rule 26 or Rule 16. Those are still available to courts. We just think that it's misplaced to curative and cured measures and sanctions in Rule 37(e).

With respect to 37(e)(1)(b) Roman II, we think that "meaningful opportunity" is simply too vague a standard, and again, subject to multiple interpretations, will likely increase motions practice.

So we would suggest that you consider that going with a different standard than "meaningful opportunity."

We would suggest that the committee, if you decide to retain 37(e)(1)(b) Roman II, that it should apply only for the party that has been irreparably deprived of the ability to present or defend its claims in the litigation.

With respect to the list of sanctions, we believe the list of sanctions should be more comprehensive, and should apply culpability requirements subject to the absent exceptional circumstances -- exceptional circumstances language that we prepared and proposed.

It should include a direction that courts choose the least severe sanction necessary to remedy the preservation failure, and be proportional to, A, the failure to preserve; and B, the degree of prejudice suffered.

Further, a court should only be able to invoke the most severe sanctions for the failure to preserve was intentional.

We want it to be also known that we don't agree that a preservation letter is a factor that should be considered. It's going to result in preservation letters being sent in every possible case.

Receipt of a preservation letter is not necessarily coterminous with the trigger of the obligation to preserve, which is problem one.

Receipt does not actually indicate that there is actually an obligation to preserve information, problem number two, and it could lead to such letters being sent as gamesmanship.

With respect to 37(e)(2)(b), as proposed it could be interpreted too narrowly with respect to the reasonableness of effort with respect to specific information.

Thus, we propose a broader standard so that the consideration is whether a party made reasonable efforts to preserve information relevant to claims and defenses, including whether the party timely notified the key facility's obligation to preserve rather than focusing on the failure to preserve specific information.

The list of factors should include whether the party intentionally destroyed information that it knew was likely to be relevant to claims or defenses.

We also think it important that the meaning of the term "discoverable information" be clarified. As was noticed earlier, cross-referenced to indicate that discoverable information is now the subject to the scope limitation relevant to a party's claims or defenses.

I will pause for questions.

HON. CAMPBELL: Only a pause?

All right. Thank you.

Questions.

MR. BARKETT: Is there anything that you said that isn't in your written statement?

MR. CROWLEY: I think what I intended to do here was to highlight the high points in our written submissions to ensure that the --

PROF. MARCUS: I read them quite carefully.

Am I correct in interpreting what you said to mean that you would prefer that the effective date of any changes be put off at least a year or two so that what you have endorsed can be published for comment, and go through the whole cycle again?

MR. CROWLEY: I think that's a very interesting question, Judge Marcus (sic).

I would suggest, if I may, that what we are attempting to do is not to change the meaning of what you -- or the intent of what you propose, but rather --

PROF. MARCUS: I'm not saying necessarily that sort of a republication would be required. I'm asking you if the conclusion is this change can be made only with republication? You're saying it's worth it.

MR. CROWLEY: That's a tough question, because I don't --

PROF. MARCUS: Yes, it is.

MR. CROWLEY: I think that I disagree with the preface.

I don't know that republication is required. That is a mistake.

If I push the button, I did it intentionally even though I didn't mean to do what I was doing. So I mean I didn't mean the consequences. I didn't mean for that deletion to occur. It is an error, it's a mistake, but it's not in bad faith.

The way the rule is proposed right now a mistake can result in the same kind of sanction that a bad faith action can. So without any definition, at least it has to be an "and" rather than an "or."

If you have "and" rather than "or," you may have a mistake, you may have an intentional act that was done in bad faith, maybe that's sanctionable, but it can't be just a willful act with an unintended consequence.

I think we have to think about these rules, of course, are geared to everybody, and there are a lot of litigants out there that are mom and pop trucking companies who upload data to SnapDish, and plaintiffs do too, and then the rest of the photos are gone, or they get rid of an old Blackberry and get a new iPhone and don't preserve the SIM card without thinking about the consequences.

Well, that's an intentional act. Those are mom and pop folks who don't have in-house counsel to advise them all the time, or they purposefully replace their computer system.

So I think we have to -- we have to do something about "willful or bad faith." And the first proposal will be, of course, to make it "willful and bad faith."

If not, then let's define "willful."

I would suggest to you that the Sedona Conference definition is the way to go. Which, of course you know, is, "acting with a specific intent to deprive the opposing party of material evidence relevant to the claims or defenses."

Judge Grimm, earlier you asked about reckless disregard, and I would submit to you that reckless disregard should not be -- should not be suggested as an alternative. I believe it's subsumed in the rest of the rule. I think the Court is going to consider the totality of the circumstances.

If it considers the totality of the circumstances, it's going to consider whether or not actions were reasonable, whether or not actions were done with reckless disregard. So I believe that the reckless disregard criteria is subsumed in what we already have, and it shouldn't be highlighted and made a particular focus.

If we were talking about (c) change in the way the committee views this, certainly we're not.

What we're talking about is different language designed to achieve more precisely the goals of the language that was proposed by the committee.

HON. CAMPBELL: Thank you very much for your comments, Mr. Crowley.

Neva Lusk.

MS. LUSK: Good afternoon.

I'm Neva Lusk with the Charleston, West Virginia offices of Spilman Thomas & Battle. I am a civil litigator, and have been so for a couple of decades. And before those two I was an assistant prosecuting attorney for about a decade. So I bring that graphing of experiences with me today.

You -- the committee has heard a lot of comments about Rule 37(e). That is my topic today. So I know that you have heard several, and thus, I will be brief.

The way the rule is currently proposed, of course, "willful or bad faith," and I want to first think about the word "willful," which in a lot of circumstances is simply an intentional act, so an intentional act without necessarily intentional consequences.

I think that's all my comments. Do you have questions?

HON. GRIMM: I just want to make sure I follow your point.

It's not irrelevant, just like as Judge Sutton said, if you did something good, then you would want the Court to know about all the good things you did when you made your decision to try to -- and something happened by accident.

Similarly, anything that wasn't -- whether it was anything from negligence all the way up to intentional conduct, that's all grist for the mill. It's not irrelevant, you just have to come to the conclusion of the totality of the circumstances that a person should be chargeable with the knowledge that what they were doing was to deprive someone else of evidence.

Is that right?

MS. LUSK: Yes, sir.

JUDGE GRIMM: So you said the intentional action, I may point at the gun at you, it's loaded and fully triggered, not intend to kill you, but if that happens you would agree that was a reckless disregard of the consequence of pointing the gun. So it's willful, but there is more to it than that, even though I may say, geez, I don't want to hurt anybody, when I take it under those reckless conditions, that's relevant to the decision about whether or not it was done with intent to cause the harm, right?

MS. LUSK: That's right.

HON. GRIMM: Thank you.

HON. CAMPBELL: Parker and then Solomon.

MR. FOLSE: I would like to pose to you the same hypothetical that Peter posed to an earlier witness today.

A situation where a party who has discoverable information intentionally allows the deletion, or stops the preservation of evidence, knowing that it allows deletion, not out of some specific intent, or even knowledge that the information is now going to be lost, is to use the Sedona proposal, relevant and material to the ability of an opposing party to present the case. It's nevertheless a very conscious deliberate decision, perhaps to save money, and destroys evidence as a result of it.

How would you deal with that situation, and why should it be dealt with differently than in terms of whether or not sanctions are available to someone who acts in bad faith.

MS. LUSK: Because that person doesn't have the specific intent to deprive another party of relevant and material information.

MR. FOLSE: Right. But I guess my question is why should we make -- why should we treat that situation any differently from someone who does have a desire to deprive an opposing party of discoverable information?

MS. LUSK: Because there should be an intent if there is going to be a sanction. I think that is the point. If you're going to have a sanction, it needs to be such bad conduct that you do have an intent.

HON. CAMPBELL: Solomon.

JUDGE OLIVER: With all due respect to Judge Grimm and Judge Sutton, what I think about as willfulness, sometimes I think about it in terms of the alternative to willfulness. So I don't normally think of -- when I'm thinking of willfulness and whether it was intentional, for example, I won't think about, well, were they negligent, or whether they were reckless.

I mean, I may consider all their conduct, but I would not label it all as I am going through it. I would be trying to determine whether something is willful or not.

So I think of -- I would think of reckless as an alternative, but something else with relatively high standards. So you can't prove willingness, but you can prove reckless conduct. So I would see it as assumed willfulness, when I see it, as an alternative standard. That's the way I would look at it. So --

MS. LUSK: Well, I think it's also included, and the Court has to -- you have the factors for the Court to consider, and (b) is the reasonableness of the party's efforts to preserve the information. And it goes there too, I think.

HON. CAMPBELL: Thank you very much for your comments, Ms. Lusk.

While Susan Rotkis is coming to the lectern, everybody stand up.

(Brief pause in the proceedings.)

HON. CAMPBELL: Everybody have a seat.

MS. ROTKIS: Susan Rotkis. I go by Susie.

I'm an attorney in a seven-member law firm in Newport News in Alexandria, Virginia. All we do is litigate on behalf of consumers. And we are almost exclusively in federal court where we feel comfortable, but the Eastern District of Virginia is our home. But we will be happy to go to any federal court where consumers need us.

We represent consumers individually, and we also have quite a large class action practice. Because

we are a small firm, we collaborate with other class action law firms to prosecute those class actions.

The founder of my firm was going to be here today. I understand he can't be here, but he's on the board of directors of the National Association of Consumer Advocates. We're all members of the National Association of Consumer Advocates. We're all active in our association.

Our association has some pretty stringent guidelines for plaintiff's attorneys and for class action attorneys. So we don't have financial stakes in the outcome of our class action cases.

Those, I think, aspersions that are cast on class action lawyers, you know, I take professionally very seriously, and I want to make sure that I get that out there out front.

We have by far the largest docket in the Eastern District of Virginia, and not just plaintiff's firm. Our seven-member firm has more cases than any other law firm in the Eastern District of Virginia on an annual basis.

The reason for that is we file a lot of lawsuits. There aren't a lot of consumer protection attorneys in Virginia, we are good at what we do, and there is also an endless supply of consumers with really good federal cases. And some of them have tried for month, if not years, to have their rights vindicated by communicating directly with the organization that has violated their rights, going to the regulatory agencies, the financial services regulatory agencies, the SEC, and now the CFPB, and they haven't been able to get anywhere.

Congress predicted when it passed the Comprehensive Consumer Protection Statute 40 years ago automation has led to grave violations and consequences for consumers whose information has been traded on the open market, unregulated, is inaccurate, is reported in a derogatory way, is often mixed with the other consumers, and subject to theft.

I know it's going to be a big shock. We oppose the rules amendments. We oppose the changes specifically to the proportionality standard in Rule 26.

That change is viewed by us as generally one-sided, and transparently in favor of the very organizations that already hold all the cards, all the evidence, all the information, and all the power in consumer litigation.

The proposed changes are going to affect every consumer's ability to have his or her case fairly and fully considered before a court and before fact finders.

The addition of the proportionality analysis adds five factors to the scope of discovery, and I do think that it's going to be a threshold for plaintiffs to propound discovery. They're going to have to fight that battle on the front end.

In consumer cases the factors are going to be disproportionate every time. Congress recognized that when they enacted this law the amount in controversy and the expense of litigation are going to be disproportionate.

To address that reality Congress established a statutory scheme that created statutory damages and fee shifting. So private attorneys general, like me and the attorneys of my firm, can take the little consumer cases that aren't going to pay a consumer very much, but we can still make a living while helping people.

For the most part we prosecute under the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act.

My husband is an ex-prosecutor, ex-Justice Department and Assistant U.S. Attorney, and I come home and I tell him about my cases, and he says, how are these not a crime?

And it's true. Would you think about curtailing the ability of a law enforcement officer to investigate the wrongdoer?

Well, maybe you would, and there are constitutional provisions there that -- and case law that guides us in that respect.

The issues that are of importance, our clients have suffered from violations that only the defendant has the evidence in their possession.

For instance, if I have a financial services client, they may have their bank statements and proof of payments, but the policies of the bank, the procedures that they follow, but most importantly, the witnesses, the people who actually handled our clients' accounts, we have to talk to them.

And sometimes, even though in the Eastern District of Virginia -- and let me tell you, the judges have us on a very tight schedule, and a very short leash, so we are not going to be getting phased discovery. We have to phase that discovery ourselves.

You have heard it before, and I'll tell you again, when we're working on a contingency fee, we're not going to multiply discovery unnecessarily, and we don't have the luxury of doing phase discovery, but we do have to propound interrogatories, requests for production, and interview some witnesses before we know where discovery is going to go.

We don't propound discovery that we can't defend on a motion to compel. Every piece of discovery we send out, and I see the same lawyers over and over again, and I love them -- I mean, I feel like I have personally trained numerous Jones Day associates, and I'm very proud of them, they're very good -- but we don't propound discovery that we can't defend on a motion to compel. How am I going to face the judge that I have to go and see day in and day out?

I was a law clerk to a federal magistrate judge for seven years, and believe me, I saw a lot of discovery disputes on that end too. I think that implementing the proportionality requirement is kind of insulting to the bench. Our judges, our jurists can deal with these questions when they are brought on a motion to compel.

Every single interrogatory, request for production comes back to me with a boilerplate objection, a general objection, I have a meet and confer, they never have any authority. This drags the process out.

Adding these proportionality requirements are not going to assist us in getting to the truth of the matter. Defendants rarely make substantive 26(a)(1) disclosures. We haven't talked about that really at all today.

Without substantive 26(a)(1) disclosures, you have no idea who their witnesses are, and what documents they are going to rely on for their defenses. So you have to do some general discovery to just discover who's even involved in the case.

Many consumers, they come to us at their darkest hour. They have been fighting for a long time to correct inaccuracies on the consumer reports, federal bank accounts. They have no resources except the power of the Federal Consumer Protection Statutes.

The only reason that these Federal Consumer Protection Statutes have worked is because judges have gotten behind our ability to discover what those defendants are doing, and liability is rarely a question.

If they come right out with their 26(a)(1) and give us the documents that we need, we would not need a trial, we would not need a dispositive motion, these cases would actually settle quite early.

That's all I have got.

HON. CAMPBELL: Questions?

Jean.

HON. PRATTER: Well, do you really think -- what did you really mean when you said that it's transparent, that the proposal on proportionality lines up exclusively with people who have got all the cards?

Well, focus in on the word "transparent."

MS. ROTKIS: To me, your Honor, it is transparent. There hasn't been a single person from the plaintiff's side -- have there been support of the proportionality requirements?

I think most of us view it as a hurdle. Most of us already encounter those hurdles. I don't have any empirical evidence for you, but I will say that our associations are uniformly of that opinion.

HON. PRATTER: So that's pretty clear.

(Laughter.)

HON. PRATTER: I'm more concerned with the suggestions that the proposal is a transparent lining up by the drafters of the proposal with one side.

MS. ROTKIS: I don't mean to attack the neutrality of the forum, I sincerely don't, and I apologize for that. That is a bad judgment in choice of words on my part.

HON. CAMPBELL: John.

HON. KOELTL: I also in my notes made a note of the same comment. Particularly after we just heard from a representative of Sedona who represents both plaintiffs and defendants who supported the change to 26(b)(1).

We have heard from the general counsel of the EEOC, who supported the change to 26(b)(1).

We have read comments from the Justice Department who represents both plaintiffs and defendants who have supported the changes to Rule 26(b)(1).

The question for those of us who are responsible for proposals to the rules is ultimately whether it furthers the just, speedy and inexpensive determination of every action. So we have to listen to the merits of the arguments.

That's all.

HON. CAMPBELL: Peter.

HON. KOELTL: Just a question about how you see proportionality playing out.

You said that when you are representing an individual plaintiff you're going to have to depose people who handle his or her account, that kind of thing.

I would assume that for an individual plaintiff taking the depositions of the people who handled that person's account will always be considered proportional.

For a class action you will always be able to get, you know, the broader kind of information that

would relate to the treatment of members of the class.
Is there just a case that the gray area here where the proportionality thing might play out in a way that raises the most questions would be when you have an individual action and you're looking beyond what relates to that person's interactions with the institution, but trying to show how other similarly situated people have handled it, is that the scope that we are talking about which is at issue?
MS. ROTKIS: I didn't intend that, but I can see where you're going with that, because many defense attorneys are always concerned when you have class action attorneys deposing your employees, where is that going to go?
HON. KOELTL: Yes. But in a nonclass action, is that where the space is that you are concerned about?
MS. ROTKIS: Well, the standard of proof in many FCRA cases, for instance, is whether the defendants had reasonable procedures in place to assure maximum possible accuracy.
So I don't take any cases where the case is we have to find out their policies and procedures, and how they treated that person is very much how they are going to treat everybody else.
But we have to fight this fight every single time. I just, you know, sort of sitting there looking at my phone, getting documents and cases, looking over them, you know, this is playing out every day as I am getting my ECF notices on my phone, these very issues.
HON. KOELTL: Just to understand, there is no really -- presumably the policies and procedures are reduced to a manual, you know, the simplified situation, that would be easy for you to get.
So there is another category of ways you would have proven policies and procedures that would require more expansive discovery than what I'm talking about, right?
So what is that that you fear would be considered disproportionate in an individual plaintiff action, but that you nonetheless feel you need in order to be able to put on a provable case.
MS. ROTKIS: You know, I'm trying to think of an example.
In Equal Credit Opportunity cases oftentimes there is a policy and procedure in place that doesn't happen because decisions are being made on an individual basis, whether somebody was current on their mortgage at the time that they applied for loan modification.
I mean, there could be individualized

questions. I'm not sure if I'm getting to your question. So you talk to the operators who do it, you talk to the people who implemented the policies. Sometimes there are more esoteric questions that haven't been dealt with in the law before.
We have a couple of cases right now, one is a class action, but it had -- I guess that's not responsive to your question.
HON. CAMPBELL: Ms. Rotkis, thank you very much for your comments.
Dan Regard.
MR. REGARD: Your Honor, other members of the advisory committee, thank you.
My name is Dan Regard. I'm the CEO of iDiscovery Solutions. When you need discovery consulting services we pride ourselves in influencing that area and section of law and technology.
I'm an 18-year member of the Louisiana Bar Association.
I'm an original member of the Sedona Conference Working Group I and working Group VI.
But I belong to no special interest group, and my work is a subject matter expert. I have worked on all sides of the V, plaintiff, defendant, on behalf government agencies, in front of government agencies in criminal matters, and as a special master.
Today I'm here as a technologist, not as a jurist. As such I'm not here to advocate a particular role or particular wording -- excuse me -- rule or particular wording, but I am here to alert you to an area of ambiguity, and to provide some support for your efforts.
In terms of ambiguity, many commentators had noted that there is an ambiguity in the use of the phrase, quote, "willful or in bad faith," under the proposed language for 37(e)(1)(b) Roman numeral I.
From a constructionism and grammatical point, use of the conjunctive "or" has been highlighted by the comments of those submitted to the committee directly and indirectly.
However, there is also another type of ambiguity. The interpretation of "willfulness" as a technologically empowered action. This argument is the following.
All automated systems are purposely set up, or are purposely configured, and therefore if an automated system deletes information, is that willful?
There are several aspects of the technology I will highlight. I want to focus on data cashes, data movement, system shortcuts and cloud computing.

Data movement. When data is moved, it is not moved. Rather it is copied and then deleted.

Therefore, every time data is moved it is deleted.

No, it is not destroyed, because it now exists in the new location, but it is deleted from the old location, and this concept alone has befuddled many jurists.

So the question is when original data is deleted from the original location, is that willful?

Data caches. Data caches move data in a way that makes our computers appear faster. Small portions of data are stored close to where you are using that data to improve response time. That means that data is being stored somewhere, and when the need is gone, it is deleted.

There is the word again. "Deleted." Not destroyed, in the main location, at least.

Caching is so effective it is used everywhere. When you browse a website on the Internet, dozens, if not hundreds of cashes are created for each page that you view. The result is data is being copied in potentially hundreds of locations each time you go to that page. Some are short-lived. Others, not much.

Most of them are stretched out along a very long connection of Internet computers that feed you the information from its source to your computer. Some of them are stored in your computer itself, whether you know it or not. If these temporary cashes are deleted, is that willful?

Cloud computing. More concerning is technological use of cloud computing. This is resulting great economies of sale, but also an attenuation of control of computer centers, including file storage centers, databases and disaster recovery systems.

Meaning it becomes exponentially more difficult to talk to these backup tapes or stop the maintenances of databases when you are renting capacity rather than running a center yourself. This may result in different rules depending on who is utilizing the system for the willfulness of a computerized program.

If a company owns their datacenter and configures their system to delete disaster recovery tapes after 30 days, this could lead to a situation where willfulness is construed against them. But if they rent their datacenter which has identical capacity, they didn't make the configuration, are they also held to the same standard?

If you have a Twitter account and if you are sued and Twitter does not stop recycling disaster recovery tapes, is that willful?

My recommendation to the committee is they take serious the comments to address the language of 37(e)(1)(b)(1), and find a way to clarify the use of the word "willful," either by striking the word, by changing the word "or" to the word "and," by defining the word "willful," by referencing the current language of 37(e) with respect to "system, processees," or by clarifying the language of "willful" via examples.

With my remaining time I would like to encourage the committee to continue its work on these rules. There has been some commentary that the rules are not necessary -- the rule changes rather.

I disagree, but for different reasons. My reasons are forward-looking, not backward looking.

Normally the law follows the emergence of problems and common law solutions. As a result, our codified laws land with problems.

But respect to the rapid development of the Internet I would suggest the problem is already here, which is why we're here today, and it's only the beginning of the problem.

As a technologist I am already seeing things such as the emergence of the Internet of things. This refers to the connecting of objects rather than people to the Internet in an interactive data tracking manner.

According to Gardener there will be nearly 26 billion devices on the Internet by the year 2020. This will result in terabytes of data per person. Most of that data will contain location, date and time information. Data vibes of this magnitude will affect everyone, defendants, plaintiffs and agencies alike.

Finally, I want to address the idea that technology will solve the problems created by technology.

Perhaps eventually, but not in a timely fashion. Our best data tools today are dealing with date vibes that are five or ten years old. The lag time will not go away. The solution will always trail behind the problem.

I believe that my company has expertise to work around some of these issues, I hope we do, but I know that the tools and the expertise is not evenly distributed.

Therefore, given the rapid growth of data in the world and the time required to make these types of rule changes, I support the committee's work and recommend that you move forward with anything that would address the cost, scope and proportionality of discovery. If not for the problems we have today, then

for the challenges we will have tomorrow.
Thank you.
HON. CAMPBELL: Questions?
(No response.)
HON. CAMPBELL: All right. Thank you very much for those comments, Mr. Regard.
John Martin.
MR. MARTIN: Thank you, Mr. Chairman.
I'm the other John Martin.
I appreciate the committee's work, and the opportunity to be heard today.
I'm a partner with the law firm of Nelson Mullins Riley & Scarborough. I work out of our Columbia, South Carolina office. I manage and am responsible for our firm's electronic discovery practice, and in that practice we have 30 professionals -- over 30 professionals who fight in these trenches every day, both in a counseling and in an advocacy role for our clients. And also the operational side of the discovery where the rubber meets the road, the preservation and collection and production like what we're talking about today.
While I generally support the -- by the way, my opinions that I express today are purely my own, not of my firm, or of our clients -- and I am generally supportive of the rules, and appreciate the extreme amount of work that has gone into it from this committee and others to put that package forth.
In my role as counsel to corporations across a number of industry sectors which spans pharmaceutical, health care, manufacturing and other sectors, I routinely see clients who come to me, and many of whom are still in what I consider a preservation paralysis mode.
It may be a health care company that feels like they have no choice but to maintain a warehouse of over a half million backup tapes at the cost of a million dollars a year, because they can't competently rule out the idea that some information that is sitting somewhere on their tapes may be snuffed out by one of their many litigation holes.
I see pharmaceutical companies who will have three-quarters of their products line subject to essentially a perpetual global litigation hold because of this string of legal actions that attach to a major global product over time.
But we also work with smaller clients. Just in the last two days I was on the phone with a client of less than a thousand employees who are dealing with litigation that was filed about a year ago. They don't get a lot of litigation. Their IT department was planning a migration from Window 7 to Windows 8 that involves some technical details.
That migration is now on hold permanently until we can get some meaningful feedback from the plaintiffs in that litigation about the information that they need to prosecute their case, and through their own need to get it proper.
So we're dealing with a real problem on the preservation front, and I am very thankful for the committee's attempts to address that.
But because of the explosion of the data that Mr. Regard mentioned, unchecked fear driven over preservation is simply not sustainable.
I agree that the notion -- I agree that the notion that technology will solve this issue is aspirational at best. I know that others will speak to that later today.
I want to focus in on Rule 37(e) for a couple of minutes.
One, I agree. I support the amendments overall. I agree that we -- that the standard of "willful" could be interpreted to encompass almost any degree of action or inaction. And thus, favor the use of "and" rather than "or" for a combined standard there.
The result of the current state of the rules is a gotcha game that is frequently -- it's not only at our corporate clients, but also at their in-house and outside counsel, and that results in -- results in additional over preservation.
The reality is in the litigation that we see there is little realistic incentive for requesting parties to narrow their requests or tailor their demands. That forces both in-house and outside counsel, such as myself, into a defensive process mode rather than analysis of claim mode, which leads to, again, more over preservation, and distracts from the type of dialogue and reflection that is needed to either resolve claims, or to get them to trial.
Finally, in my last bit of time I want to point out what may be an unintended consequence in Rule 37(e)(1) and 37(e)(2)(a), both in the curative measures language, and in the factors to be considered language.
There are general references to conduct in litigation as opposed to conduct in the litigation. This is why I think this is potentially important.
We have seen recently a disturbing trend where requesting parties are seeking discovery into prior litigation holds that our client at issue in completely separate legal matters, but may have had some overlap

with data sources that could be at issue in the instant litigation.

Completely different historical litigation, privileged communications instructing holds maybe as far back as a decade, but seeking discovery into those prior hold directives.

Thus, the intent of the strategy is to piggyback on the prior litigation hold directive to shift the preservation trigger to some point far long before the current case. That is a disturbing trend.

My concern is without adding the word "the" in front of litigation in 37(e)(1) and 37(e)(2)(a), it could kill that trend which we are seeing, and many of my clients are especially concerned about it.

I appreciate the committee's time, and stand ready for your questions.

HON. CAMPBELL: Questions?

(No response.)

HON. CAMPBELL: To be clear, your suggestion then in 37(e)(1) would say, "If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of the litigation."

MR. MARTIN: Yes, sir, that is exactly right, as opposed to just "any historic litigation."

The focus of a sanctions discussion under this rule ought to be focused on the absolute litigation at hand, not under an alleged preservation duty from the prior litigation that has nothing to do with the instant case other than the fact that perhaps it touches on the same database that could need preservation for this case.

PROF. MARCUS: A little clarification.

Earlier today I think there was some reference to Toyota sudden acceleration cases.

What's involved in that litigation --

MR. MARTIN: I was not here for that testimony.

PROF. MARCUS: You have heard of the cases?

MR. MARTIN: Yes. I'm familiar with the case, yes.

PROF. MARCUS: Well, cases.

Is the litigation only crash number 311, or is it also the 310 before that?

MR. MARTIN: That's going to vary from case to case. So in that circumstance, if you have a series of product liability cases that relate to a particular product, for example, and relate to the same issue --

PROF. MARCUS: Well, a series is the litigation.

MR. MARTIN: A series could be the litigation, but a series could also not be the litigation. Because you may have a product that has, you know, patent litigation, early on there a contract litigation with suppliers, there is then some type of alleged personal injury case, and then five years later there is a completely different personal injury case.

You can say that a series of litigation, but that certainly, in my opinion, would not trigger a litigation hold dating back to the first in the series.

My intent today isn't to ask for a trigger rule from this committee. I understand that has been discussed, and that ship has sailed, but I think these small modifications could help prevent a gotcha game that we are seeing develop quite recently.

HON. CAMPBELL: All right. Thank you very much for your comments, Mr. Martin.

Ashish Prasad.

MR. PRASAD: Good afternoon.

My name is Ashish Prasad. I am the founder and CEO of a company called Discovery Services LLC, which handles document review and electronic discovery matters across the country.

I founded the company five years ago when I took a leave of absence from my position as a litigation partner, and head of the discovery practice at Meri Brown.

Over the course of the past decade I have spent more time on ediscovery than any reasonable person would ever do. I have authored two treatises, published dozens of articles, taught at Northwestern Law School, and basically all over the bar on topics of ediscovery.

The reason I'm here today is to talk about a narrow issue, but an important issue. This is the issue that some members of the committee brought up in Phoenix, which is the issue of technology-assisted review, and what is the impact of technology-assisted review on discovery costs.

A very important issue, because document review constitutes a large cost when it comes to electronic discovery, and litigation in particular.

I would like to say it's wonderful that the committee has focused in on this precise issue, because I think it's a big ticket item.

So let me begin by explaining what I mean when I say, "technology-assisted review."

Technology-assisted review means the use of computer search tools to make the process of attorneys

reviewing documents for relevance, privilege and issue codes more accurate and more efficient.

Everyone in this room is familiar with search terms and how search terms are used to cull large volumes of collected data and determine what of that data that's collected is going to be reviewed by attorneys for purposes of determining relevance, privilege or issue code responsiveness.

Over the past five years or so we have had a new development in the area of technology-assisted review, and that development is often referred to as predictive coding.

Predictive coding is an approach to document review in which a small group of very qualified reviewers, usually law firm partners or counsel or associates, will review a small subset of a larger volume of documents.

The results of their coding of that small subset will then be fed into a machine, and the machine will extrapolate based on what those reviewers did to a much larger volume of documents.

So since this approach to document review has evolved there has been a lot of controversy in the narrow circles of the bar in which I live, the ediscovery circle.

Some people say that predictive coding is going to dramatically reduce discovery cost over the next decade.

Some people say that predictive coding is going to make it unnecessary for attorneys to be hired to look at large volumes of documents in large cases, because the computer can do the work.

Other people say that predictive coding is a fad and that it's the issue of the day and that ultimately we will find another issue of the day and attorneys will always been reviewing large volumes of documents.

I am going to gaze into the crystal ball and offer a prediction, although I hesitate to do it in the company of so many well-informed people.

My prediction is that over the next decade the advent of predictive coding will make attorney document review more efficient and more accurate, and it will lead to a small reduction in attorney review costs in the next few years.

But I also predict that during that same time other factors will offset that decrease in review costs, and will cause discovery costs to remain where they are now as a result of document review costs, or even grow.

There are two reasons supporting this prediction I make.

The first prediction -- reason for the prediction is that most of the practitioners in the country today are not comfortable having the machine look at large volumes of documents.

Most of practitioners today want attorneys to look at large volumes of documents so that the law firm and the client can understand what the case is actually about.

Most practitioners are very reluctant because they know that the documents often contain personally identifiable information, trade secrets, business sensitive information.

So even in cases where we have predictive coding available, and we can say that it will lead to a reduction in review costs, more often than not the clients will say we still want to do a lot of review.

Usually what I see, because I have many predictive coding matters going on, as well as nonpredictive coding matters, is that a good rule of thumb is that if predictive coding is being used, one will cut the review volume, and therefore, the review cost by about 25 percent. It is not more than that.

The attorneys in our matters are still insisting on reviewing all the responsive documents before they go out the door, all the privileged documents, and even a subset of the nonresponsive documents.

The second reason I made the prediction I did is that we are seeing large increases in data volume being collected every year for purposes of discovery.

Sometimes we're seeing 25 or 30 percent year-on-year increases in how much data is even being collected for discovery.

If we're seeing those kinds of increases, it's having the effect of offsetting the efficiencies that we're gaining as a result of predictive coding.

So what I think is going to happen is that technology is going to continue to improve with respect to the predictive coding. It's a great development. It allows us to do the reviews more quickly, have the reviewers look at the more important documents, but we are not seeing a meaningful reduction in discovery costs absent some big change in adoption.

Now, one could say over time lawyers will adopt to new technology, but if I have to predict, I would say that's going to be many, many years away based on what I have been seeing over the past five years.

I really appreciate being able to come to talk to you on such a narrow but important topic.

If anybody would like to make any comments, or ask any questions, I would be delighted to talk about it.

HON. CAMPBELL: Questions.

(No response.)

HON. CAMPBELL: All right. Thank you very much, Mr. Prasad.

MR. PRASAD: Thank you.

HON. CAMPBELL: While Ariana Tadler is coming to the lectern, everybody stand up again for a minute.

Not because of you, Ms. Tadler, but just to stretch.

(Brief pause in the proceedings.)

HON. CAMPBELL: Okay. Let's carry on.

MS. TADLER: Very well then.

Thank you very much for letting me have the opportunity to speak before you today.

I'm not usually wed to notes. Actually, quite frankly, I do a lot of public speaking, and I usually don't use notes at all, but I feel that there are so many issues that are before you, and that have really been jelling, that I am going to rely on them.

My name is Ariana Tadler. I'm a partner at Milberg LLP. For the past 22 years I have focused principally on many areas of complex and class action litigation on behalf of principally plaintiffs, although I have also represented corporations on both sides of the V, 90 percent of my practice is in federal court.

Over the last 11 years I have built a very successful ediscovery practice, and so I am told, I have earned a solid reputation as being knowledgeable, reasonable and cooperative, in which I take great pride.

I served for five years as chair of the Working Group 1 for the Sedona Conference governing document retention and production, and I currently now serve actively as the chair emeritus of that group.

I am also among a select group of lawyers that was asked to serve to put together the Southern District of New York Complex Lit Title Pilot Program.

I have also been an active observer of this rules committee and the work that it's been doing, engaging in active dialogue, reviewing the proposals as they come out, also attending meetings, and I can honestly attest to the hard work and the openness and the transparency of this process for which I am very grateful.

So I thank you again for the work that you have done, and for the opportunity to be here.

The comments that I make today are my own. Five minutes is insufficient to possibly cover the various areas that are before you, including those which tend to be the most controversial.

I'm principally going to focus on Rule 37(e), because I think it has had the longest process life, and unfortunately I hear too little attention by the broader bar during the formal comment period, and in recent months has in fact generated a number of interesting and creative suggestions that have yet to be fully vetted, including from some very interesting groups, including interest groups, corporations, the DOJ, and now several judges who have put their own comments in.

More on 37(e) in a moment.

If I have time, I will turn to my objections to the proposals governing proportionality and scope, which in short, I believe are unfair insofar as the apparent increased burdens to be placed on those who already have increasingly stringent pleadings and burdens of proof, and will inevitably lead to extensive motion practice on an uneven playing field, and about that I am very, very concerned.

Presumptive limits, I also oppose, for which there has been no empirical showing to my knowledge to justify change, for which I have tangible examples, including in the last two weeks in cases where I would think I would have no problem negotiating with the other side in working things out.

I have been -- even heard in certain circles among corporations that quite frankly they were not urging these presumptive limits. They support them now because they're here in the package, but that they were not urging them as much as perhaps you have heard.

On the plus side, I fully support the change to Rule 1, but would urge incorporation of the word from corporate cooperation in the actual rule. I think that makes a difference.

For those of us who have lived in the Sedona bubble and who have lived and breathed and created the concept of cooperation, it works. It really, really works. It's a win, win. When we don't cooperate -- or I should say when others don't cooperate, because you won't find me there -- judges know it. That's when they -- people can be called to be accountable.

I also support the amendment in Rule 26(d)(2) regarding early Rule 34 requests, 34(b)(2)(a) and the provisions governing responses under Rule 34(b)(2)(b).

As I did at the Duke Conference in 2010, and since I have spoken favorably about active judicial management, but don't be fooled, rules that in practice will increase motion practice under the proposals will

deplete, if not eliminate, the opportunity for judicial management given already stressed judicial resources today.

Rule 26's proportionality and scope of presumption limits will do just that, as will Rule 37(e).

Rule 37(e) is the most complex and difficult of the tasks the committee has undertaken. The issues of preservation and sanctions has been the subject of attention far longer than the proposed Rule 37(e).

Indeed, preservation was an issue in the context of the Rule -- of the 2006 amendment, and it was determined at that time that that issue of preservation was too thorny and even untouchable.

So now we take it from the other side. We're coming in on the other end with sanctions.

As late as April 2013 the committee was still considering alternatives to the rules and you were still hearing comments and you were wordsmithing.

And even before that time, before you released the ultimate package, there were literally hundreds of comments that were coming in, but that I understand the committee wanted to wait so that it could get the package out, and then consider those as well as reactions to the package today.

I understand waiting. I understand why and to get through and to get something out for a real full transparent view, but the public comments that have been submitted since August reflect a very, very vigorous debate. And some of the issues are the difference between curative measures and sanctions, culpability standards and burdens, who bears the burden.

Some say it's not clear, but others believe it's quite clear, and those speak in hushed tones for they are waiting in the wings ready to stand before a court and boldly argue, oh, wait, Rule 37(e) says it right there, it's on the requesting party, that's where the burden is.

So the party who doesn't have the information, that's why she asked for it, and does not know what happened to the information, or how it was destroyed or why, is supposed to now have all the answers if she wants justice, remedial or punitive.

Really? How is that supposed to work?

I still haven't been able to figure that out. If in fact that intent had been answered and it was spelled out clearly in a proposed rule, far more opponents of the rule, I believe, would be clamoring at the door about this very rule, imploring that the burdens to right wrongs not be heard and increased, and that the doors to justice not be further closed.

I sincerely believe, as Butterfield stated at the 2010 Duke Conference, that the fault lies not within the rules, it lies with those who don't use, apply and enforce them correctly.

It lies with lawyers who don't cooperate.

It lies with the way in which we all create and manage, or choose not to manage in a reasonable and defensible way, information.

On the subject of this proposal the divide between those who represent corporations and those who promote civil consumer industrial rights is not just large, it's enormous, it's dark, it's ugly.

That in and of itself should tell us to stop and rethink, and not because the process hasn't been transparent. It's because people have such strong feelings about this kind of rule that there is more work to be done.

I don't support a rule on this issue. I believe that the committee does feel strongly about issuing a rule. I would submit to you that we're just not there yet, and that there is more work to be done.

Even the Sedona Conference, as Conor spoke to you earlier, struggled, and they are known for reaching consensus, they struggled so hard, and then ultimately you saw a position that was put before you from the steering committee.

The steering committee's presentation specifically had a footnote. It was a disclaimer because we really did not have consensus.

I think that too tells you something. It doesn't mean stop and throw it all in the trash and walk away. It means that there is just more work to be done.

We have heard some things today that have really been very interesting. Up until now in my mind there has been no empirical evidence, including based upon a study that we incurred some years back.

We heard about some statistics. Those statistics, based upon my review, did not support the kind of changes that we are looking at.

But now today we have actually heard from Professor Hubbard. Two and a half years later we're hearing that he doesn't have any empirical evidence about cost. Nothing more today than he had before.

He reports that there were detailed questionnaires that were completed by 126 companies.

Extensive interviews conducted with only 13.

Detailed matter level data on litigation holds were provided by six companies. Six.

In most litigation matters preservation scope

is not broad, well over half the matters had 20 holds or fewer.

Even Mr. Hubbard concludes that a benefit of the proposed amendments is likely a modest -- or I think Mr. Hubbard today also said small -- reduction in preservation costs.

But what we don't know, and I haven't heard it, is how is this rule going to solve over preservation? How is it going to do that?

There are proponents on the corporate side who believe 37(e) will provide further clarity on that issue.

Again, there is nothing that I have seen that answers that question.

Simply put, the rule will not alleviate over preservation. The solution simply cannot be to insulate producing parties, including companies, without the ability and means to manage their data when consequences of destroying them have been evidenced.

I see that my time is nearly up, so I will suggest this to you.

I believe that we heard a lot of very interesting and creative ideas and modifications.

We have seen some suggested modifications from the DOJ.

You have received comments now from some very, very knowledgeable judges.

Judge Francis has given you a proposal, an actual proposal. The words are there.

I would suggest that you take that back, and that you use that as a baseline.

The last thing that I would want to do is to add to your oh-so-not-spare time, because we are all so grateful for all that you do, but in my mind we're just not there yet.

Thank you for your time.

HON. CAMPBELL: All right. Thank you very much, Ms. Tadler.

Jennifer Henry.

MS. HENRY: Good afternoon.

Perhaps I should say good evening.

It's my pleasure to be here, and to share my comments about the proposed rules that this committee has so thoughtfully studied and extensively spent some time considering.

My name is Jennifer Henry, and I'm a partner with the law firm of Thompson Knight here in the Dallas-Fort Worth area.

I have been in private practice for 22 years, and my practice has primarily been representing airlines in massive accident cases, pharmaceutical companies and medical device and mass tort cases.

In the course of my practice over recent years I have seen the burden, expense and gamesmanship of discovery, and especially ediscovery, overwhelm the case and detract from the merits and the liability issues in the case.

So I recognize and appreciate the efforts that this committee has made to try and address some of these problems with these proposed changes to the rules. I'm here today to voice my support for those proposed changes.

I have some comments that I want to focus on, two particular aspects of the proposed changes, Rule 37(e) and the presumptive limits on the number of depositions and the duration of the depositions.

With respect to Rule 37(e) I think it's an important change, because I have been provided some guidance in uniformity regarding when sanctions may be imposed for the failure to preserve discoverable information.

I disagree with Ms. Tadler that this would do anything to deal with the over preservation issue.

From my personal experience in dealing with clients who are facing these large requests and obligation to preserve information, I do think that it would help the problems that they face.

The current state of law is in flux, and it's inconsistent among the different circuits. Many of my clients work, however, and do business all across all the circuits, or various circuits, and so they need to go to the standard in which the burden, or the threshold for having the sanctions, is the lowest and meet with that.

So they live in this fear of releasing information from a litigation hold. Even though there's no indication that any material evidence for a particular custodian may be relevant to matters, they have this fear to potentially release it, even though there is no willful or bad faith or specific intent to deprive the other party from information, that they could be subject to sanctions. This over preservation of information could be incredibly expensive, and a waste of resources.

As an example, one of my clients is an airline who does business across the world, and at any one time it may have litigation holds in place for a variety of different cases. Not only antitrust matters or government investigations, employment matters, and the air disaster or air crash cases in which I'm involved

with them.

Some of these custodians may overlap matters, and when a new matter comes in for a particular litigation, and that custodian is already subject to a litigation hold, then under the new hold that is just adding on all that additional information, because that custodian has already been under a hold for a significant period of time, which increases the burden for this particular client in all of the preservation costs that they have to incur.

This particular client has five full-time employees whose sole duties are to identify custodians, collect their materials, routinely followup on litigation holds, and manage the preservation of these materials. These are their duties of five full-time employees. That doesn't even deal with the review of the materials.

This is not a particularly awful company that is getting into a lot of trouble. These are just the average issues of doing business.

So I ask if whether this having five full-time employees that are necessary for this company to meet what it believes its obligations are under the current -- with the breadth of sanctions in the discovery world, whether that's a productive use of

only used maybe a handful in the case. So it doesn't seem that it's a very efficient and productive use of the discovery process.

These are very real problems, so I think there is a real need for the guidance that's set forth in Rule 37(e).

I would, however, advocate that the committee consider making two changes to the rules. The first -- I think Ms. Lusk spoke about, I think others have -- pertains to the language where it states that sanctions may be appropriate if it was willful or in bad faith.

I believe that the word should be "and" for the reasons that she explained. "Willful" can be interpreted by some to be just the intentional act of saying, okay, we can delete -- or add a particular custodian to the auto delete, or we can put them -- remove them from our litigation hold, even though there is no specific intent to deprive the other party of material information.

Now, I think that that intent, the specific intent is what's critical and important if you are going to be imposing sanctions, which is essentially a punishment, so that should be for some wrongdoing.

My other concern with the proposed Rule 37(e) is in the subsection, the little i. So it's

Human Resources.

I would argue that with more certainty provided by Rule 37(e) that maybe those numbers can be reduced, and we can have a more productive use of these individual's resources that would benefit society.

Some of the other things I have observed about the electronic discovery preservation review process is that the materials that are routinely preserved are for numerous custodians who have nothing ultimately to do with the litigation, or little connection with the case, but they have been encompassed with the review or the preservation of materials because they happen to be in the same department, or were tangentially related.

I recognize that the committee in the proposed rules aren't dealing with the trigger and the scope of that, but to the extent the scope deals with the proportionality, I think that that would be helpful.

Moreover, I have noticed in all of these dealings with discovery that with this over preservation and the demand for all of this ediscovery, you find that, as some of the other witnesses have said, when you get to a trial, despite the review and the production of millions of pages of electronic documents, sometimes I have found that the defendant -- I mean, the plaintiffs have not even looked at the records, or has certainly

(e)(1)(b)(2) where it permits sanctions if the Court finds that the party's actions irreparably deprived a party of any meaningful opportunity to present or defend against the claims in litigation.

That section has no culpability or bad faith requirement either, and I think that that should be considered and included with that section.

The other issue I want to touch on briefly is the presumptive limits of depositions. I have heard other -- and read comments from some of the other hearings, and heard from some other individuals here today complaining about the six-hour limit and the limitation on the number of depositions.

I -- quite frankly, I disagree.

With respect to the time limit, I practice here in Texas, and in 1999 there was a large revamping of our discovery rules. One of the rules that we changed was our limits on discovery and the time period and they imposed a six-hour limit on depositions.

They also imposed a limit on the objections that we could make so that we could not make any speaking objections, and put forth a lot of other restrictions that were to really control the misuse, and make depositions hopefully more efficient.

During the 13 years that I have been practicing

since those deposition new change rules have gone into effect, it has remarkably -- I only had one instance where it appeared to the parties that we needed to go beyond the six-hour period, and we agreed to go beyond it. The parties reached an agreement. It did not cause any problems at all.

In fact, it kind of became a saying around, you know, a good trial lawyer doesn't need any more than six hours to take a deposition, take the deposition and get what they need.

So I would argue or advocate that the six hours is a fair -- and is an appropriate time in there.

Similarly, changing the presumptive limit on the number of depositions from ten to five should also not be a concern of practitioners. Because, again, it's just a presumptive limit.

I think that by whittling it down to five, it is causing and requiring the parties at the very beginning to be more selective and think about do I really need to take all of these depositions, and let me be strategic with which depositions I'm going to take.

If they want to take more, then stipulations of the parties, the agreement, or they still may seek leave of the Court. Which, again, in my experience, any time I have had a case where we needed more than the ten that are currently allowed, we have been able to reach agreement.

So with that, I would just thank the committee for their work on this, and thank them for letting me give my thoughts here today.

HON. CAMPBELL: All right. Thank you very much for those comments, Ms. Henry.

David Kessler.

MR. KESSLER: Good evening.

I would like to thank the committee for the opportunity to speak today. Like everyone else, I want to applaud all the hard work that you have done on the proposed amendments.

My name is David Kessler. I'm a partner at Norton Rose Fulbright where I live in Philadelphia, but work in New York and Houston.

I am the chair of the electronic discovery information practice. While I am not a dinosaur, I will promise you I did graduate from high school, and I occasionally have to shave.

I am a discovery lawyer. I work with ones and zeros. My entire job is about moving data from point A to point B, get data from my opponents and produce data to my opponents.

I have worked for the largest companies in the world and death row inmates and everyone in between as both plaintiff and the defendant.

I'm an active member of Sedona. I teach ediscovery at the University of Pennsylvania.

The one thing that I am most proud of is that my firm is one of the first to use technology-assisted review, and have done so on dozens and dozens of cases. I'm a huge proponent, do not believe that this committee should rely on it as a solution, as a panacea, or should encourage it in the rules.

I'm happy to address anything and everything in my written submission of January 15th, but I want to talk about something new that has not been addressed today, which I hope will lighten your hearts.

I'm only focusing on Rule 34. I think it's -- the amendments are under appreciated. What Rule 34 does is provide communication between the parties so that we can decide on what are we talking about, what are we looking for. Because if you don't know what you're looking for, any amount of effort will get you nowhere.

So where do I start?

Well, I start with a problem, I think, that is endemic in the ediscovery world, which is we have only been focusing on what the responding party needs to do.

I read depositions in particularized discovery objections, but what we have failed to do, I think, is focus on what the requesting parties need to do. I would recommend that the committee tie these two things together.

It makes no sense for a responding party to actually spend any effort in the due diligence to make a particularized objection to a request they never fashioned appropriately.

I have gotten requests such as, please produce all your databases, please produce all emails.

Now, those are the exception, but I would sadly say that the word "all" appears in the majority of requests I receive.

I'm going to touch on the proportionality of that word later. I think that can be addressed in the notes.

My second point is I'm very concerned with the amendments to Rule 34(b)(2)(c), which think it inappropriately requires the responding party to identify whether or not documents are being withheld, as I believe the philosophic conflict on how discovery is undertaken in the rules are practically difficult to implement.

Many objections to discovery requests do not withhold any documents whatsoever, but rather limit

those stems of proper scope of discovery under the rules.

Simply put, a party does not withhold something that someone -- from someone else when that someone else has no right to the document.

For example, if a requesting party seeks all emails from Mr. Jones without any limitation, a responding party's objection limiting the request to email of Mr. Jones relevant to the claims and defenses is not withholding emails from Mr. Jones' wife saying he's late for dinner. I am concerned that there will be much mischief created by the current rule.

I note in my written submission that I propose, and I think it would be a better solution, is to have the responding party identify what they're looking for.

What am I trying to find that I'm willing to produce?

This level of transparency will allow the requesting party and the responding party to engage in a conversation about what is important to the case.

Don't look in the negative space. Look at the positive space. Look at what is distinct, and what is at issue in the case. That's what we should be striving for.

Third, on a related note, I think the committee should clarify in 26 or Rule 34, perhaps both, that the Courts are not empowered to produce privileged material, or that which is irrelevant or outside the scope of discovery.

There has been a disturbing trend that courts befuddled by the complexity, expense and time of discovery to try to take shortcuts into space, and have forced parties, either directly or indirectly, to produce such data, I think simply because they undervalue the harm and damage that the production can cause.

Let me give you a few examples.

Recently we have seen courts say, I'm not going to value the cost of your review, you no longer have to review documents. Between TAR and Rule 502(d), simply produce it. If you want to review it, that's your fault.

Well, 502(d) does not solve all the problems, and I will tell you that a relevant document can do great damage. Not because I'm afraid of the besmirchment, but because there is things like redaction, privacy and other issues.

In the case that I am currently working in, which happens to be in a state court, but relies entirely on federal jurisdiction rules and procedure, I had a judge require me to produce, after I had done samplings of hundreds of thousands of boxes, said, well, that's nice that you found that they were responsive, please turn them over so that your opposing party can review them themselves, which was double troubling since they were archives from the legal department.

Finally, in Soldamore (phonetic), which is a great case and well articulated, an unintended consequence of approval of the TAR process in that case was that it put a chill on the use of TAR, because my clients, and other companies, are afraid that they are going to have to produce irrelevant documents to support their use of TAR. They have decided to move away from that.

I think that's inappropriate, and I would have the committee emphasize that it's not appropriate.

In fact, emphasize that the new rule which allows the producing party -- responding party to choose between productions and inspections, that is a completely discretionary choice similar to the rights under the -- the organization of the production whether you ordinarily maintained or by document requests.

I see that my time is up, so I will stop here, and take any questions.

HON. CAMPBELL: Any questions?

PROF. MARCUS: Can I ask one very quickly.

In terms of specificity of objections, it seems to me that the permission added in this package for early Rule 34 requests before the Rule 26(f) conference might assist in doing that.

Does that seem that way to you?

MR. KESSLER: I'm sorry, Professor. I don't think it does that.

The reason is when a requesting party -- first of all, a requesting party has a limited number of document requests. So even if the judge said, well, that will not be a request, I waive it, and let that end the discovery period.

PROF. MARCUS: I guess what I'm getting at is it seems to me it might foster an interaction which would achieve greater precision in the request, because you have more information on the other side about what it is they're trying to get, and you can talk about it.

MR. KESSLER: Well, we could talk about it, but the answer is they filed the overbroad request and served it on me, I have to respond.

Right. Because of 26(g) I have to do due diligence. If I say it's disproportionate, if I say

it's beyond the possession, custody and control, if I make any of my other objections, I have to take that cost. There is no cost there.

If I fail to do it, and the judge says, well, you know what, you do not comply with 26(g), you do not comply with Rule 34, you waive it.

I am now obligated to produce all documents responsive to what could be an overbroad request. It is not -- what appears symmetric is actually painfully asymmetric.

HON. CAMPBELL: Any other questions?

(No response.)

HON. CAMPBELL: All right. Thank you very much, Mr. Kessler.

Danya Reda.

MS. REDA: I'm going to say good afternoon, because I'm an optimist. We're in the homestretch here. I think you are almost done when you're on me. I think there's one more person after me, so I will be try to be short and sweet.

I am going to echo the tremendous, continual commendations you have all received, because I think they are really well-deserved for your service and commitment to our rules and our procedural system, and particularly for the tremendous efforts you have expended on these amendments.

That said, because of that tremendous effort you have expended on these amendments, I'm going to urge you not to make the quite common cognitive psychological error of overvaluing that sum cost.

What you have heard today, what you have heard in the last two hearings and the written comments give us pause not just about the Rule 37 proposals, but about almost this entire slate of proposals.

The reason I think that is because these are -- aside from the Rule 1 amendment, and aside from the Rule 31 amendment, information-suppressing amendments rather than information-forcing amendments.

To my mind, that makes no sense based on what we're trying to achieve through our procedural system, which is an assessment of the merits of claims, and a sharing of information and a cooperative working relationship between the parties that can get us closer to the truth.

I say that as somebody who -- I teach at NYU Law School, and I write about procedure. Not so long ago I wrote an article specifically looking at the question of cost and delay in the federal rule reform.

Part of that article, called The Cost and Delay Narrative in Civil Justice Reform, a significant part of that article was taking a very close look at the information, and what was called empirical data as presented at the Duke Conference.

Most of the surveys, opinion surveys is attorneys, and a major exception to that, as others have said, the 2009 FJC Cliff Case Study.

Having been on board at that conference to -- from its inception to the actual conference occurrence to taking a careful look at everything that was presented there, and preparing an article on it, I was actually baffled, respectfully baffled by the amendments that we proposed coming out of that.

Because the empirical data that was presented presents no support for the general claim that our discovery system is broken, that costs are staggering, and that there is a huge over discovery problem.

So I think your -- the proposals, although carefully considered, are too narrow, and they are too narrow in two respects.

First, they narrowly construe the problem. So the problem is entirely understood as the burden that can be placed upon a producing party by the requester, which is certainly a thing that one can impose burdens through a discovery request. That is definitely a power that the rules allow.

But there is an equal and opposite power, which is the power to impose costs by discovery avoidance, discovery delay, discovery attrition.

So a really well-known problem that is perhaps not as well documented as it might be, but it's not reflected almost anywhere in these amendments are perhaps startling and disconcerting, and actually leave these proposals at the risk potentially increasing cost and delay that emerges from discovery, rather than decreasing it.

Second, I think there is a narrowness to our understanding of the function of discovery.

Yes, it's absolutely an important part of discovery function that we identify information that allows claimants to litigate their rights.

But discovery is part of a much broader system in the United States. A system that is kind of firmly committed to private regulatory -- privatization of the regulatory regime. I think that is why we have a distinctive discovery system, and why our friends from abroad are skeptical and surprised when they view our discovery system.

They have very robust centralized governmental public socialized regulation systems. And so, yeah, we see there is less discovery available, because private

citizens aren't being asked to play that regulatory role.

But here we're asking private attorneys to play that role, and so when we -- if you propose -- if you continue forward with these amendments, I think make no mistake, you will be sanctioning for less law abiding conduct, more law breaking, because it will be easier -- it will be a rational decision to pay less attention to following the -- dotting the I's and crossing the T's of the letter of the law, because you are going to be less accountable.

If I may, I believe I still have a couple minutes, so two points that I just wanted to address that came up in earlier discussion.

One is I would caution us about the plaintiff-defendant understanding the polarization issues of plaintiff versus defendant. I don't think that actually captures it. I think what's much more important is the role that a client that the attorneys represent, and the type of practice.

So what type of fee structure is the attorney working on, and therefore, do they have -- what type of incentive that sets up for litigation. So is it billable hour or is it donor-funded organizations or is it contingency fee?

Also, what kind of symmetries or asymmetries exist in the litigation?

Is there -- we talk about informational asymmetry laws, but actually I think resourcing symmetry is just as important, and I think that's someplace where we don't have enough empirical data. What affect does the relative resource and informational power or strength of the parties do to the way that discovery unfolds, and the type of discovery practices that occur?

So I would love us to actually get more information before we move forward.

HON. CAMPBELL: All right. Thank you, Professor.

Questions?

HON. PRATTER: I notice you are not a signator to the letter about Rule 84.

Not to say it's not complete here, but I wanted to know if you have given it any thought whether Rule 84 should be preserved or could be abrogated?

MS. REDA: That's a great question.

I am -- or I am actually in Professor Coleman's camp on this, and so -- and I would be very hesitant to make that -- I think that that does actually render a fundamental change to the structure of the rules.

HON. PRATTER: Why?

MS. REDA: Because I think that there is a way in which those rules -- and certainly a number of the rules are promulgated in conjunction with the forms.

HON. PRATTER: When is the last time you looked at the forms? Have you ever used them?

MS. REDA: I never used them, but I will tell you that part of my hesitation, which will be no surprise, is that to me this is really not -- whatever the actual intent, it signals an approval of a heightened pleading standard --

HON. PRATTER: So the anti Twombly-Iqbal camp?

MS. REDA: Well, it's -- right in the letter discussing these amendments is the suggestion this makes sense because now our pleadings standard is out of whack with the form.

That's a problem of the Supreme Court jurisprudence, and not a problem of our rules.

HON. CAMPBELL: Thank you.

So is your suggestion then that we do nothing? Is that what I'm hearing you say?

MS. REDA: I'm happy with the Rule 11 amendment. I'm happy with the Rule 34 amendment.

HON. CAMPBELL: Otherwise, do nothing?

MS. REDA: Otherwise, do nothing. I think there isn't a cost problem that we have proclaimed that there is.

HON. CAMPBELL: Thank you, Professor.

Brian Sanford. Last but not least.

MR. SANFORD: Thank you.

I'm an attorney practicing here in Dallas, Texas. I am president of TELA, which is the Texas Employment Lawyers Association, a plaintiff's bar of prominent lawyers in Texas, sister to the one who testified earlier from California.

I have a three-person firm. I'm just an every day regular attorney representing every day regular people.

I just finished a three day -- a three and a half day trial yesterday in federal court here in Dallas representing someone asking for less than $15,000 in overtime pay.

I would address the proportionality as something that obviously should be considered, and is being considered now, but that needs to be considered over and against the fundamental principle that a court should consider and decide a case as an action between persons of equal standing in a community holding the same or similar positions, that the law is no respect for persons, all persons stand equal before the law, and

are to be dealt with equally in a court of justice.

That, of course, I just quoted from a standard jury charge in federal court, which I just tried this week.

So the -- of course, there needs to be reasonableness in discovery, but I think what the earlier colleague was talking about transparency is that the proportionality rule here is assuming that the costs and that the problem is on the requests that are being made by plaintiffs, and therefore this is going to solve that problem, when that is not a real problem today.

So I would -- I don't think that that should be something that should be changed.

In fact, the issue about less trials are because of settlement costs related to discovery, I don't think is true. I think you can make a good argument for just the opposite, that plaintiffs are not getting fair value for their cases because of the obstruction caused by discovery fights based on rules, and that an emphasis of proportionality in the rules is going to cause that even more.

So there ought to be a study for how much corporations are saving by forcing parties to settle for less than fair value. Of course, part justice is no justice.

I would talk a little bit about -- well, just along those lines, the reason that there are no -- less trials is because of motion for summary judgment practice, because people are forced into arbitration, and because we don't have enough judges.

Depositions, we rarely take five to ten depositions. I always bump up against the ten. Many times the other side will agree. Most of the time they don't. I just try to work within it. The last time I tried to expand to ten, the judge -- magistrate judge denied it.

I have got a case pending at the Fifth Circuit right now where the other side in the brief is complaining that I took nine depositions.

Those nine depositions were all either decision makers or comparators. Three of them were less than an hour, only one was more than half a day.

So this is a real issue, it's a real problem, and if you give -- if you reduce it down to five, it's a real problem for people that practice in my area.

Rule 37, I do think that -- my opinion on this is why not have live tort law, you know, the reasonable standard, negligence. You have a reckless standard, you have intentional standard. The reasonableness standard, fine. You have punitive, the reckless, and the intentional, there ought to be some sanctions.

You shouldn't be -- because adverse inference is curative, it should be in (e)(1). I get to argue that to the jury anyways as an inference. If they didn't produce documents, it ought to be in a negligence or reasonable standard. That's happened.

I'm in the Fifth Circuit. I had that. I was not allowed a reasonable inference standard because I couldn't show willfulness. I could argue it to the jury, but it ought to be in -- it ought to be something that's curative, and it ought to be allowed in there.

Also, you should clarify that willfulness does include reckless.

Again, going back to just the case we tried this week, under the FSLA I know that there are definitions for "willfulness," but under the FSLA the jury charge was, "To establish willfulness you must prove by a preponderance of the evidence that the defendant either knew that his conduct violated the FSLA, or showed reckless disregard as to whether his conduct violated the FSLA."

So "willingness" there, the definition includes "reckless disregard." It should be clarified, and it should be part of that.

The last thing -- I guess I have got 35 seconds. The last thing I'll say is just an example of another case that I have on withholding documents.

I have got a case, represent a professor against the university, and after taking the president's deposition, only a couple weeks later he announced a change in the policies on email retention, that they were going to now destroy emails after a certain date.

About a month later in an all-employee meeting he announced, and I quote, "I have been sued enough," unquote, urging employees not to save emails because, quote, "all that stuff is discoverable," end quote.

Those are the kinds of things that we need, and what is happening now is, of course, the changes in the rules are going to encourage this.

PROF. MARCUS: Is that bad faith?

MR. SANFORD: I think it's bad faith, and I'm going to argue it's bad faith, but what about the next person down the line that --

PROF. MARCUS: Bad faith in connection with, quote, "the litigation," unquote.

MR. SANFORD: Exactly. The next litigation and the next litigation and the next litigation.

So I'm taking questions.

HON. CAMPBELL: Any questions?

(No response.)

HON. CAMPBELL: Mr. Sanford, thank you very much.

Thank you to everybody else for being here.

We'll will be adjourned.

REPORTER'S CERTIFICATE

CASE TITLE: Proposed Amendments to the Federal Rule of Civil Procedure, Judicial Conference Advisory Committee on Civil Rules

HEARING DATE: February 7, 2014

LOCATION: Dallas, Texas

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: March 2, 2014

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