TRANSCRIPT OF PROCEEDINGS

In the Matter of:

PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE
JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES

Pages: 1 through 335
Place: Phoenix, Arizona
Date: January 9, 2014

BEFORE: HONORABLE DAVID G. CAMPBELL, CHAIR
APPEARANCES:

Committee Members and Reporters:

HONORABLE DAVID G. CAMPBELL, CHAIR
DEAN ROBERT H. KOLONOFF
HON. ARTHUR I. HARRIS
HON. GENE E.K. PRATTER
PETER D. KEISLER, Esquire
HON. JOHN G. KOELTL
PROF. EDWARD H. COOPER
PROF. RICHARD L. MARCUS
HON. PAUL H. GRIMM
HON. SCOTT M. MATHESON, JR.
ELIZABETH CABRASER, Esquire
HON. SOLOMON OLIVER, JR.
HON. ROBERT MICHAEL DOW, JR.
JOHN M. BARKETT, Esquire
PARKER C. FOLSE, Esquire
### Speakers:

<table>
<thead>
<tr>
<th>Name</th>
<th>Company/Affiliation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ROBERT D. OWEN</td>
<td>Sutherland, Asbill &amp; Brennan</td>
<td>8</td>
</tr>
<tr>
<td>JOSEPH D. GARRISON</td>
<td>Garrison, Levin-Epstein, Richardson, Fitzgerald &amp; Pirrotti; National Employment Lawyers Association</td>
<td>16</td>
</tr>
<tr>
<td>TIMOTHY A. PRATT</td>
<td>Federation of Defense and Corporate Counsel; Boston Scientific Corp.</td>
<td>26</td>
</tr>
<tr>
<td>ARTHUR MILLER</td>
<td>New York University School of Law</td>
<td>36</td>
</tr>
<tr>
<td>JON L. KYL</td>
<td>Covington &amp; Burling, LLP</td>
<td>45</td>
</tr>
<tr>
<td>HENRY KELSTON</td>
<td>Milberg, LLP</td>
<td>52</td>
</tr>
<tr>
<td>JOHN H. BEISNER</td>
<td>Skadden Arps</td>
<td>61</td>
</tr>
<tr>
<td>P. DAVID LOPEZ</td>
<td>U.S. Equal Employment Opportunity Commission</td>
<td>68</td>
</tr>
<tr>
<td>DAVID M. HOWARD</td>
<td>Microsoft Corporation</td>
<td>78</td>
</tr>
<tr>
<td>KASPAR J. STOFFELMAYR</td>
<td>Bayer Corporation</td>
<td>88</td>
</tr>
<tr>
<td>THOMAS A. SAENZ</td>
<td>Mexican American Legal Defense and Educational Fund</td>
<td>96</td>
</tr>
<tr>
<td>MICHAEL R. ARKFELD</td>
<td>eDiscovery Education Center</td>
<td>104</td>
</tr>
<tr>
<td>BROOKE COLEMAN</td>
<td>Seattle University School of Law</td>
<td>114</td>
</tr>
<tr>
<td>JOCELYN D. LARKIN</td>
<td>Impact Fund</td>
<td>125</td>
</tr>
<tr>
<td>QUENTIN F. URQUHART, JR.</td>
<td>Irwin, Fritchie, Urquhart &amp; Moore; International Association of Defense Counsel</td>
<td>133</td>
</tr>
<tr>
<td>WILLIAM P. BUTTERFIELD</td>
<td>Hausfeld, LLP</td>
<td>142</td>
</tr>
<tr>
<td>ELISE R. SANGUINETTI</td>
<td>Khorrami, Boucher, Sumner, Sanguinetti, LLP</td>
<td>151</td>
</tr>
<tr>
<td>KATHRYN BURKETT DICKSON</td>
<td>Dickson Geesman</td>
<td>160</td>
</tr>
<tr>
<td>LARRY E. COBEN</td>
<td>Anapol Schwartz; Attorneys Information Exchange Group</td>
<td>169</td>
</tr>
</tbody>
</table>
Speakers:

PAUL D. WEINER
   Littler Mendleson, P.C.  177
JANELL M. ADAMS
   Bowman and Brooke, LLP  187
THOMAS HOWARD
   Bowman and Brooke, LLP  194
ROBERT HUNTER
   Altec  200
HON. DEREK P. PULLAN
   Fourth District Court, Utah  205
WILLIAM F. HAMILTON
   Quarles & Brady, LLP; Bryan University; University of Florida Law School  218
DENNIS CANTY
   Kaiser Gornick, LLP  225
TOM HORNE
   Office of the Attorney General  232
HENRY M. SNEATH
   Picadio Sneath Miller & Norton; DRI  235
STEVEN J. TWIST
   Services Group of America  243
PAUL V. AVELAR
   Institute for Justice, Arizona Chapter  250
L. JILL MCINTYRE
   Jackson Kelly, PLLC  259
PATRICK J. PAUL
   Snell & Wilmer  265
JENNIE LEE ANDERSON
   Andrus Anderson, LLP  271
LEA MALANI BAYS
   Robbins, Geller, Rudman & Dowd  283
JAMES C. STURDEVANT
   The Sturdevant Law Firm  296
JOHN J. ROSENTHAL
   Winston & Strawn, LLP  305
RICHARD B. BENENSON
   Brownstein Hyatt Farber Schreck  316
ANDREW B. COOKE
   Flaherty Sensabaugh Bonasso, PLLC  323
JONATHAN SCRUGGS
   Alliance Defending Freedom  328
PROCEDINGS

JUDGE CAMPBELL: Good morning, everybody. And thank you for being here. We particularly appreciate those of you who've traveled from afar to help us address the issues we are wrestling with on the Civil Rules Committee. We need your input, we welcome your input. And we appreciate both the oral and the written comments that you will be sharing with us.

So far, we've received about 405 written comments, hundreds of pages of them. We are reading them. I can't say that we have all read all of them. In fact, I can say we have not all read all of them, because I haven't read all of them, but we are working on it. And we give you our assurance that we will read every one of them before we get together for making any final decisions.

There have been no final decisions made on this -- these issues. The Committee is very much in a listening and learning mode. We won't be meeting to actually discuss things until after we've held all of these hearings and heard everybody's input, because we want to make sure
that we consider all of the comments that have been made.

So we are very appreciative for the efforts you're making to help us address these matters.

We have a lot of folks who are scheduled to speak today. We have 39 individuals who are scheduled to speak. And given those numbers, unfortunately, that means about ten minutes total per speaker.

We wish we could have you address us for longer periods of time, but we have 39 scheduled here. We have 43 scheduled in Dallas, and we have 29 on a waiting list hoping to have an opening come up somewhere where they could speak. So we feel we really need to move along and give everybody an opportunity to speak.

So when you do speak, what we've done is set a timer for about five minutes. We borrowed some lights from somewhere in D.C. You'll see a yellow light come on when you've used three minutes up there on the lectern, a red light when you get to five minutes. We are going to then have about five minutes for comments.

And after we've spent about ten minutes
addressing those issues, then we will move on to
the next speaker so everybody gets an opportunity
to speak.

Please feel free to submit to us in
writing any points you wish to make that you
didn't have time to make here.

We are going to also ask that you pull
those mics together and speak directly into them,
because we have folks on the phone who want to
hear what is said by you as well.

In terms of just logistics, important
matters, we will break at about 10:30 for about 15
minutes. There are rest rooms in this building.
If you go out the door and to your right, there's
two sets of rest rooms on this floor. And there's
two sets on every floor above it for the four
floors above it if you need to get into a restroom
that's not crowded upstairs.

When you do speak, we are going to ask you
to please identify, if you would, your firm or the
organization you're with and your practice area or
the focus of your -- your studies or your efforts.
That is helpful background for us.

So with that introduction, we are going to
go ahead and get started, and the first speaker is
Bob Owen.

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

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

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

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

What to preserve, especially when preservation decisions must be made precommencement in the absence of a complaint is not certain.
How long to preserve, if the anticipated claim is not filed, is not certain.

It's been said in order to be just in its application, the law must be clear to those whose conduct it regulates. Because of the current law's lack of certainty concerning preservation and because of my -- of corporations' aversion to becoming the next Echostar or Qualcomm or Rambus, they overdo it. This is a waste of our country's resources, and proposed Rule 37(e) is a tremendous step in the right direction.

I applaud the difficult and hard work that's been done by the Committee. Its most important contributions are to provide a single national standard for spoliation sanctions, and to require a showing of culpability higher than negligence or gross negligence.

Preservation of ESI, when residential funding was decided in 2002, was a relatively simple matter. It is anything but simple now. The explosion in volumes and the explosion in complexities make the opportunities for mere mistakes far more numerous than they were ten years ago.

My clients' line employees don't need
extensive of training to know when they are doing
something in bad faith. They come prewired to
know when something is wrong. Training them to
avoid mere mistakes in this area, however, is a
different matter. In this area, frankly, it's
almost impossible to train every line employee
about the nuances of preservation.

The single point I want to emphasize in my
testimony this morning is that whatever form the
final Rule 37(e) takes, it is vital that the rule
be tightly written. The guidance it provides to
practitioners and judges must be clear. And there
must be no wiggle room to misapply the spirit of
the rule.

I particularly applaud the Committee's
intention to displace inherent power, which has
been -- that is certainly not a certain source of
counseling for us.

Why do I say this? There are three
reasons, really.

First, although the Committee and its
groupies of which I am one, live and breathe these
topics, the vast majority of practitioners in the
country do not routinely encounter these issues.

The Rules of Civil Procedure normally
provide clear guidance. How many days do I have
to answer? How many depositions can I take? Do I
have to produce my expert's drafts? What form
does ESI get produced in? Pull the book off the
shelf, look it up, and act accordingly. That's
what practitioners expect from the rules.

Rule 37(e) ideally should conform to that
expectation, especially because those
outside-the-bubble practitioners have to make
preservation decisions precommencement, with no
complaint, no adversary to talk to, and no judge
to resort to.

So the preservation rule has to be as
clear and as unambiguous as possible in order to
be fair.

Second, understandably, many judges and
magistrate judges themselves are also less
familiar with the nuances in this area than you
and the people in this room. In a recent Southern
District case one of our most respective district
judges was called upon to decide a preservation
issue as one of about six motions before him,
including summary judgment. A spoliation motion
was in the mix. His decision on summary judgment
was entirely reasonable. His decision on the
preservation issues was just wrong.

Third, there are also judges whose personal views are out of step with the Committee and for whom tightly worded guidance is essential. One such judge in my district for whom I have both deep respect and affection issued an opinion recently which construed "willful" to mean merely intentional conduct. If applied as part of the new Rule 37(e), that construction of willful would enable residential funding to survive and possibly drag the other circuits down to the negligence level.

So my overarching point here is in light of these three reasons, please write a clear and unambiguous rule if at all possible. How to do this?

First, "willful" is a confusing term. When a client destroys documents pursuant to a document retention program, that's a willful act. The term should be either eliminated from the rule or clearly defined, or the "or" should be changed to "and." I prefer the latter.

Second, the (b)(2) clause is, I submit, an invitation to construe any loss of data as an irreparable deprivation. The deleted e-mail
account of the defendant, Mr. Hart, in Sekisui had no bearing on the case. Plaintiff had alleged a single count of breach of warranty. His state of mind had nothing to do with that. But the judge there found that the willful destruction of his e-mails was sufficient to infer relevance even in the absence of any bad faith.

I submit this shows how this will go if you leave (b)(2) in the rule in any form. And I suggest that you take it out.

I deeply appreciate the opportunity to come and testify. Thank you very much.

JUDGE CAMPBELL: All right. Thank you, Mr. Owen.

Are there questions from members of the Committee?

PROFESSOR MARCUS: Mr. Owen, one follow-up. You said among your preference, preferred results for the culpability provision would be saying "willful and bad faith" rather than removing "willful" altogether.

Can you explain why?

MR. OWEN: First of all, I think that bad faith needs to be a part of this as the Committee has recognized. Because without a -- an act taken
in bad faith, and without an act taken willfully,
you can't apply the presumption that what was
destroyed was harmful to the spoliating party's
case.

And so I just think willful and bad faith
emphasizes that there must be a relevance
connection between what was destroyed and what the
jury hears in the way of an adverse inference.

JUDGE CAMPBELL:  John?

MR. BARKETT:  You mentioned
precommencement several times and I wanted to get
your reactions to factor C in (e)(2), the factor
that describes sending notice to a potential
defendant as a factor that courts could consider
in evaluating the conduct of the preserving party.

MR. OWEN:  I think preservation demand
letters are a tool for parties to begin
discussions. I would like to see in the factors a
suggestion or a reference that if an overbroad
preservation demand letter is sent, it should be
regarded as a fishing expedition and as a nullity.

I think there ought to be a certification
requirement that if you send a preservation demand
letter, you're sending it in good faith and it's
as narrow as possible, because it can be misused.
But, you know, I think that starting to talk about these things earlier rather than later is a plus. The problem is that you don't have a starting place from which to negotiate, and so it's very formless. And you don't have a judge to go to and you don't have a complaint. And so those things make it difficult for my clients to make scope decisions.

JUDGE CAMPBELL: Paul?

JUDGE GRIMM: You've given us some helpful thoughts in terms of drafting. I appreciate that. With regard to the willfulness and bad faith, willfulness or bad faith or eliminate willfulness altogether, you've given us your preference. You've explained why.

If one of the options to be considered is to define "willfulness," and you have talked about the malleability of that term as it can be used to range from anything starting with an awareness of what you are doing, namely that you are not in a coma while you are doing it, all the way up to trying to have an awareness of some consequence of what you are doing.

Is there language that you would offer us if we are trying to evaluate a definition for
"willfulness" to have it remain in the rule as it's presently drafted?

MR. OWEN: Yes. And I would suggest you look at the Sedona Conference submission on this point. They are proposing a definition of willfulness as follows: The spoliating party acted with specific intent to deprive the opposing party of material evidence relevant to the claims or the defenses.

I think that's an excellent definition.

JUDGE GRIMM: Thank you.

JUDGE CAMPBELL: Thank you very much, Mr. Owen.

Mr. Garrison?

MR. GARRISON: Good morning, my name is Joe Garrison. I'm NELA's liaison to this Committee. And I represent employees in employment cases.

I want to focus on proportionality. Under the proposed rule change, proportionality will become much more prominent, and I want to ask how does this proposal change -- these proposal changes address two major objectives of the rules. And I would like to express it this way with a couple of questions.
Question one: Will the focus on proportionality lead to acceptance of our civil justice system as having more fairness with rules that are more even handed?

And question two would be: Will the focus on proportionality lead to a process with less cost and more efficiency?

How to achieve fair, just, and even-handed rules is the most important of the questions. If the case is only about money, the case with a value of X should generally not have a discovery cost of 2X or 3X.

But in making rules, we can't set the value of cases by the potential recovery. In employment cases, for example, the wrongful discharge of a high-level officer will have much more money, quote, value than the wrongful discharge under the same legal theory with roughly the same factual proof of a salaried salesperson.

You all know there are hundreds of examples I could give you that would be the same. Just recently in my office, for example, we are representing a very high-level woman who earned almost half a million dollars a year. And over the summer, we represent a bunch of massage
therapists who were lucky if they made $30,000 a year.

The value of those cases, I would suggest, was a lot greater for the ones who were making 30,000. And that's because they were facing foreclosures of their houses, they were facing losing their cars, they were going on food stamps, and they were suffering the humility and embarrassment of all of that.

There are parts of our system that cause a great deal of admiration and respect by the public. And that's largely because the public sees that when individuals come into court, those individuals have the -- have the value of impartial judges and juries and the rules don't tilt in favor of a large corporate party.

But if the amount in controversy is the primary factor in evaluating proportionality, then we will, in fact, categorize citizens who use the courts as rich versus poor and the rich will get greater discovery solely because the amount in controversy is greater.

This strikes me as neither fair nor just nor even handed. And I would respectfully suggest that the amount in controversy factor be
eliminated as a factor. That would leave as relevant factors the importance of the issues, the parties' resources, the importance of discovery in resolving the issues, and the cost or burden versus the benefit.

So this last one implicates question two: Will the process be less costly and more efficient?

I believe the plaintiff's bar has reacted adversely in substantial part because we strongly predict that the -- that the present so often untenable discovery objection of burdensome, harassing, and vague will be replaced by the word processor that's going to say objection, the discovery sought is not proportional.

And what happens then to the touchstones of cost evaluation and efficiency enhancement? It will depend where the burden lies.

The way the rule is written now, there -- or proposed, the burden is going to lie with me, the proponent of the discovery, to show that my requests are proportional. And while I ought to have the burden to show that my requests are relevant, the objecting defendant shall have the burden to show lack of proportionality.
Otherwise, the defendant has got no reason at all to be cooperative.

Just say no might work. Especially at the beginning of the case where discovery is asymmetrical. How does my client know what discovery lies where and what the costs are to retrieve it? The burden to show lack of proportion should be shifted to the party who bears the cost and who knows where the material is and how to get it.

Allocating the burdens in this matter, relevance is for the proponent to show and lack of proportion is for the objector to show, will go a long way in avoiding motion practice in every case and should lead to much more productive cooperation between counsel.

So I've got three seconds left.

Judge Grimm, you and Elizabeth Cabraser wrote a paper that cited to Susman's Checklist. And Susman's Checklist says for depositions, each side gets ten lasting for six hours each. And our rules ought to keep this ten deposition presumption.

JUDGE CAMPBELL: Thank you, Mr. Garrison.

Let me, if I can, ask a question about
the -- one of the points you made regarding the relative value of the case. Your point about
somebody with a $500,000 claim getting more discovery than somebody with a $30,000 claim has been made in many of the written papers. And it's a very legitimate point.

But I'm interested in your thoughts on the sort of reverse of that. If somebody has a $30,000 claim and to prove it they believe in good faith they need to conduct discovery which will cost a defendant $60,000, and as a result, the defendant settles, not because of the merits of the claim, but because they are going to spend a lot more litigating it than it's worth.

What about that problem? I mean, isn't the amount -- I mean, that arguably is not just to the defendant. And it's not inexpensive as Rule 1 would suggest.

So I guess my question is: How can we not consider the amount in controversy when -- when a court is trying to decide what the appropriate level of discovery is in a case?

MR. GARRISON: I think it's an overblown factor is what I'm saying. I think it is a factor that can be misread by a number of courts. And
the -- what you were just saying would become the
only factor or the major factor or the
preponderant factor and it shouldn't be.

You know, it's easy to say from a
practitioner's side, and this is what we see is
that most of those cases that you're talking about
settle. I have no reason to want to conduct
$60,000 of discovery myself in a $30,000 case when
I have a contingent fee. It's cost me then six
times as much as it ought to cost me to do that
case.

Sometimes that happens. But it doesn't
happen with your better lawyers, Judge. It
happens with your lawyers who don't know what they
are doing, to state it clearly.

And those of us who do know what we are
doing look at the cost of cases before we start
them. We reject cases that aren't going to be
effective for our client. And for them to be
effective for our client, they have to be
effective for us as well.

That's one of the reasons. The other one
is that in employment anyway, we enforce a lot of
statutes that don't have high value attached to
them. And the FMLA is a really good example of
We did a case involving intermittent leave. Intermittent leave is, Your Honor, leave that happens only once in a while. And the deprivation of intermittent leave by a large corporation can be important to every single worker in that corporation. But it isn't worth much. It's going to be worth maybe $5,000.

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

JUDGE CAMPBELL: John?

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

And in Dallas, we were told that it all works just fine, that people know how to balance those factors.
There are some cases, as you've pointed out, where there are interests at stake that are nonmonetary. And many of those cases reflect congressional judgments by -- by fee shifting at the end where the lawyers who pursued the cases are able to get attorneys' fees.

And one would think that judges would appreciate that there are cases where there are factors that have to be taken into account that in an individual case are more important than amount in controversy. And the list doesn't prioritize the various factors.

So the question would be if judges had been able for 30 years to be able to look at the rule and to interpret it fairly, as we were told in Dallas they were able to do it, why do we expect that judges faced with exactly those same considerations, which they were supposed to be imposing for 30 years, would now begin to interpret them differently or establish priorities which don't exist there?

If it weren't true that there are some cases, employment cases, civil rights cases, where the interests involved are plainly more important than the specific amount in controversy, that
provision wouldn't have been included in the rule and wouldn't continue to be included in the rule.

Why do you think judges will begin to interpret that differently?

MR. GARRISON: Because I think this Committee didn't move this rule up to where it's going for nothing. I mean, you moved it up because I think, in fact, it was buried in the rules and it really wasn't used.

Amount in controversy, I don't dispute at all that amount in controversy is a factor judges look at, and they ought to. When you are looking at what kind of costs and benefit is going to arise in a discovery dispute, I'm not suggesting that's wrong. I am saying that it's listed as number one.

Number one on my list, you know, when I make my lists, when my wife makes lists to go shopping, number one is the first important thing. And it's number one on this list and it shouldn't be.

If you're going to keep it, move it to number five. Put it where it belongs, which I think is not anywhere. But at least move it down. And include the interests of litigants otherwise.
JUDGE CAMPBELL: All right.

MR. GARRISON: Sorry to take so long, Judge Koeltl. Your question was very short and I couldn't finish it on time.

JUDGE CAMPBELL: Your answer was right to the point. Thank you very much, Mr. Garrison.

Mr. Pratt?

MR. PRATT: Good morning. I'm privileged to give my perspective on the proposed changes to the Rules of Civil Procedure.

I'm here as the president of the Federation of Defense and Corporate Counsel. It's an organization that's invitation only, limited membership. Its history goes back to 1936. It consists of 1400 of the best and brightest defense and corporate counsel around the world. I speak on behalf of those 1400 members in my November 13 comment letter as well as my comments today.

I'm also here to share my experience with the civil justice system in two ways. One, I was a trial attorney for over 30 years handling litigation, trying cases around the country. I was a pretty heavy user of the federal court system.

My more recent role in the last six years
is a general counsel of a medical device company called Boston Scientific. It's in the business of health care, and it has over 24,000 employees and has 15,000 products available to physicians and to patients. And we have litigation, intellectual property, products, commercial, you name it.

Some of the cases we are the plaintiff, often we are the defendant. I've seen firsthand the cost delays and disruption that our civil justice system creates for parties that find themselves embroiled in that system. A significant percentage of my litigation costs are attributed to litigation and discovery matters.

I'm not suggesting we can eliminate all litigation costs. Companies like mine, we are going to have to preserve materials, review them, and produce them. It's not just because our opponents want documents that they think will help their case, but also because I want to find the documents that prove my case.

All parties have an interest in getting the documents that count. And that's the rub, what counts. The current broad standards of Rule 26 go way beyond what counts and that creates a looming fear that you have to hold and produce.
more documents lest you be sanctioned for not
doing enough.

Let me give you some numbers. Since 2005,
my company has preserved 107 terabytes of data, in
just the last year, we have preserved 35 terabytes
of data, including 90 million messages.

Roughly half of our U.S. employees are
subject to litigation holds. We pay our outside
discovery vendor approximately $32 million to
process, host and provide our document review tool
since 2005. And it's averaging $5 million a year
right now to that outside discovery vendor.

Since 2010, I've paid document review
teams $7.35 million to review roughly 56 million
pages.

You hear these stories over and over again
from companies. But don't be numbed by them
because therein lies the critical evidence that
shouts out for change. All parties know this.

The requesting party often gets millions
of documents that have absolutely no bearing on
the lawsuit so they are not used. Estimates vary
but my best guesstimate is far less than one
percent of all produced documents are used for any
reason in litigation.
Think about that. Let's reduce that excess, the ones that no party needs. And that's what these rules will help accomplish.

We favor the proposed revisions to Rule 26. The goal is to bring common sense, reasonable and proportional restrictions on the scope of discovery.

The problem with the current rule is really twofold. One is "relevant to the subject matter of the lawsuit" is very broad, and requesters can engage in fishing expeditions by allowing discovery of anything reasonably calculated to lead to the discovery of admissible evidence.

The changes in Rule 26(b)(1) are laudable. They would permit discovery materials relevant to a party's claim or defense and proportional to the needs of that particular case.

Moving proportionality into the scope of discovery is critically important. It sets the framework for how much discovery is appropriate in that case rather than deal with that issue from a protective order standpoint.

I don't see how these changes can be portrayed as the end of the world as we know it.
Focusing on the documents relevant to a party's claim for defense and the custodians who have those documents will narrow the universe of potentially relevant documents without sacrificing the true needs of the parties.

All parties will get the ones that are meaningful. We should see more accommodation rather than expensive motion practice.

I believe in the capacity of good lawyers to treat each other with reasonable and professional ways. If there are outliers, there are ways to deal with them rather than craft the rules to accommodate them.

I see my time is running out. I do want to comment briefly on proposed changes to Rule 37. I agree with the comments that "willful" or "bad faith" undefined is dangerous. It's got to be tethered to some level of culpability.

I subscribe to the definition of "willfulness" as provided earlier this morning. There is a specific intent to deprive the opponent of material evidence relevant to the claims or defense.

I am very concerned about the section of Rule 37(e) that deals with the irreparable
deprivation of information. And keep in mind, my company makes products that are often relevant in litigation. Sometimes the plaintiffs lose them, sometimes we don't lose them, but there's a potential that we could lose them. And most of those devices are actually helpful to my defense.

So the idea that if that is lost, irreparably, without any showing of materiality, and I could be sanctioned for that, I think it's an untoward outcome and will result in lots of litigation.

Finally, I favor the presumptive limits on depositions, interrogatories, and requests to admit as they are included under these proposals. These are reasonable limits, they are not impenetrable ceilings, and lawyers can figure out where their case fits on that scheme. Cases are different. Most lawyers can put these cases on the right point of importance on the spectrum, which important in my view for all of those rules is to set a reasonable mark or target regarding discovery. They should not default to the position that every case is critically important and that excessive discovery should be allowed. Nor should they default to the
issue that cases should not have a lot of
discovery.

I think these hit the midpoint of
reasonableness and leave it to the attorneys and
judges to move the buoy up and down in accordance
with the circumstances of that case.

These changes will help the parties better
achieve the objectives of Rule Number 1. And the
true winner, I believe, will be our system of
justice.

Thank you.

JUDGE CAMPBELL: All right. Thank you,
Mr. Pratt.

Questions? Sol?

JUDGE OLIVER: Mr. Pratt, I address the
question to you relative to what Mr. Garrison said
earlier. He indicated that under these proposed
changes that the burden of proof changes in regard
to proportionality. His position is that the
plaintiff should have the burden in regard to
relevance, but the defendant should continue to
have the burden in regard to showing that the
discovery is not proportional.

What is your response to that?

MR. PRATT: My response is that you can't
really define in terms of plaintiff and defendant. I've been on both sides of that V, and I've been the requesting party no matter which side I am. So I wouldn't deal with it in terms of burden. I don't think it's the right way to look at it.

    If my company submits a discovery request, I've got to certify that that's consistent with the Rules of Civil Procedure and I have the burden of proving it. So the requesting party for a long time has had the burden of certifying and proving its compliance with the Rules of Civil Procedure.

    I wouldn't talk about it in terms of burden in my view. I think this is a question of balance. I think that's the right word. When you take a look at the factors of proportionality, some of them, the -- the receiving party can answer, what are the resources.

    JUDGE OLIVER: What happens, and I didn't mean to say plaintiff, I guess the person who is seeking the discovery would have to show it's relevant, but the person who produces discovery. So I was wrong in saying plaintiff.

    But -- but the court has to have some -- some guidance. The court has to look to some party in regard to what the burden is,
wouldn't it?

    MR. PRATT: Yeah. I mean I think what the
court would look at and what I would urge to the
court if I were urging that right now is to take a
look at all of these factors.

    Take a look at the amount in controversy.
    Take a look at the issues, the importance of
discovery in that particular case. And in
balance, is the discovery right or wrong?

    I wouldn't -- it isn't like a trial on the
merits in my view, Your Honor, where you have a
preponderance of the evidence or clear and
convincing evidence or anything like that. I
think it's a question of listening to the parties
present their side of it and saying in this view,
this case fits here. I don't think it changes the
burden of proof. I really don't. And I wouldn't
look at it that way.

    This is a balancing of the interests with
both parties contributing information that will
allow the court, if they can't reach an
accommodation mutually, to decide what the level
of discovery ought to be allowed.

    JUDGE CAMPBELL: Other questions?

    JUDGE KOELTL: How does your definition of
"willful" differ from bad faith?

MR. PRATT: It may not. It may not. So in my letter submission to you, I said you put "and" in there, you are making it clear it could be an intentional act if that's the way the courts define "willful." And it's been defined that way at least in one case, and bad faith has the element of culpability.

So, but if you define "willful" in that way, which has a level of culpability, it may be a difference, Your Honor, between actually doing something, willfully actually doing something, versus if it's a bad faith, not doing something. When you're sitting back and you're allowing documents to be destroyed, you are not taking an affirmative action.

So I think if you define "willful" in the way that we describe it, I think it -- it will get to the point of what I think the primary concern is, in my viewpoint, which is allowing just an act to be a basis for sanctions. I think it either has to be some intent, some culpability, some element of wrongfulness, if you will, within that particular sanction rule.

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

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

JUDGE CAMPBELL: Mr. Miller?

PROFESSOR MILLER: Good morning, Mr. Chairman. My name is Arthur Miller. I appear for no one other than my own point of view. In other words, I'm here on my own dime.

I know how hard this Committee works. I was an assistant to reporter Benjamin Kaplan in the '60s. I was a reporter to this Committee in the '70s. And I was a member of this Committee in the '80s. Those were three very hard working periods in my life.

It's also very difficult for me to stand up here and critique the work done by a reporter and an associate reporter, both of whom are my coauthors. How do we write books together, friends? I don't know.

I've been very disturbed and I will speak impressionistically, that for 30 years or so, a pendulum has been swinging against civil litigation in general, plaintiffs in particular.

What used to be a sleek pretrial process is now littered, literally littered with stop
signs, whether they be motions to dismiss, expert
testimony, class certification, summary judgment,
now, of course, discovery.

That pendulum swing to me has lost the
moorings of the original rules and has worked
against those who seek compensation, and worked
against those who tried to enforce public policies
reflected in federal and state statutes, and
common law principles.

I don't think that's very good. I don't
think it befits the American civil justice system
to have this preoccupation with cost, abuse,
extortion, clichés that have been thrown out by
the defense bar that sadly in my judgment have
been picked up in judicial opinions without any
empiric demonstration whatsoever.

We just heard an anecdote. There are
dozens of those anecdotes. But some of the
research suggests that the costs of litigation are
not that high when compared to stakes. Abuse is
basically something in the eyes of the beholder.
And extortionate settlements are the settlement
you made.

Now this is the fourth time in recent
decades that the rules will be amended to restrict
discovery. '83, '93, 2000, and now 2014 or '15. There is yet to be any demonstration that any of these amendments have had any effect, yet you've gone back to the same old well without considering the possibility that: A, do some empiric work on these clichés; B, are there alternative approaches to abuse, cost, extortion if they are ever demonstrated to exist. No, you limit discovery.

Make no mistake about it, moving the proportionality concept from where it is now into the scope of discovery provision is a major shift in the balance of discovery. I'm the unindicted coconspirator.

I can almost feel Judge Koeltl laughing at me.

JUDGE KOELTL: No.

PROFESSOR MILLER: Because it was on my watch, my watch, that that provision was inserted in the rule. We were concerned with needless and excessive discovery. That's what we said in the advisory committee note. We lacked empiric evidence because the FJC at that time did not provide those services.

We viewed it as a very limited safety valve on the scope provision. You've now put it
into the scope provision so that the proponent
must show relevance and proportionality, and the
advisory committee note makes it clear you are
intending a limitation on discovery.

Now, Judge Koeltl said: Well, that stupid
provision that Miller put together in '83, that's
been working like a charm, almost as good as US
Airways, who knows.

Well, let me suggest, Judge Koeltl, that
when you put something in as sort of a discount or
safety valve on relevance, that is quite different
than pushing it as an adjunct, a correlative, a
coequal with relevance.

So the relative paucity of motions under
the existing provision that the last 30 years has
seen, you've got to think about the incentive to
defense interests or any interest opposing
discovery to make a motion or to try and stop
discovery based on proportionality.

We did the best we could in '83 to
describe needless and excessive. You describe
proportionality with the same subjective terms,
the same abstract terms.

I agree with Mr. Garrison, the cure may be
more vicious than the disease if there is, as may
well occur, a tidal wave of discovery motions
addressed to blocking discovery based either on
relevance or on proportionality, and you've taken
out that very important safety valve which allows
a district judge discretion to expand the ambit of
discovery from claims or defenses, which came in
only in 2000, but allowed anything relevant to the
subject matter of the action. That's an important
safety valve.

Why are you depriving district judges of
discretion to open up relevance and
proportionality, if you keep it there, and
prohibiting that judge from saying: In this case,
I want to see what's relevant to the subject
matter of the action.

So it's a double whammy in there. These
proposals, by my light, this is me speaking, are
one sided. Even your obliteration of Rule 84 in
the forms is a very stealth-like signal that
you're approving Twombly and Iqbal.

It's time that this pendulum of the last
30 years be stopped. I would hope to live long
enough to see what pendulums always do, namely
retrace its arc. But I'm an old fogie.

JUDGE CAMPBELL: Thank you, Professor.
Questions? Yes, John.

MR. BARKETT: Professor, the original Rule 34 you mentioned in your comments that we've lost the moorings from the original proposals. The original Rule 34 provided that documents were produced only upon motion and showing of good cause.

Is it your view that that language is something that we should have today in the rules if we are going to go back to 1938?

And I'll just give you -- my sense of having studied the original rule making is that the real focus was on deposition discovery.

PROFESSOR MILLER: Absolutely.

MR. BARKETT: And I went back and reread Hickman versus Taylor which you cited in your paper. And the paragraph that you cite to actually is talking about deposition discovery in terms of the importance of gathering facts.

And there's a Charles Clark symposium from 1951 that contains a survey of the uses of discovery tools in the first ten years of the rules. And five district courts in four percent of the cases at the time even involved document requests. So it seemed to me like the focus back
in the late '30s and '40s was really about depositions.

And we live in a different era today. So part of what I think that we are reacting to is the effect that electronic discovery is having. So when I hear comments about let's go back to 1938, and I realize that it was also apparently on your watch when requests for production went extrajudicial in 1970 when the motion and good cause requirement was eliminated, I wonder what was the original reason why you couldn't get documents unless you showed good cause in motion and now we've basically taken judges in 1970 out of the business and we now have eDiscovery, so that the world sort of turned.

And I'm not sure that Edson Sutherland would have written the rules the same way today had he been facing the electronic storage information market that we face today.

PROFESSOR MILLER: Number one, the original 34 in part reflected concerns about privacy that there was something about documents and things, remember it's about things, too, that cautioned the rule makers to sort of create that barrier of the motion. By '48, and later, the
motions were being granted without any difficulty. So the requirement of the motion was removed because it was a needless procedure. It was just a motion that was unnecessary.

The original people, and through my watch in the '80s, we and they were very concerned, certainly Ben Kaplan was very concerned, don't create transaction costs. We had Mr. Garrison speaking about the transaction cost that this proposal might generate, might exceed the benefits that you might get from proportionality.

So in 34, that was taken out. Now, we understand that the 800-pound gorilla right now is electronic discovery. The last speaker addressed that. You've addressed it. It is a problem. There is no doubt there is a problem. But, it may be a shorter-term problem than most people think because the development of information retrieval sciences and linguistics have now already achieved a massive improvement in data retrieval analysis.

MR. BARKETT: I read that reference in your papers but do you have a sense of the costs?

PROFESSOR MILLER: Lower. Lower.

MR. BARKETT: But who can afford that kind of assistance in routine cases?
PROFESSOR MILLER: I assume that the very people now complaining about electronic discovery, about the terabyte concept, those people can afford it.

The study done by the FJC shows that the cost of discovery is not that great. It resonates to stakes, stakes resonate to the economic viability of the parties.

We've already got pretty good evidence that the district judge working with counsel on protocols for electronic discovery, coupled with the constantly improving retrieval and analysis techniques produces lower costs, and forgive us, since we are humans in this room, higher accuracy than human retrieval. With costs that undoubtedly, as we know from the electronics industry, will constantly decline, techniques will constantly improve.

And I would hate to see a premature rule-making reaction to something that is really a moving target. Electronic discovery frightens everyone. But some very talented district judges have managed to capture and control this 800-pound gorilla. And I don't think that tail should be wagging this dog, namely discovery as we have
known it since 1998.

JUDGE CAMPBELL: All right, thank you very much for those comments, Professor.

Senator Kyl?

SENATOR KYL: Judge Campbell and members of the panel, my name is Jon Kyl. I'm a senior advisor of the Washington firm of Covington & Burling. My practice is primarily in public policy.

I'm here for the firm because lawyers in the firm and clients of the firm have become increasing concerned about the abuse of federal discovery rules by some, driving up the cost of litigation and in some cases forcing settlements in situations where it probably is not appropriate.

So I commend the Committee for its hard work, for its proposals, and express support for those proposals. Indeed, I would even go further in at least one area. But I think for those of us who not only support the substantive changes, but also believe that this is the appropriate process for making rules changes in the Federal Rules of Civil Procedure, it's important to move this process to successful conclusion.
There are frustrated parties and interests who have other options, such as the congressional action that's being pursued on patent litigation reform. I think some were surprised at how quickly that process has moved forward.

My point is that it's fine to say that we need more time or more empirical evidence or more meetings, but this Committee, the standing committee, the Judicial Conference, the Supreme Court, and eventually the layover time of the United States Congress, by my calculation, will take about five years before this process has concluded and the rules are changed and become final.

So I don't think anybody can deny that this process has been thoughtful, it's been deliberative, it's been fair, and by all the materials I've read, exhaustive. And as a result, as I said, I not only commend the Committee for the substance of its proposals, but also urge support for moving the process to conclusion.

Others have talked about and will continue to document the high cost and low relative return of the value of discovery that is currently allowed in some cases. University of Virginia law
professor John Setear gave this function of discovery I think a quaint and interesting name a few years ago. He called it the impositional function of discovery. In other words, the ability to impose costs on the other side. That's the concern being addressed here.

And I don't think it's really necessary. We have -- our system allows successful conclusions in criminal law, in administrative law, in the arbitration context. Other countries have systems that don't require this kind of expensive discovery.

And indeed, it's one of the reasons that some foreign firms find it difficult to contemplate coming to the United States because of their fear of our judicial system and the costs that would be imposed upon them in cases.

So what to do? Let me limit my comments to Rule 26 and briefly make three points here.

First of all, the elimination of language about leading to evidence admissible at trial I think is a positive step. Many have misunderstood this language as really reflecting the real standard for discovery. And the Committee has made clear, I think, the reality.
Second, moving the proportionality language from the back to the front of Rule 26, I think, will be very helpful. And I think that while it technically changes very little, if anything, the protest from opponents reveal its true value that just maybe parties and judges might take this requirement more seriously.

And for this reason, I'm particularly supportive of the Committee's recommendation to clarify that judges have the power under Rule 26(c), relating to protective orders, to allocate the costs of discovery in some situations to the party requesting the discovery, the so-called requester pays rule.

This gets the incentives right. And it puts incentives on the parties to determine what they really need. And a party who determines that he really or she really needs something should have the ability to get it if that party is willing to pay for it.

It's very difficult, I appreciate, for judges, and very time consuming for judges to try to manage the discovery process in litigation. And giving the parties the incentive for, in effect, self-policing could go a long way to help.
This is something my colleague at Covington, Don Elliott, has been advocating since 1986.

Finally, I think it would be very helpful if the Committee provided some examples in the advisory committee note of when judges should use this authority to allocate the cost of discovery to the requester rather than the responder.

I noted that Dean and later Judge Clark drew as one of the main lessons from his experience that to be effective, a rule should not merely grant power but explain how that power is to be used, giving illustrations. This could be very helpful.

For example, when you have an administrative proceeding from the EPA or the FDA, determining, after exhaustive examination, the safety of a drug or substance, this might be an appropriate case in which to go beyond that or to try to pierce that should require a requesting party to pay for the -- for the attempt to do that.

And I understand that administrative determinations don't necessarily restrict the right to sue. But that doesn't necessarily get at
the question of who should bear the cost of investigating something for the second or third time after an agency has already done so, and especially given the long-standing presumption of the regularity of administrative determinations.

This, I think, should provide at least a sufficient basis for, in these kinds of circumstances, creating a rebuttable presumption that in that situation, the requester should pay.

So my suggestion is that the Committee encourage judges to actually use the power by specifying examples of where it is appropriate to do so.

And I'll, in my written comments, expand on this a bit further. But for now, again, I commend the Committee for its hard work and urge that advocates here try to help the Committee bring this to conclusion so that we can have a successful result in the Committee's process.

JUDGE CAMPBELL: Thank you, Senator.

Questions?

Perhaps I could ask one of you.

You mentioned requester pays. As I expect you know, we have a subcommittee of the rules Committee right now looking into the proposal of
requester pays in the form that Don Elliott has
advocated it, which I understand to be that there
should be some threshold of discovery a party can
get for free. But if they exceed that threshold,
whether it's a dollar amount or some other metric,
they pay for it.

That would be a very significant change in
the way discovery is done. And we are not
recommending that. We are studying that, because
we've heard from Congress and others that it's a
legitimate point to look at.

Do you think the change that we are
proposing in Rule 26(c)(1)(B) for the allocation
of expenses would cause judges to think that we
are supporting that broad notion of requester pays
that Don Elliott is advocating?

SENATOR KYL: No, Judge Campbell, even
though I support what my colleague is proposing,
and I am aware of the fact that there will be a
look at that to determine whether something beyond
what the Committee is doing now might be
appropriate.

What the Committee is recommending right
now would not do that. But it certainly gives
judges the discretion in certain situations to
determine whether or not the requester should pay. And what I'm suggesting is that the Committee could help the judges to guide them to situations when this might be appropriate with some illustrations.

One way would be, as I suggested where there's already been an administrative determination. A more drastic way, as you imply, would be the notion of, and I shouldn't say drastic, but a different approach would be where a certain level of discovery is, in effect, free. And then beyond that, the requester, absent extraordinary circumstances, would bear the burden.

But that's a proposal that I understand is not included within the Committee's recommendations.

JUDGE CAMPBELL: All right. Other questions?

Thank you very much.

SENATOR KYL: Thank you very much.

JUDGE CAMPBELL: Mr. Kelston.

MR. KELSTON: Good morning. My name is Henry Kelston. I'm a partner at Milberg LLP in New York. Milberg primarily represents plaintiffs
in class actions and other complex litigation.

Based on just that one piece of information, each of you now probably assumes with a fairly high degree of confidence that I will urge the Committee not to adopt the proposals altering the scope and amount of discovery, that is, the proposed amendments to Rules 26, 30, 33 and 36. And your assumptions on that score would be correct.

So rather than discuss specific proposals, I would like to draw attention today to some larger issues that I believe should frame the Committee's deliberations.

Issue one, does it matter that the response to the proposed amendments is so highly polarized between the plaintiffs' bar and the corporate defense bar?

On the first day of public hearings on these amendments, 41 witnesses testified. And while they voiced widely divergent opinions about the merits of the amendments, there was one point on which there was a clear consensus. That is that the proposals to limit discovery individually and collectively will be beneficial to large corporate litigants and detrimental to plaintiffs.
The next day, Law360 described the hearing this way, quote: Top attorneys from the defense bar and major corporations urged the Federal Judicial Committee on Thursday to adopt proposed changes to federal rules that curtailed discovery in depositions in civil cases, while plaintiffs' attorneys and nonprofit law groups warned that the changes would limit their clients' access to the justice system.

Reading that, I was struck by the realization that no one close to the rule-making process seemed either surprised or concerned about the highly partisan response to the proposals. Everyone inside the rules' bubble had already come to accept that the proposed discovery amendments are highly skewed in favor of large corporate defendants.

And so I pose this question: Should the Committee consider enacting a package of amendments that so clearly favors one group of litigants over another, as evidenced by the comments of both the favored and disfavored groups?

I would suggest that if the public comment process means anything, the intensely polarized
response to the proposed amendments limiting
discovery should raise a caution flag at the very
least.

Issue two: Why is the response to this
proposal so polarized?

The goal of reducing discovery costs is
not an inherently polarizing one. On the
contrary, like lowering taxes, one might expect
nearly unanimous support if the benefits and
sacrifices are perceived to be fairly distributed.
But if the benefits are seen as running mainly
from one group -- mainly to one group at the
expense of another, those groups become
adversaries rather than cooperators in the
process. And that is precisely what we are seeing
in the response to the pending proposals.

The reason for this, which is not being
acknowledged by proponents of the amendments, is
that if corporate litigants spend less on
discovery as a result of these amendments, it will
not be because the amendments have made discovery
more efficient, more effective, or have caused
less time to be wasted on unproductive adversarial
conduct. There is nothing in the amendments that
requires or even incentivizes conduct that would
reduce the overall cost of discovery.

The concept of cooperation may get a brief nod in the notes to Rule 1, but no one really expects that to change conduct on the ground.

By design, these amendments will reduce discovery costs for large corporations, simply by reducing plaintiffs' access to the information they need to prove their claims. This is not true cost saving. This is cost shifting with plaintiffs paying the price in reduced access to justice. This is why the proposals, the reactions to the proposals are so deeply polarized.

Issue three: Are the proposals necessary? Do they represent the best, most effective and fairest solution to a genuine problem?

I will not go through the detail as Professor Miller discussed much of this. There is simply no evidence that there is a genuine problem. And in the end, these amendments may well end up raising discovery costs, not reducing them. By reducing the number of depositions, interrogatories, and requests for admission, which are relatively low cost mechanisms, the amendments may increase the cost of document review, which is already the most expensive part of discovery.
Regarding the change in Rule 26, scope of discovery, this Committee wrote in its report to the Chief Justice after the Duke conference, that there was no demand at the conference for a change in the rule language, which there is no clear case for present reform.

In closing, there's understandably a strong desire to make changes in the wake of the Duke conference to show some concrete results. But it is vitally important to the millions of plaintiffs seeking justice in the federal courts that we do not confuse action with progress.

Thank you.

JUDGE CAMPBELL: All right. Thank you, Mr. Kelston.

Questions? Peter?

MR. KEISLER: A few years ago, several years ago, we did a rule change that relates to discovery that both plaintiffs and defendants liked a lot from the beginning. And that was to protect the confidentiality of expert -- draft expert reports and communications with counsel. And that was, you know, uniformly liked both because it was sensible, and because both sides have equal stakes in that kind of thing.

- 57 -
I'm wondering if we are in a situation where, to the extent we are addressing the scopes and limits of other forms of discovery where the needs and burdens aren't going to be symmetrical, whether almost anything we do will be polarizing in the way you describe in one direction or another. Or if not, if there are thoughts you have about things that would address that part of the rules that wouldn't be as polarizing either one way or the other.

MR. KELSTON: I think there are measures we can take to reduce costs and burdens of discovery without shifting those costs on to plaintiffs in the form of reduced access to relevant facts and reduced access to justice.

Examples would be incentivizing cooperation in a meaningful way.

Revitalizing initial disclosures is another possibility that's been briefly discussed but not in any serious way.

Sanctioning parties, for example, for late production of material adverse evidence. There's another way to speed up discovery, essentially so the parties that are bearing high costs of discovery I would say, if you want to lower the
costs of discovery, go get the information and turn it over. Stop making it difficult. Stop arguing about every response.

    Yes, it's wonderful to talk about, you know, serving only targeted responses so we don't get the millions of irrelevant documents. But the likelihood is, we are not going to -- in -- we are not going to get the really meaningful documents either unless we ask with a description that we know covers it. And that -- and that's just the facts of life the way it is.

    But, yes, there are absolutely things we can do that would genuinely reduce the costs of discovery as opposed to simply shifting by reducing the amount of discovery available to the plaintiffs.

    JUDGE CAMPBELL: Gene?

    JUDGE PRATTER: Mr. Kelston, could you give us an example of a meaningful incentive to cooperate?

    MR. KELSTON: I think I can.

    JUDGE PRATTER: Good.

    MR. KELSTON: I think we should consider a rule that says -- discussing, let's say preservation, the requirements of preservation,
what a party is required to serve. To the extent that a party discloses to the other side what they are doing and what they are not doing to preserve information with sufficient specificity that it's meaningful to the other side, and does not receive -- excuse me, my mouth is dry -- but does not receive objections in return, again, with sufficient specificity to make them meaningful, that the preserving party should be entitled to a rebuttable presumption that what they have done is meaningful. I'm sorry -- is reasonable.

This provides a real incentive for a party in litigation to open up and describe what they are doing to preserve and not preserve. That gives the other side an opportunity to voice objections and get them resolved by the court, if the parties can't resolve them, and avoid the later disputes that end up causing so much distress about --

JUDGE PRATTER: Just one follow-up if I might.

We've heard from all quarters and all corners that the effort to promote cooperation and speed up the process by the so-called self-executing discovery, which I frankly think I
was hearing a little bit in your example there, has been a complete charade and been totally unsuccessful.

Do you agree with that?

MR. KELSTON: No, I don't think it's been a complete charade.

JUDGE PRATTER: How about a partial charade?

MR. KELSTON: Yes, it's definitely been a partial charade.

JUDGE PRATTER: So it's been a little mask.

MR. KELSTON: There are genuine cooperators, there are pretend cooperators and then there are parties that don't even pretend to cooperate. And it makes a lot of difference in the way the litigation proceeds, which variety you're working with or against.

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

Mr. Beisner?

MR. BEISNER: Good morning, I'm John Beisner. I'm partner with the Skadden Arps law firm in Washington. I've been involved on the defense side of civil litigation for about 35
years. And I appreciate the opportunity to appear before the Committee this morning.

And I also want to express appreciation for all of the hard work this Committee does. It's very important to everyone out in the civil litigation community.

I've submitted written comments addressing a number of issues raised by the proposed amendments, but I would like to seemingly join the crowd this morning in focusing on the proposed proportionality change to Rule 26.

I guess I'm having difficulty seeing this as any sort of radical change to the rule. Indeed, several of the members of the Committee have pointed out Rule 26(b)(2)(C) already says that either on motion or on its own, a court must limit the frequency or extent of discovery if it's not proportional. This is not a new concept there at all.

And I think the movement of these considerations to Rule 26(b)(1) really is just an elegant solution to the fact that these considerations have lived, as the proposed advisory committee notes observe, in relative obscurity back in Rule 26(b)(2).
I've heard the expression of concern that this change is going to create many more disputes, and a lot more motion activity. I have a hard time appreciating that assertion, because the rule is there. It has not produced an avalanche of disputes or motions. And I really think it may actually serve to diminish the number of disputes.

Right now, 26(b)(1), in my view, is lacking criteria that encourage meaningful discussion when discovery disputes arise. I mean, in my experience, you get into these discussions, and the proponent of the discovery is basically saying, "Well, I can basically get whatever I would like under this rule."

And the responding party says, "No, you can't."

And you end up presenting the issue to the Court unless cooler heads prevail.

And I think putting proportionality into Rule 26(b)(1) will actually give the parties something to talk about. There is some tangible criteria there that I think the parties can get their teeth into and hopefully reach some compromise.

The suggestion has been made here this
morning that the change will shift the burden of proof in obtaining discovery. And I think we need to look at this at two levels.

First of all, there's the burden of moving to obtain discovery. Most of these disputes arise in the context of Rule 34. This change isn't going to modify who has to move. The person requests discovery, objections are made, and if you can't resolve the dispute, the requesting party makes a motion. That's not changed by anything that the Committee is proposing to do here.

And I think the change, frankly, just simply gives more prominence to the proportionality considerations that should already be part of that discussion, particularly given the fact that the attorney making the request, I believe, can fairly be said, should be certifying under Rule 26(g) that the requested discovery is proportional.

Judge Oliver, to your question earlier, I think it's important to look through the considerations that are already in the rules and think about this notion of burden of proof. These considerations don't create any sort of rigid,
one-sided burden. As was suggested earlier, it's
a discussion to which both parties have to
contribute.

Let's look at them for just a moment. The
first consideration, amount in controversy. Well,
obviously that's something the plaintiff is going
to be declaring in the case. The importance of
the issues at stake in the action is something to
which both parties are going to contribute
discussion. No burden on that issue.

Each side presumably will speak itself to
the available resources, the third factor that's
in the rule. I suspect the requester of the
discovery, at least in the first instance, will
need to speak to the importance of the discovery
in resolving the issues in the case.

But conversely, it's the responding party
that will need to address the burden or expense
issue. And I assume the requesting party
presumably will take the first shot at describing
the discovery's likely benefit.

But in -- in sum, the rule just simply
articulates consideration. On some of these the
court will probably be looking in the first
instance to the requester and to the responding
party in other instances. Both sides offer their views and the court will have to make a determination as to whether the proportionality requirement is satisfied.

With that, I'm happy to respond to any questions.

JUDGE CAMPBELL: Questions? Parker?

MR. FOLSE: When Professor Miller made his remarks earlier, he said, as I think Mr. Pratt also said, that in fact, moving the proportionality standard into Rule 26(b)(1) would be a quite significant change.

And I took from his comments the idea that where it is currently placed in Rule 26(b)(2)(C)(3) reflected the intent of the drafters that it operate as a safety valve on the scope of relevance. And that moving it into 26(b)(1) would make it coequal with relevance and not just provide an additional subject to be discussed, but work a material change in the scope of discovery.

So how do you respond to his comment?

MS. BEISNER: Well, I think it's more than just a safety valve where it is presently. I mean I think it's a requirement. When I file a
request, I've got to certify under 26(g) that that limitation is satisfied. I think it's an up-front consideration.

Will it make that a more prominent part of the discussion in determining whether discovery is available? Yes. But I don't think it's a radical change. I think it should be part of the discussion already. And it probably isn't being raised frequently enough.

But I think if you have right now a motion to compel discovery, and you're the responding party, there's no reason you can't, as part of your response to that, say it's disproportionate.

MR. FOLSE: How do you explain then why there has been relatively little motion practice under the element of the rule as it currently appears? And don't you foresee that if it goes into 26(b)(1) that it will become a much more significant aspect of discovery motion practice?

MR. BEISNER: There's no question it's going to become a more important part of the discussion, I'm not rejecting that, that concept at all. But I think that the fact that it's going to create some sea change in all of this, I think may be overstating the issue.
It's going to make it more prominent. I think it should be. I think it's been lost back where it is now.

But I think the idea that it's going to preclude any requesting party from getting important discovery, which I took it to be the gravamen of what Professor Miller said, to me doesn't make any sense.

The considerations that are there that are being moved repeatedly use the term "importance of the discovery." That's a major focus of that.

And so, you know, I don't think it's going to deprive anyone of access. It may require parties that are requesting information to make some choices to prioritize what they want, but that's not a bad outcome.

I think unless we get to that point, the discovery problems that we are experiencing will not be resolved.

JUDGE CAMPBELL: All right. Thank you very much for those comments, Mr. Beisner.

Mr. Lopez?

MR. LOPEZ: Thank you. My name is David Lopez. I'm the general counsel for the United States Equal Employment Opportunity
Commission. Before being appointed to that position, I practiced in federal court here for several years. It is nice to be home, Judge Campbell.

JUDGE CAMPBELL: Welcome back.

MR. LOPEZ: The EEOC is the federal law enforcement agency responsible for enforcing the federal antidiscrimination laws. As we prepare to celebrate the 50th anniversary of the Civil Rights Act of 1964, it is useful to remind ourselves that Congress contemplated that the federal employment discrimination laws implement national values of the utmost importance to the institution of public and uniform standards of equal opportunity in the workplace.

These civil rights laws are the envy of the world. And the federal courts are an essential component of the statutory scheme.

On March 4th, 2013, I commented in writing on the rule changes proposed by this Committee. We currently, at the EEOC, have approximately 250 cases pending in the United States Federal District Courts across the country. This rule, I believe, provides us with an enormous and unique perspective on the broad range of case management
and discovery practices used by judges across the country.

This morning I want to raise three points. First, I believe that the Committee has come up with some proposals that would actually streamline and make discovery less expensive.

We agree, for instance, with proposals to shorten time limits for service of the complaint and require Rule 34 objections to be stated with specificity.

Perhaps most importantly, we concur in the importance of early court involvement in discovery planning as well as informal conferences with the court prior to filing what are often very expensive discovery motions and would recommend that these be mandatory.

Second, I want to express my opposition to the presumptive limits on depositions, admissions, and interrogatories. The numerical discovery limits are a blunt instrument to address supposed over discovery. Several civil rights practitioners have noted the asymmetry in information. We wanted to approach this problem empirically.

Based on the survey of cases over the past
three years, the proposed discovery limitation would impact a significant portion of the cases we prosecute. And we prosecute both small individual cases, and large systemic cases.

Currently, over 40 percent of our cases seek relief for more than one person. And approximately 20 percent of the docket consists of these systemic cases.

For this three-year period of time, the agency took over five depositions in over 40 percent of the cases. The agency took over 25 requests to produce in over 40 percent of the cases, and served over 25 requests to admit in 15 percent of these cases.

As do most plaintiff-side attorneys submitting comments, we believe the more likely result from reducing the presumptive limits will be the considerable time faced and spent in motion practice on requests to exceed the limits. This will be a particular obstacle for the EEOC that often needs to go over the deposition limits.

Now, I recognize that many judges are very flexible in terms of increasing the current presumptive limits, but not all judges. Not all judges. And as you lower this, as you lower the
presumptive limits, we think that what we are going to see is much less cooperation on the part of the defense bar to agree to raise the presumptive limits.

And in cases involving individuals, in cases involving low-wage workers where there's a tremendous amount of discovery required, often to obtain fact witnesses within the control of the employer, we think that this will be a real burden.

As I started to look at the proposals, and I came to this process late, I will admit. I was struck by the sharp demarcation in views on the presumptive limits between the plaintiffs' civil rights bar and the defense bar. Given this sharp demarcation in views, any proposed changes should be based on a factual foundation.

As I started to look at what the factual foundation was for these presumptive limits, what I saw mostly were anecdotes and impressions. I recognize that discovery costs are rising and there have been studies that indicate discovery costs are arising. But it is not clear how much of this is attributed to the over discovery in cases, how much of this is attributed to raising
legal fees, how much of this might be
distributed -- contributed to other factors.

Thus, I urge the Committee to wait on any
proposed changes and to ensure first that any
reduction in the presumptive limits rest on an
empirical foundation before adopting what would
certainly now be viewed by many as a retreat on
the part of the federal court from its historical
role as a forum for the vindication of civil
rights violations.

This might include an examination of the
effectiveness of various protocols that have
been -- pilot protocols that have been adopted
across the country in federal court and state
court. There is a body of empirical evidence that
I think is emerging that will allow this Committee
to assess whether these changes are in fact
needed. I think at this point, I don't think the
case has been made that they are needed.

Thank you.

JUDGE CAMPBELL: Thank you, Mr. Lopez.

Judge Matheson.

JUDGE MATHESON: Mr. Lopez, the data that
you provided in your March 4, 2013 letter, and you
have alluded to this morning, leads me to ask
whether data also was collected on the frequency in which you had cases that exceeded the current presumptive limits and how often requests were made to exceed and what the results of those requests were.

Does that data exist?

MR. LOPEZ: I actually requested that information from our regional offices. And what we found is that in many cases, the judges, particularly in the large systemic cases, the judges certainly were cooperative. The other side was cooperative, because I think what we are seeing in many of the systemic cases is that the defendants want to take depositions of many of the claimants and many of the individual charging parties. So it's almost a situation of a joint interest in terms of raising these presumptive limits.

But I think where we have run into problems anecdotally are really on the cases involving one or two workers or the small class cases that often embody very important public values and often involve really extreme asymmetry of information in terms of trying to be able to obtain testimonial evidence from individuals
within the control of the corporation.

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

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

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

    JUDGE CAMPBELL: Other questions?

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

    MR. LOPEZ: You're talking about proportionality?

    JUDGE KOELTL: Yes.
MR. LOPEZ: We support it although I do have some reservations about -- that were raised earlier about the --

JUDGE KOELTL: Calculated to lead to the discovery of admissible evidence?

MR. LOPEZ: Not only that, in terms of the proportionality factors, in terms of the importance of the cost of the case.

We are a law enforcement agency. So what we try to obtain in our cases is not only individual relief, we try to obtain nonmonetary relief that will make sure that the violations do not recur.

This is a law enforcement function and it is something that cannot be monetized. And we would want to make sure that those considerations, those public interest considerations are weighed as well in this assessment.

JUDGE CAMPBELL: Other questions?

Professor Cooper.

PROFESSOR COOPER: In your written comments you suggest that the limit on requests to admit, something that has been very seldom addressed, should be considered in light of the need to submit what sounds like essentially the
same request to admit essentially the same fact in several different forms so that in the end, you will hit on a form the respondent feels compelled to admit.

How frequently do you encounter that use of requests and how well do they work?

MR. LOPEZ: I think requests for admissions can be a very, very effective tool. I think the problem that all lawyers face is that often the ideals of cooperation are not necessarily achieved in the discovery process. I think there are many of us who would just love to try cases and bypass discovery altogether.

But I think given the realities that we often face in our litigation in terms of the types of objections that are raised, the sort of instinctive objections that are raised, I think my point really went to the fact that it’s really important that we craft these right. And to the extent that one formulation triggers an objection, that it’s often important to craft an alternative formulation as well.

JUDGE CAMPBELL: All right. Thanks very much for your comments, Mr. Lopez.

We are going to have one more speaker
before the break, that's Mr. Howard, and then we
will take our morning break.

MR. HOWARD: We have a demonstrative that
we are going to just spend a minute setting up.

JUDGE CAMPBELL: Okay.

MR. HOWARD: Good morning. My name is
David Howard. I am corporate vice president and
deputy general counsel at Microsoft Corporation in
charge of both litigation and antitrust. And I'm
honored to be here.

I want to state at the outset that
Microsoft is very supportive of this Committee's
work and this set of proposals. The rules
governing discovery have not kept up with the
explosion of electronic data generated and
maintained by businesses.

For a company like Microsoft, to do what
we believe is necessary to comply with the rules
is expensive, disruptive to the business of doing
business, and in many if not most cases
disproportional to the benefits gained.

I'm happy to answer any questions later
about other proposals, but I want to focus my
testimony on Rule 37(e) and the proposals relating
to that rule. And I'm going to do that by
focusing on some specific Microsoft data and then
talking about how I think the proposed rules will
help address the problem.

In 2012 as we prepared for the Dallas mini
conference, we debated whether to share Microsoft
hard data with this Committee, data which had
previously been considered pretty confidential.
We decided to do that and to put our money where
our mouth was. And today we do it again with
updated data based on even more recent
information.

As you can see at the top of the
demonstrative, and we are going to leave some
handouts in the courtroom and append a copy of
this inverted pyramid to our comments that we will
file later.

In 2013, we preserved on average over 59
million pages per average case. In the average
case we processed over ten and a half million
pages of data. And by "processed," I mean that we
applied technical tools to filter and to
duplicate.

After this processing was complete in the
average case, attorneys reviewed about 350,000
pages for privilege and responsiveness. We
produced about 87,500 pages in the average case, which we believed to be responsive. And according to industry data, which is consistent with our own experience, about one in a thousand pages produced are actually admitted into evidence at trial.

To put it another way, for each page that is actually used in evidence, we produce 1,000 pages, review 4,000 pages, process 120,000 pages, and preserve over 670,000 pages.

Depending on the tape of case, we spend 30 to 50 percent of our out-of-pocket litigation dollars on discovery. In the last decade, we paid about $600 million in fees. $600 million in fees to outside counsel and vendors to manage discovery.

And the figure does not even begin to address all of our costs. It doesn't address our internal costs. It doesn't address our opportunity costs based on the time thousands of employees under preservation must take away from other productive tasks. It doesn't address the costs spent to settle cases, cases that are often without merit, simply in an effort to avoid the preservation and discovery burdens I have described.
And let me be clear: We have overpaid in cases to settle, to avoid the burden and expensive discovery. In other cases, we've decided to fight even though, frankly, on a pure cost benefit analysis, we should settle.

In terms of actual preservation data, in 2013, we preserved over 1.3 million pages per custodian. That's a 425 percent increase since we first began measuring this type of information in 2010.

Today, at Microsoft, we're preserving over 261 terabytes of employee data alone. That comes to about 11.5 billion pages.

So there's a problem. And we believe that the proposed amendments are an important step in addressing that problem.

Proposed Rule 37(e) has the greatest potential to reduce over preservation in the short term. I say this with one proviso. The rule must make clear that spoliation sanctions are only appropriate on a finding of culpable intent.

Using a word like "willfulness," which the Supreme Court has already recognized in a couple of cases is one particularly susceptible of many different meanings, injects the type of
uncertainty this proposed rule is trying to
remedy.

In a world in which we face significant
spoliation sanctions, even where we take
reasonable steps to preserve relevant material, we
have no choice but to over preserve, to go well
beyond the list of employees reasonably likely to
have relevant information. We will often put
those employees' management chains and all of
their direct reports under a litigation hold as
well.

We don't do this because we believe that
that expanded circle has unique or important
information. We fear that if we don't, the
requesting party will argue that the hold was too
narrow and the data was likely lost.

Rule 37(e) should reduce the need to over
preserve as a form of insurance policy. At the
same time, I don't think that the proposed rule
will lead to the loss of relevant data through
sloppy practices. It is in Microsoft's best
interest to locate and preserve key sources of
information. They are just as likely to hold data
relevant to our own claims of defenses as those of
our adversaries.
What we are trying to avoid is preserving dozens of hay stacks just to avoid the risk of later being accused of missing a needle that may or may not have been there in the first place.

There are many causes for the costs and efficiencies in our current system and there are other steps that we can collectively take to address some of these issues. Educating the bench and bar, technological changes in information management improvements will all help, but the problem won't be solved without fundamental rule reform.

Our rules remain rooted in a paradigm from an earlier era, a paradigm that incentivizes overbroad discovery and over preservation. To really solve the problem, the rules need to change in a way that moves us toward merit-based discovery.

Again, I would like to commend this Committee for the work that it's doing and for moving us in the right direction.

Thank you.

JUDGE CAMPBELL: All right. Thank you.

Judge Grimm.

JUDGE GRIMM: Just one quick question on
the issue of willfulness. And we've heard that there are a number of alternatives that people have identified, willful and bad faith or get rid of willful.

Is there a definition of "willful" among the many that have been articulated in different contexts by the courts that if we were looking for a definition to try to address the uncertainty that you fear that an undefined version would have that you would put for us to consider?

MR. HOWARD: I think that the definition put forward by the Sedona Conference of specific intent is a good one. I think it's -- it's rooted in the law. If you look at the Ratzlaff case in the Supreme Court for instance, I think it essentially adopts that same definition in another context. So I would propose that that's the right way to go.

JUDGE GRIMM: Thanks.

JUDGE CAMPBELL: Judge Pratter and then Judge Matheson.

JUDGE PRATTER: Mr. Howard, I would first like to say when I was in practice I paid David a lot of money to do a lot of discovery, so I know a little bit how he counts.
But I would like to know what's the definition of the average case that you've used when you gave us the standard?

MR. HOWARD: Well, it's based on aggregate statistics. And obviously we handle everything, you know, from employment cases --

JUDGE PRATTER: It's not a dollar amount or a type of case?

MR. HOWARD: Yeah, it's not a dollar amount or type of case. I mean, we have huge patent cases and antitrust cases. And we have much smaller employment cases. So it's an average based upon the number of custodians on an average basis.

JUDGE CAMPBELL: Judge Matheson?

JUDGE MATHESON: That was my question as well.

JUDGE CAMPBELL: All right. Rick.

PROFESSOR COOPER: Mr. Howard, I think you said something like you preserved more or less 670,000 documents for every one that was used at trial, some number like that?

MR. HOWARD: Right.

PROFESSOR COOPER: Can you tell me how, back at the time you become aware of a possible
litigation or you are sued you would go about identifying those and preserving only them?

MR. HOWARD: Preserving --

PROFESSOR COOPER: Instead of a much larger number.

MR. HOWARD: In other words, if the rule is amended as proposed, how would we go about it differently than we go about it now?

PROFESSOR COOPER: I guess in addition to that, just how one would, from that information base back when the lawsuit is filed, foresee what will turn out to be important when the trial arrives.

MR. HOWARD: Well, I mean I think that the process that we go through is relatively simple now in terms of trying to overpreserve. And it will become even simpler, you know, if the rule is amended.

I mean, we look at the employees who are likely to have relevant information. We look -- obviously look at the claims and the potential defenses in the case. We look at the -- the not only what might be important to the plaintiff, but what might be important to us as well.
If the rule is amended, our goal would be to preserve the information that we believe is potentially relevant to those claims and defenses. What we do now, however, requires us to go well beyond that. And to over preserve and be as conservative as possible in order to avoid the possibility that somebody could later accuse us of hiding the ball.

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

We are going to take a break. We will resume promptly at eleven o'clock with Mr. Stoffelmayr.

(A recess was taken.)

JUDGE CAMPBELL: All right. Let me mention one scheduling matter. We are running about ten minutes behind schedule. The members of the standing committee who are with us, and we appreciate them being here, need to leave right at noon, so you all should feel free to stand up and walk out. We won't be offended. They need to be on a bus by noon, because they have a busy schedule this afternoon.

And as a reminder to us on the Committee, we need to keep our questions short and to the
point so that we give folks maximum opportunity to speak.

It means we will probably run into the noon hour by about ten minutes, but we will do our best to stay on that schedule.

All right, Mr. Stoffelmayr.

MR. STOFFELMAYR: Thank you very much. My name is Kaspar Stoffelmayr. It is a real honor to be here. I'm the vice president and associate general counsel at Bayer. I serve as the head of the litigation function there.

And before coming to Bayer, I had a broad civil litigation practice primarily in the federal courts representing both plaintiffs and defendants.

Just a little bit about Bayer. It is a truly global operation. Here in the United States, we have about 12,000 employees. And we are active in fields ranging from pharmaceuticals to agricultural chemicals to plastics and films and materials of that nature.

As someone who has devoted my entire career to litigating cases in the U.S. courts, it has really been striking and disappointing to me from my experience at Bayer in representing other
international companies in private practice, that
I think if you were to take a poll of general
counsels of foreign companies and ask them where
would they prefer to have a major legal dispute
resolved, either as a plaintiff or a defendant,
virtually none of them would say the American
courts, probably wouldn't be on their top three in
most cases.

And I thought a lot about why that is.
And it's not because our courts don't do a great
job deciding cases on the merits. I think we
probably have the world's premier system, our
system of jury trials for resolving disputed cases
on the merits.

The reason is the extraordinary cost of
getting to a decision on the merits in the
American courts. And that takes us, I think,
directly to the cost of discovery.

In the typical large case, virtually
nothing will occur that requires any resources
other than discovery. There may be some motion
practice, may be expert work. But the cost of
that will not approach the cost of discovery in
the average case.

And with that background, I want to focus
on the proportionality issue that has been discussed in some detail this morning but maybe with a slightly different perspective.

I know people disagree sometimes strongly about what the right conclusions are to draw from the Federal Judicial Center closed cases survey. But one thing I think it clearly shows is that there is a large group of cases, exactly how large people might disagree about, but a large group of cases where the stakes are relatively speaking low, the disputed facts are relatively simple, and not a lot of discovery occurs.

No change to the rules on proportionality is going to have any effect on those cases. The discovery going on in those cases already is proportional. There's not much discovery going on.

But there's also a very important group of large cases where the situation is very, very different, and there is a real need for reform.

And in talking about that, I want to focus on the part of the proportionality rule that has been referred to tangentially, but I don't think has been a focus of the discussion, and that is that discovery has to be proportional not just to
the amount in controversy, not just to the resources of the party, but even in the biggest cases where both parties may have tremendous resources, and where the amount in controversy may be very high, has to be proportional to the importance of the discovery in resolving the issues in the case.

Sometimes as practicing lawyers we act as if discovery is an end in itself. Sometimes it certainly feels like it is an end in itself. But, of course, it's not. The whole point of discovery is to develop the evidence that will be useful to the trier of fact in deciding disputed issues, disputed factual issues. That's why we are doing discovery in the first place. And if the burdens of discovery are not proportional to that purpose, we are doing something wrong.

To try to get a sense of how far out of whack things have become, we looked at our last trial of a large case, that is other than a single plaintiff employment case, and compared what we did in discovery to what was actually used by the trier of fact in deciding the case.

We thought this would be a relatively conservative example in the sense that the
discovery record was, relatively speaking, modest. We produced just over 2 million pages, 2.1 million pages. For us that is a relatively small document production. And it was a long trial. It was an eight-week jury trial.

And even then, only four/hundredths of one percent of discovery documents were used as exhibits at trial and played any role in the jury's determination of the facts. I think the ratio would be worse in other cases where you had a shorter trial, maybe a one or two-week trial and a larger document production.

And I know my time is up in a moment, but what I -- what I think we can take from that is surely we can do better. You know, clearly in our system discovery is going to go well beyond the trial record. The discovery record may be 10 times, 100 times, even 200 times the trial record. And that would be completely proper.

But where we've gotten to a system where the discovery record exceeds the evidence actually used at trial by a factor of two, three, five thousand times, things are out of whack. And surely we can do better than that without closing the courthouse doors to anybody.
JUDGE CAMPBELL: All right, thank you.

Questions? Judge Oliver?

JUDGE OLIVER: Yes. Mr. Stoffelmayr, I just wanted to go back to something you talked about when you started out. And you said that major companies or major -- general counsel of major corporations would -- foreign corporations would prefer not to have -- prefer other places, other venues to litigate their cases rather than litigating them here in the U.S.

And I guess my question is: Do you have examples from those other countries as to how they effectively and fairly handle the kinds of issues that we are dealing with here? Because it's not just a question of what you prefer so much by itself, but it's also a question of fairness as relates to all litigants. And so are you satisfied that those systems are fair and how do they handle the complex issues that we are talking about?

MR. STOFFELMAYR: Sure. Obviously every system is different and handles things differently. Some systems are terribly unfair and nobody would ever say I want to have my disputed litigated there unless you thought you were going
to be the beneficiary of the unfairness, I suppose.

But certainly there are examples that you couldn't easily import to our system. For example, in civil law countries where the fact finding is done by a judge and done through a sort of piecemeal process where the judge takes -- takes complete control of the fact finding and the evidence gathering in sort of an ongoing way over the life of the case. I think it would be very hard to import something like that into the U.S. system, because we use jury trials. And that's one of the great strengths of our system.

But at the same time, there's systems like the British system where they do have single-event trials the way we do and manage to conduct it with far, far less discovery. Many companies obviously in forum selection clauses will seek arbitrations before the ICC. And in those proceedings typically discovery is very limited.

I don't think it's a limiting scope of discovery in the way we are talking about really raises a fairness concern, because I'm not talking about depriving anybody on either side
of -- depriving them of access to those documents that really make their case, and the additional set of documents that might help them find those. It's the other 80 or 90 percent of documents that we tend to request and tend to produce that don't benefit anybody.

And I think a telling example, too, from our own system, how we know this can work, is if you consider disputes between large corporate parties where they tend to have -- in a case where they have similar resources and where the nature of the case means the discovery burdens will be symmetrical, they tend to get by with far less discovery than you see in cases where the disputes are asymmetrical.

I think of patent cases I have been involved in where the stakes were as high as any case, in the many hundreds of millions of dollars. And the parties had no trouble getting by with five to ten depositions, and document productions of a couple million pages.

JUDGE CAMPBELL: All right. We've got a little less than a minute. Any other questions? No? John, quick question, please.

MR. BARKETT: Just wondering whether in
the example that you gave, the 400 something percent example, whether you went back and looked at the request for production to figure out whether the actual trial exhibits that were used related only to a small subset of the request such that your 2.1 million pages would have been a half million pages had you focused the discovery on areas that -- that related to what was actually used at trial.

MR. STOFFELMAYR: No, we haven't done that, but that's a very interesting question and I'm going to do that.

JUDGE CAMPBELL: All right, thanks so much, Mr. Stoffelmayr.

Mr. Saenz.

MR. SAENZ: Good morning, honorable Committee members. My name is Thomas Saenz. I am the president and general counsel of MALDEF, the Mexican American Legal Defense and Educational Fund. MALDEF is now a 46-year-old national civil rights organization whose mission is to use the legal system to promote and protect the civil rights of all Latinos living in the United States.

As you might imagine, much of our work is in federal court litigation. Indeed, at any given
point in time, we maintain a docket nationwide of
between 25 and 35 active cases, the vast majority
of which are in the federal courts.

Our cases fall in four issue areas:
Education; employment; immigrant rights; and
voting rights. And as a result of those
particular issue areas, with the exception of
education, most of our cases are in fact federal
question litigation in the district courts of the
United States.

My comments this morning relate to the
presumptive limits, the changes in presumptive
limits on discovery and the creation of a
presumptive limit on requests for admission as
well as to the elevating of the proportionality
requirement.

As I mentioned, our education cases, as a
result of a Supreme Court decision some 30 years
ago -- some 40 years ago, tend to be in state
court these days. But our other cases in
employment, immigrant rights, and voting rights
are in federal court.

But you've already heard much testimony I
believe about employment, so this morning I want
to concentrate on two elements that are increasing
in proportion of our docket in voting rights and immigrant rights.

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

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

To be more specific, in the voting rights context, our cases are under Section 2 of the
Voting Rights Act of 1965. Section 2 under a Supreme Court decision some 30 years ago is governed by a totality of the circumstances test. You can imagine with a totality of the circumstances test how much evidence is potentially relevant and necessary to successfully prosecute these cases.

In these cases, because of the breadth and type of evidence that can be presented, and how long these cases take to try, often requests for admissions in particular play a significant role in streamlining the pursuit of these cases.

Let me note finally that these cases will increase in magnitude as a result of the decision last year by the Supreme Court in Shelby County versus Holder, which took away Section 5, a protection against changes that will now have to be challenged to this very contentious Section 2 litigation.

With respect to immigrant rights, our cases tend to challenge state and local statutes and ordinances that seek to regulate immigration. And we generally contend that they are preempted because of the exclusive federal right to regulate immigration in this country.
Even though these are often facial challenges, we have found ourselves having to engage in contentious discovery around the intent behind these laws, particularly if an equal protection claim is alleged along with preemption claim.

And we have often found as a result of the Supreme Court's decision two years ago in Arizona versus United States, that what may have started as a facial challenge becomes an as-applied challenge looking at the specific practices and policies that would be followed to implement statutes and ordinances that on their face have a lack of clarity around them.

These immigrant rights cases and these voting rights cases create an increasing proportion of MALDEF's docket. As I mentioned, our total docket is between 25 and 35 cases. At least half of that today is comprised of these complex, highly contested cases under voting rights and immigrant rights.

Because of the characteristics that I described earlier, a differential in access to evidence and the highly contested, indeed very public nature of these cases, setting presumptive
limits at a lower level for discovery will hamper the ability of plaintiffs across this country to engage in this type of critically important federal court litigation. I therefore urge the Committee to reconsider its reduction in presumptive limits on discovery, and indeed to reconsider its creation of a presumptive limit on requests for admissions and to reconsider its elevation of the proportionality requirement with respect to discovery across the board.

Thank you.

JUDGE CAMPBELL: Thank you, Mr. Saenz.

Dean Klonoff.

DEAN KLONOFF: Sir, some of our witnesses have been more concerned about the proportionality piece, others have been more concerned about the discovery limitations. In fact, the EEOC generally supported the proportionality.

As between the two bundles of issues, which is of more concern to you?

MR. SAENZ: Well, on its face, the presumptive limits would have a more immediate impact. I think there are questions about how the elevation of the proportionality requirement into Rule 26, what its effects would be. I do,
therefore, have concerns about how that might in
practice be implemented.

In the highly contested cases that we are
involved in, there is resistance. As I indicated
previously, sometimes that resistance is not
driven by the lawyers. Indeed you have the strong
sense that they would wish to be more cooperative.
But because these are political cases, they are
being pushed by their clients to be much more
contentious.

In that context, I am concerned that the
proportionality requirement being elevated could
give them another tool to engage in resistance to
legitimate discovery requests.

In every case, at least publicly, the
defendants are claiming that the claims against
them, the lawsuits against them are not
significant, are not important, should never have
been filed. That's the context in which these
cases are litigated.

JUDGE CAMPBELL: Other questions?

Mr. Saenz, I have one if I could ask it.

I'm assuming that in a number of these
high profile voting rights or immigration rights
cases, the discovery exceeds the current
presumptive limits of 10 depositions and 25 interrogatories.

MR. SAENZ: That's certainly the case in voting rights, yes.

JUDGE CAMPBELL: Have you had trouble getting judges to agree to exceed those presumptive limits?

MR. SAENZ: I think it's been a mixed bag. Some judges are more familiar with Section 2. And in some cases you have defendants who are familiar with Section 2 and have been involved in it often with the same plaintiffs' lawyers multiple times before. In those cases, generally you can reach an agreement or you can convince a court to give you additional discovery.

In other cases, it's a lot of education. It's a lot of argumentation that's required, and I would just note that these are already cases that are quite resource intensive and long running. And adding additional motions, additional debates, additional practice before the court on discovery simply takes cases that are already in my view quite costly and quite time consuming and makes them even more so.

In a context where quick resolution may be
critically important, particularly in voting
rights you may be looking to get a resolution
prior to an election or more importantly prior to
filing deadlines for an upcoming election, so
streamlining is really important.

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

Mr. Arkfeld?

MR. ARKFELD: Your Honor, I want to say
may it please the Court since I had the
opportunity to practice here for many years. My
name is Michael Arkfeld. I do not represent any
groups today of any type, whether plaintiff or
defendants, requesting or producing parties.

I think I -- the question I want to
address today is different, I think, to some
extent, is whether these proposed rule changes
will increase or enhance access to our justice
system. If these rules decrease meaningful access
to our system because of proportionality or some
of the other issues or proposed changes, should
they be adopted.

I think I bring a rather unique
perspective here today. I'm -- I was, am a trial
attorney. I was -- I represent plaintiffs for
five years, was a prosecutor for 12 years, and the
last 20 years served as an Assistant U.S. Attorney
for the District of Arizona representing the
United States in civil actions, multimillion
dollar medical malpractice, a variety of civil
actions.

For the past 14 years I've written
extensively, instructed extensively in the area of
electronic discovery. I have the privilege of
reading every eDiscovery opinion so I can update
my treatise twice a year. I find it very
fascinating in terms of the history of what we've
moved through through the last 14 years.

However, I would like to make one
preliminary comment, one that concerns me greatly
from the comments I've heard before is I do not
hear about a lot of the technological changes or
advancements we've made concerning electronically
discovered information.

I've maintained for the last 13 years when
I first saw e-mail, text messages,
chat -- SnapChat, a variety of other things that
we are seeing today that what technology has
created in terms of a problem, can be solved by
technology. And we've seen that, especially this
last couple of years.

Some of us have thrown around the term of predictive coding. Some very respective jurists throughout the country are saying that has reduced the cost of discovery one/fiftieth to what it was before. So a hundred thousand dollar cost of eDiscovery has now been reduced to $2,000 if you look at it from that perspective.

We are going to see more advancements in that area. It is a moving target, there's no question about it.

I've heard today testimony about a million documents, two million, six million, 600 million, and yet when we talk about that, we need to talk about the technological issues with that also.

How fast can we search a million documents? A matter of seconds.

How can we cull, produce, use hash, algorithms, duplicate, how do we use 502(d) of our rules to reduce that information and to protect all parties in access to the court system? Those are the things I hope we focus on in terms of the access to justice.

There's an agenda for a justice statement by the ABA. I won't go into it entirely. But
first any change to the justice system should be based on desire to protect, enhance ability of all persons to use the justice system.

There's a Georgia study that came out in 2009 that said essentially between 70 to 80 percent of all Americans from low to moderate income do not have meaningful access to the justice system.

Now there's a variety of reasons for that. They don't know their rights, complexity of the case, cost of the system. But we don't really have a system that's available to most Americans today.

That's a whole different issue. Obviously we are very much invested in the system that we have today.

For background purposes and one of the issues about access to justice, I've had the opportunity to talk to two businessmen over the last two months on airplane flights. Since I teach like twice a month at either government agencies or law firms across the country, very intensive eDiscovery discussions about technology and legal issues.

And these two businessmen I said to them:
How much money has to be in dispute before you
would take a case to federal court? And both of
them said, without hesitation, $75,000 or they are
not going to take it. It would just be a wash if
it was $75,000.

I said what would you do with any disputes
under that? They say we just write them off,
generally speaking.

I think we have a system that we need to
reverse. We need to make more meaningful access
to it. For example, with proportionality, what
concerns me about taking that rule out of the back
and moving it to the front is this: When I was an
advocate for the United States Government, if I
had that rule, one of the first things I would do
is I would go to my client, and I would start
talking to their IT department and I would say to
them: What kind of servers do you have, legacy
systems, unallocated space on your hard drives,
application and system meta data, BYOD devices,
and a myriad of other ESI media sources, types,
locations?

And they would say to me: Mike, we have
all of this information.

I say: You need to give me a cost of what
it's going to cost to acquire all of that information, put it together.

    They would give that to me, I would go to the plaintiff, whoever filed the lawsuit and say, well, this is expensive. And you need to get information, you need to get experts and other people to refute what I'm saying here.

    And that little interaction with moving proportionality to the front of that rule is going to costs tens of thousands of dollars in e-motion costs. I mean in the motion cost.

    As an advocate for the United States it would be something that I would utilize if the facts presented that.

    And so what I'm urging, you know, this Committee here today is if you're going to move that or any of these rules, look at it from an access to justice. Are we taking our justice system where we make it easier to access or are we increasing the eDiscovery cost as we put these rules into effect?

    Unfortunately, I think we are limited in time when there's very little meaningful access to our justice system, just complexity, costs and now eDiscovery.
With eDiscovery, when we look at it, we look at a system that started developing in 1985 when we first got desktop computers. I started using them in ’87 for the Department of Justice, putting all my information on it because I knew it would level the playing field.

But in the last 30 years approximately we have not kept up with technology. We just saw the ABA in 2012, September, first pass some comments regarding competency of lawyers in technology. They called it the bewildering rate of change in technology.

I don't think there is a bewildering rate of change. I don't think we are going to see a lot more change. We are going to see different locations, access, more advancements. But in terms of technology, full text databases, that will remain constant and current.

Though a digital paradigm shift has occurred for the rest of the world, I would maintain that the courts and legal profession, we have not kept up with it. We've seen some real important movement in that area, one of them is to reinvent the law, how the University of Michigan, State University College of Law by Dan Katz and
some of the things going on there. I would urge you to start looking at that in terms of accessing our justice system.

But I urge the Court here today, I mean the Court or the Committee, to start looking at the technological advancements that are occurring around us all the time now. They have a profound influence on these proportionality rules, on the 37(e) and the rest of them.

And so if you have any comments, I'm here for that.

JUDGE CAMPBELL: All right. Thank you.

Are there questions? John?

MR. ARKFELD: Yes, John.

MR. BARKETT: In your example that you gave of having all these various storage media, if there was no rule change made, how would you handle that same issue?

MR. ARKFELD: If there's no rule change in terms of --

MR. BARKETT: I heard you describe that there were four or five, six, seven, eight, nine, ten different sources of electronic storage media and if the rule change were made, you would go to the requesting party and say: This is going to be
very expensive, how are you going to deal with it.

But if no rule change is made, how would you deal with that same set of facts? What would you be doing?

MR. ARKFELD: First, I don't think there's seven or eight different sources. I think there's probably 40 or 50 different --

MR. BARKETT: 40 or 50 sources. What would you be doing under the current rules?

MR. ARKFELD: What I would be doing is, number one, I would go to my agency and I would say to them, hopefully before litigation occurs, let's put our house in order in terms of electronic information. We need to put it in a methodology where we can take --

MR. BARKETT: I accept that, but your example was that you had a lawsuit, there were these various storage devices, and it was going to be very expensive. I'm just trying to understand under the current rules how you would handle that.

MR. ARKFELD: Under the current rules I would go to my agency and figure out the cost, go to the other side and sit down with them, meet and confer and try to figure out with them whether we can reduce the scope, the number of custodians and
a variety of other issues.

If we are unable to do that, then I'm sure there would be a motion to compel of some sort or I would file a motion asking the court to issue a protective order for a possible proportionality.

JUDGE CAMPBELL: So I think the question is how do you think that would be different if we adopted the proportionality change that's been proposed?

MR. ARKFELD: From my experience if I was still an Assistant U.S. Attorney, I would look at that rule and immediately go to my client and start talking with the other side about proportionality and bring it to the forefront in terms of cost and that. And before, I think I probably, to some extent, you would try to work that out.

Proportionality, under the federal rules is, I don't want to say it's not at the forefront, it's behind. And the cases I've read, there's very few cases that even discuss proportionality. And I think part of the reason for that litigants don't realize it is there for them.

If you are going to move it to the front, I think what you are going to have is you are
going to have a lot more litigation on proportionality. It's going to decrease the access to the courts, because I sincerely believe it's going to cost tens of thousands of dollars to bring it up.

But I, you know, when you work for the Department of Justice, we are there to seek access, you know, to seek justice. And so as part of what I was doing was always trying to ensure that they had the correct electronically stored information from the perspective of custodians and sources and media types and that type of thing. So for me, I would not -- I mean, I would bring it into the meet and confer, that type of thing.

I think if you move it to the front, I think you're going to get a lot more litigation.

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

Professor Coleman?

PROFESSOR COLEMAN: Thank you to the Committee. I was fortunate enough to clerk for Judge David F. Levy when he was chair of the standing committee, and so I have great admiration for the work that you all do as committee members as well as a deep admiration of the rule-making
process itself.

And it's that admiration for this process that brings me to you all today to discuss the proposed abrogation of Rule 84 in the official forms and how I would argue that that proposal violates the Rules Enabling Act.

In short, the rules and the forms are one in the same. In order to understand what the rule means, you have to look at the form. This means that in order to change the rule, you must consider or to change the form, you have to consider the rule and the form together.

This is because a change to the form necessarily changes the rule to which it corresponds, meaning that in order to comply with the Rules Enabling Act process, you have to take both that form and the rule through the process, through consideration, and through publication.

Here, the abrogation of Rule 84 in the forms is being done without reference to the rules to which they correspond. And that I argue violates the Rules Enabling Act.

I have three quick points to support this argument. First, looking at the history of Rule 84 itself, the -- when the original rules
were adopted in 1938, Rule 84 was there. It was amended in 1946, however, to make clear to parties and courts that the forms were not there as some kind of passive indication of what the rules meant. They were there as an active illustration of what the rules meant. And that rule change was made because courts were not using the forms as sufficient under the rules.

So the changes in the wording tell us that now the forms are demonstrative and sufficient. But I also think that the amendment in and of itself shows us how the rules and the forms have to be considered together.

Second, if we look at the way the forms have been changed over time, this is really helpful in seeing how the rules and the forms are linked. In almost every occasion where meaningful change has been made to the form, it has been done in concert with a change to the rule that that form corresponds to.

So, for example, when Rule 4 was amended to add the waiver of service of process provision, Form 18(a) was abrogated and forms 1(a) and 1(b), now 5 and 6, were added.

If you look historically at every time the
forms have been amended, this is the pattern. The forms are amended and they're amended in concert with the rule.

        Now, there are exceptions. Sometimes federal statutory changes mean that the forms have to be changed as well. So when Congress changed the amount in controversy requirements in 1993, the forms had to be amended in order to reflect those requirements.

        But there again, the change was not done in isolation, it was done in concert with the change to federal statutory law.

        In my research, looking at all the times the forms have been changed, the only time the forms have been changed without reference to a rule or federal statutory law has been administrerential or administrative change. So a change -- the date indication from 1900 to 2000, the two -- that kind of thing is done without reference to the rules.

        But what this shows us is that if we look at it historically, changing the rule or changing the forms without reference to the rules or without reference to federal statutory law is incredibly atypical.
Third, we have a ready example of how this abrogation is going to be problematic. And I know the Committee may not want to hear about this but Twombly and Iqbal, as you all know, has caused a lot of consternation with respect to Form 11.

The court in Twombly, of course, cited Form 11 approvingly, but we haven't heard anything from the court since. And the rules committees have done an excellent job discussing this confusion that the -- that those cases have created, both with respect to the form and specifically with respect to Form 11.

But I would argue that discussion that you're having kind of proves the point. The form and the rule are connected to one another. And that while we don't have to necessarily agree, and I think we can agree to disagree about whether or not we need to use Form 11 to any great degree to figure out what Rule 8 means. The fact that we are having this discussion shows us that they are connected. And that is because a change to Form 11 necessarily changes the rule.

And here's where I argue we have the Enabling Act process violation. That rule change, that change to Rule 8 has not been vetted by the
Committee and has not been taken through the Rules Enabling Act process, through publication and otherwise. And because those two things have not been considered together, I argue that this is a violation of the act.

So between the history of the rule itself, the history of the way the forms have been amended, and this example of how Form 11 and Rule 8 go together, I think it shows that the rule and the forms are kind of inextricably linked.

And my hope would be if the Committee seeks to continue to undertake the abrogation of the forms, it would do so by looking at the forms and the rules in concert and taking those rules and forms through the process, through the Enabling Act process anew, and hopefully when you go back to deliberate you will consider this option.

Thank you.

JUDGE CAMPBELL: Thank you.

Questions? I do have a question for you.

PROFESSOR COLEMAN: Sure.

JUDGE CAMPBELL: The motivation on the part of the Committee, if I can dare to try to characterize what we are all thinking, but I think
it's accurate, is to get us out of the forms business. In part because many of the forms are outdated. We don't do a good job, and, in fact, it would be very difficult to do a good job of keeping them current through the full Rules Enabling Act process.

Not all of the rules committees, as you know, run their forms through the Enabling Act process. And our thought has been it's going to be virtually impossible to stay on top of that. We haven't done a good job. They are outdated. Nobody uses them. Let's just get out of the forms business and leave it to other entities to propose forms.

If that's the objective, I guess the question I have is: If that's the stated objective, that's the published objective, we are proposing it in that way, why is it necessary, then, to go form by form and, as I understand it, have a public discussion of whether we should eliminate this form under this rule, or why is it necessary to publish every rule that relates to the forms we are trying to just get rid of?

PROFESSOR COLEMAN: Well, I think that goes back to my point that I think the forms and
the rules are inextricably linked and I don't think that you can change the form without changing the rule.

And I understand the Committee's point about the time that it would take to update these forms. I mean, first of all, I would say that the Committee is well -- well -- is -- you do an excellent job of keeping on top of the forms. It's shown that it can do large projects and do its other tasks.

But putting that to the side, if the Committee is interested in getting out of the business of the forms, I think the answer is to publish all the forms with the rules that they correspond to, offering that you're abrogating those forms.

The reason I think this is important is because that's the Rule Enabling Act process. It may be the case that the response from the bench and the bar is that they will welcome this, and that they don't see that this is a major change to the rules. But that is -- that's what that process is supposed to do. And I think the default should always be to make sure that that process is being heeded to.
And so it could be that at the end of the day we end up abrogating the forms and that's fine. But I would like to see the Committee go through the process of making sure that the bench and the bar have a chance to respond to what I argue is a change to the rules by eliminating some of these forms.

And you can see from the level of comments that you're getting that I'm one of the sole testifiers on this, that this is not something that has really caught the attention of the bench and the bar.

JUDGE CAMPBELL: Judge Pratter?

JUDGE PRATTER: I'm having trouble understanding why you think that the process is part of the Enabling Act. Because I thought the process really came from Section 2073(a)(1), which is a judicial conference --

PROFESSOR COLEMAN: Sure.

JUDGE PRATTER: -- which could be changed.

PROFESSOR COLEMAN: Sure.

JUDGE PRATTER: That doesn't mean it's part of the act.

PROFESSOR COLEMAN: Well, I think that we consider it to be part of the Enabling Act
process. So maybe I'm not being fair in stating
it as the Enabling Act, but I consider that to be
part of the Enabling Act process. And, sure, it
could be changed but it hasn't.

And I think there's something, I mean, we
are civil procedure people. We are about process.
This is what we specialize in. And I think in
this particular case, a process that has been
followed time and time again is that when a rule
is changed, it's put through the committee
process. It is published for comment. Those
comments are responded to, the committee goes back
and considers those comments.

Here I argue you have a change that is
happening to the rules that's underlying this
abrogation of the forms, and yet that hasn't been
vetted by the Committee either. I mean, that
hasn't been discussed to a great degree. It's
been kicked around a little bit. But it also
hasn't made it through the process of having the
bench and bar respond.

JUDGE PRATTER: Again I'm going to keep
asking you for help.

PROFESSOR COLEMAN: Sure.

JUDGE PRATTER: Because I'm having trouble
seeing a link between a particular rule and an illustration, which the forms are identified as illustrative.

PROFESSOR COLEMAN: Yes, they are also identified as sufficient under Rule 84. And again that was the change that was made in 1946.

JUDGE PRATTER: But where does it say in a rule that here is a form to live by this rule?

PROFESSOR COLEMAN: Now if you abrogate Rule 84, you are getting rid of that. Rule 84 says that the forms apply and they are sufficient and demonstrate the rules.

JUDGE PRATTER: I'm not asking my question clearly. Where in any given rule does it relate to one of the forms that are currently available as an illustration? They are not exclusive illustrations, by the way.

PROFESSOR COLEMAN: No. And, in fact, the opening of the appendix says that they are not exclusive illustrations. And now the amendment that you all are proposing specifically incorporates some of the forms into Rule 4.

But you're right that none of the rules right now incorporate the form specifically by reference. But that's what Rule 84 was meant to
do from the beginning and as amended in 1946.

JUDGE CAMPBELL: Thank you.

PROFESSOR COLEMAN: Thank you very much.

Appreciate it.

JUDGE CAMPBELL: Ms. Larkin.

MS. LARKIN: Good morning, my name is Jocelyn Larkin. I am the executive director of the Impact Fund, a legal nonprofit which supports impact litigation to further civil and human rights, combat poverty, and ensure environmental justice. We do this through small grants to pay litigation costs through training and consultation with lawyers involved in these cases. We also have our own caseload of impact litigation.

I was an invited speaker at the Duke conference and also participated at the Dallas mini conference. We have submitted comments and we plan to supplement those.

I want to focus my comments on the perspective of litigants who are using the federal courts to seek systemic institutional reform. Those cases share certain distinct characteristics that I think are relevant to the proposed changes.

These are cases that are not about money. They seek injunctive relief to change governmental
or corporate conduct. They are cases that are frequently brought on behalf of vulnerable groups without personal resources or the capacity to essentially assist in the litigation. And to make that more concrete, I'm talking about children who are in an inadequate foster care system, persons with developmental disabilities who are inappropriately warehoused in institutional settings, prisoners who are denied medical care.

The third characteristic are these cases are very difficult. Plaintiffs are required to meet very challenging burdens of proof.

I think Mr. Saenz talked a bit about this. Systemic deficiencies we have to show, deliberate indifference, a pattern and practice of discrimination. We need to establish motive or state of mind rather of an entity rather than an individual. And we have to marshal a range of circumstantial evidence to meet our burden, not just to show liability, but also to get the class certified.

The discovery in these cases is entirely asymmetrical. We have to understand a very complex organization or bureaucracy with many players and multiple levels of decision making.
The cases, fifth, are brought often by nonprofit legal organizations with limited resources. These lawyers and thus these cases are uniquely vulnerable to a defense strategy of obstruction and delay.

I think that these cases also in social terms are among the most important and meaningful work of the federal courts, and a testament to our legal system and to our democracy.

The proposed rules will adversely affect these cases I believe in three ways, or at least raise three concerns for me.

The five depositions are insufficient to obtain the discovery needed to meet these very heavy burdens of proof. I think it's been raised that there is an ability to get agreement on the other side. I think the problem with lowering the limit is that you create essentially a new strategy -- a new first line of defense for the defense.

So in other words, they say to us: No, you can -- you can have the five deposition limit. Go to court to get anything in addition. It's a no-risk strategy for them, because if we end up getting maybe eight or ten because we aren't going
to get 15, but if we get eight or ten, the defense will automatically get that same number.

So whether or not we are successful in getting more depositions, we -- we've gone through the transaction costs, which in these cases, again, I said are very important.

I think also in terms of thinking about it, when you don't know at the outset how many depositions you are going to get, it's much more difficult to effectively plan your discovery. Do I need to do everything in five depositions, or am I going to be able to count on the fact that the judge will give me an additional three or five or maybe the ten that I actually need?

I think that making a complex five-part proportionality requirement part of the definition of discoverable information will also burden that process.

When you look at the factors again, these are cases that are not about money. So the amount in controversy calculus, which I know has raised a lot of discussion, actually isn't relevant in these cases.

That brings you to the importance of the issues that are at stake. And, of course, that,
to some extent is a subjective judgment and it can be in the eye of the beholder.

Just to give you a really simple example, a couple of years ago we helped fund a case to challenge the sex offender registration law in Michigan. Those are not popular people, certainly not with me. But the question is should a judge be passing on whether this is an important issue at the outset of the litigation.

It's often only in hindsight that we as a society recognize the severe injustice that these kinds of cases challenge. You know, when you think about marriage equality, prison condition cases, racially discriminatory police practices, at the outset, the cases are thought to be frivolous. At the end, we say: How did we ever let it happen.

And while there's no one else here to speak for them, I just want to remind everyone that when we add this complexity to the discovery standard, we need to keep in mind the pro se litigants who need to deal with that issue.

I also finally join Professor Miller in expressing concern about eliminating the Court's discretion to allow discovery relevant to the
subject matter upon a showing of good cause. I think this is a really important safety valve. And just to give you a really simple example, I do discrimination cases. If I have a gender discrimination case, ordinarily our discovery is limited to issues around gender discrimination and probably the particular practice that I'm challenging, say promotion.

But there are certain cases where if the woman is the only person there, discovery might be appropriate into issues concerning race discrimination or perhaps there are circumstances where sexual harassment might be relevant to that promotion discrimination case. I don't have a claim for race discrimination in my case, but in unique cases, that safety valve would allow the District Court to go beyond my claims and defenses.

And I'm happy to take any questions.

JUDGE CAMPBELL: Questions?

A question on that last illustration you gave.

MR. LARKIN: Um-hmmm.

JUDGE CAMPBELL: Why couldn't you argue in that case that because there are no other gender
promotion issues in the company, it is relevant to inquire into race discrimination practices or sexual harassment?

MS. LARKIN: I certainly would be arguing that, but it is not one of my claims. And the defenses will say you haven't made that separate claim.

I think another example, Judge Campbell, might be in a circumstance where I have one or two people who are challenging an inadequate foster care system. Those children might have one or two specific kinds of claims, but if we get into discovery and we realize that there is a systemic deficiency going on as opposed to just they made a mistake on one or two people. It may be important to go beyond what those two children's claims are to get a sense of that larger systemic deficiency.

JUDGE CAMPBELL: If I could just follow up on that. It seems to me that in that example as well, if you take the relatively lenient definition of relevancy, does it have any likelihood of making a fact in dispute any more or less likely?

You can make a strong argument that looking at these other instances of improper
conduct is very relevant to proving that misconduct occurred in your claim.

One of the things I think we discussed on the Committee in eliminating the subject matter reference was that nobody on the Committee, as I recalled when we discussed it, lawyer or judge, had ever heard anybody request a good cause extension to subject matter. Everything was focused on relevancy. And that seemed to be the arena in which all of the discovery decisions were made.

So I guess the question is, is two part: Do you really think the argument you would be making is not a relevancy argument? But secondly, has it been your experience in your cases that you do go to that subject matter provision of Rule 26(b)(1) and argue that to courts?

MS. LARKIN: Your Honor, I haven't necessarily and certainly my -- my focus is always going to be on relevance, but you are making a change to the rule and you are intentionally taking that language out.

And so the argument from the defense will be that that was intended to narrow the scope of discovery. And then that question of what is
relevant may become a different calculus than it has been in the past.

JUDGE KOELTL: Is it really an appealing argument to the court that you would say I can't argue to you that this is relevant to any claim or defense in this case, but it's relevant?

MS. LARKIN: Well, because there are circumstances in which we have an individual plaintiff who may present only a certain narrow set of circumstances about what happened to him or her. But we are looking at systemic institutional reform. And in that case, it may go beyond the specific facts of that person. So it could go beyond an individual facility to a broader point.

JUDGE CAMPBELL: Any other questions?

All right, thank you very much,

Ms. Larkin.

I'm going to mispronounce your name, Mr. Urquhart.

MR. URQUHART: Urquhart. Yes, Judge Campbell, thank you very much.

Again, my name is Quentin Urquhart, and I'm here as a partner from the law firm of Irwin, Fritchie, Urquhart & Moore in New Orleans.

I'm also appearing here today in two
capacities: First as a lawyer in private practice, who tries cases and routinely advises clients on the scope of their obligations to provide information that is discoverable under the federal rules.

Second, and probably most importantly today I appear in my capacity as immediate past president of the International Association of Defense Counsel, the IADC. The IADC is an association of approximately 2500 peer reviewed corporate and insurance attorneys for the United States and around the globe whose practice is concentrated solely on the defense of civil litigation. IADC members are partners in large and small law firms. They are senior counsel in corporate law departments. They are insurance executives.

Our members and firms represent the largest corporations around the world, but also thousands of small and midsized companies who are faced with the challenge today of completing in our global economy. And the cost of discovery plays a role every single day with those companies when they are a litigant in a lawsuit.

The IADC sponsors over 20 substantive law
committees covering virtually every area of civil practice from products liability to employment law, construction law to corporate work, from insurance law to white collar defense and trial tactics. Our lawyers are on the front lines each and every day litigating and trying these cases.

Our lawyers care deeply about the process of civil litigation. Our organization is one of the cofounders of Lawyers For Civil Justice, LCJ.

We, in sum, support a justice system in which plaintiffs are compensated fairly for genuine injuries, that responsible defendants are held liable for appropriate damages, and that nonresponsible defendants are exonerated without unreasonable costs.

We are involved in advising clients every single day about what they do with a particular matter that is before them. We want to base the advice to them as to whether they should settle a matter or bring it to trial based on the legal merits of the claim.

While transaction costs, meaning attorneys' fees and discovery costs, should play some role in that calculus, they should never be a primary driver of the decisions that are made by
litigants. Unfortunately today, in many cases the
cost of discovery is playing too large of a role
in determining whether a client will choose to
stand up for its rights or simply give in. This
needs to be corrected.

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

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

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

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

First, the scope of discovery. The
advisory committee's proposed amendment to
Rule 26(b)(1) we believe is a significant
improvement to the overbroad scope of discovery
allowed under the current rule.

Presently, many courts allow discovery of
almost any matter so long as it, quote, appears
reasonably calculated to lead to the discovery of
admissible evidence. This "lead to" language is
now really the tail that is wagging the dog. It
was really meant as a clarification on the scope
of discovery, but it has really swallowed the
entire rule.

The scope of discovery should not be
driven by a fishing expedition where the
responding party is required to spend considerable
resources to locate, review, and produce millions
of pages of information based on the hope that
this search might, quote, lead to, closed quote,
some other type of information that might be
admissible at trial.

The proposed amendment properly refocuses
the parties on evidence that is relevant to claim
or defense. Whether that evidence is ultimately
admissible at trial is a question for another day
and does not need to be an explicit part of these
rules.

Second, proportionality, we believe that
the advisory committee's proposal to include an express reference to proportionality in Rule 26(b)(1) will further bring a needed degree of pragmatism to the scope of discovery. While we know the standard is implicit currently in the rule, we believe that moving it up and actually using the phrase, "proportional to the needs of the case," will make it clear to the parties and the courts that the scope of discovery must be linked to the needs of that particular case.

That linkage doesn't ever get talked about in many circumstances. Instead, the parties serve discovery requests and the response is, well, they are abusive or it's going to be unreasonable for us to respond. The word "proportional" never gets brought up.

This Committee should be commended for bringing that word into prominence. That ought to be a discussion that takes place between lawyers when we are deciding about the scope of discovery.

And proportional isn't just dollars. I agree with the comments made by members from the other side of the V that in cases where dollars aren't at play, the importance of those issues should play a significant role in determining
proportionality.

Finally, I want to again endorse the presumptive numerical limits in the categories of discovery that the Committee has proposed. Those limits will help to send a firm message to plaintiffs and defendants, so my own clients, I'll now be forced to have a heart-to-heart talk with them about the number of depositions, the number of discovery requests that are to be propounded.

In cases that truly require more than five, we have those discussions and there has never been any issue about expanding it. But I think it sends a strong message to parties that they should try to reduce the overall amount of work that is being done to get a case to trial on the merits.

In sum, the IADC believes that parties to litigation should be given a fair opportunity to really discovery the facts that are relevant to their claims or defenses and then make a rational decision on the merits of the case and whether it should be settled or whether it should be tried. If the parties never get to that point, they never get to that decision point because the costs of discovery are too high, then justice is being
denied.

The IADC again commends this Committee for its important efforts and thanks the Committee for the opportunity of presenting this testimony here today.

Thank you.

JUDGE CAMPBELL: Thank you, Mr. Urquhart.

Dean?

DEAN KLONOFF: You mentioned that you would have to have a heart-to-heart discussion with your client about the discovery limitations, but would you agree with the sentiment here and in the written submissions that ordinarily the defendants like these limitations?

MR. URQUHART: As far as what, on the number?

DEAN KLONOFF: Yeah.

MR. URQUHART: That's a really good question and we've had a number of discussions about it. In certain cases, Dean, I know I'm going to need to take more than five depositions, and the other side knows it as well. I think it's more atmospheric. I think that the five limit is more atmospheric. It sets a tone for the parties to have discussions with their clients about do we
really need all of this? Do we really need to go that far?

So that's why I think and why we support that change, because we think it sends the right overall message.

JUDGE CAMPBELL: Other questions?

Elizabeth?

MS. CABRASER: Yes, I was intrigued by your equation of proportionality and pragmatism. I wonder though if front loading that discussion about the needs of the case in a qualitative way to determine the scope of discovery also front loads a merits discussion and perhaps a merits decision before that's even informed by the discovery that hasn't occurred. Does that -- does that bother you from a defense perspective?

MR. URQUHART: Well, I mean, it's not that it bothers me from a defense perspective. I don't think believe that should be an appropriate discussion at that point of the litigation, the actual who's right and who's wrong ultimately about it.

I think lawyers are certainly capable of having a rational discussion about the importance of a civil rights case or the importance of an
economic case where simple dollars are being sought and say, look, this is what we are arguing about here today. This is the ultimate exposure, perhaps, in the case today.

What should be the rational amount of discovery, both from the plaintiff's side and the defense side, that we need to get to trial.

And I think having the word "proportionality" in there fosters those sorts of real-world talks and discussions between counsel.

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

We will go ahead and we will excuse the standing committee folks who need to leave at this time. Thank you very much for being with us. We will give them just a minute, Mr. Butterfield, to step out before you make your comments.

All right, Mr. Butterfield.

MR. BUTTERFIELD: Good afternoon. My name is William Butterfield. I testify to you today from three perspectives. One is as a partner of Hausfeld, LLP, in Washington, D.C. where my firm primarily conducts complex litigation on the plaintiff's side, but sometimes on the defense side.
Second, as an adjunct professor of law at American University where I teach a class in eDiscovery. And third as vice chair of the Sedona working group on eDiscovery. But I do want to make it clear that my comments today are personal to me and do not necessarily reflect those of Sedona.

I wish to make a few points, and I do appreciate the opportunity to testify and I do intend to submit written testimony.

The first point is if the reason for these rule changes is truly to reduce discovery costs, the proposals, in my opinion, omit two changes that would do more than anything else to curb excessive discovery costs.

First, to adopt a cooperation regime with real teeth. And I understand that Rule 1 has been tweaked to mention cooperation, but it provides no mechanism to require it. Meaningful cooperation as set forth in various local rules and pilot programs would, in my opinion, do more than anything else to curb discovery expenses.

The second means of curbing discovery expenses in my opinion, and rather than reducing
presumptive limits on various discovery devices, the second way is to take a different approach and adopt in a real way a phased discovery mechanism.

And under the current rules, and particularly in many local rules, parties get only one shot in discovery. So that while some judges have promoted phase discovery, one of them is in this room, many other judges and local rules do not allow time for that approach to be realistic.

So the result, and the reality is parties only get one shot to do discovery and necessarily they have to be broad from the get-go.

So if there was a real phase discovery regime, parties could be targeted initially. They could take their time and assess what they have, take a deep breath and figure out whether they need to go further or whether there's good cause to go further.

That in my opinion would actually answer some of the proportionality, the vexing proportionality problems that you were discussing with Mr. Garrison. And he has problems with proportionality and my friend, Paul Weiner, defends those cases. He has problems with proportionality. And I understand those problems.
If there was a phase discovery approach, I think that would go a real way in helping both of those gentlemen and all of us in the field.

Next I want to turn to Rule 37. I think the proposal needs some tweaking. I agree with my Sedona colleagues that the term "willful" is problematic. I think, as with my Sedona colleagues, I think there should be a clear separation between what is considered a remedial measure and what is considered a sanction.

So I would suggest either taking Sedona's approach or some very minor wordsmithing to your current proposal, which would be to revise the language of proposed Rule 37(e)(1)(A) to, quote, permit nonsanctioned based curative measures such as additional discovery, ordering the party to pay reasonable expenses, including attorney fees caused by the failure. I think that would help clarify that those things are curative measures. And I do recognize what you put in the Committee note, but I think this would go further in clarifying it.

Next under Rule 37, I'm troubled because my reading of the rule seems to indicate that there's a requirement that there must be a showing
that information is lost before even imposing
curative measures.

    Often additional discovery is necessary
before determining whether information has been
lost; for example, whether that information can be
obtained through other sources, whether there are
duplicate copies. So I am troubled by that.

    And next, I think it would be helpful if
the Committee notes give some examples of conduct
that it considers to be in bad faith. So I'm
concerned about the party that doesn't initiate
any particular action to destroy relevant
information but fails to issue any litigation hold
and simply allows its auto delete tools and
routine destruction mechanisms to continue in the
face of a known preservation obligation.

    To me, that's bad faith, I would
appreciate clarity on that from the Committee and
the rules.

    Finally, I think I agree with Judge
Scheindlin. It's very difficult to show the
relevancy of information that no longer exists.
So I would propose some burden shifting here.

    So once the moving party or the party
moving for sanction proves that information has
been lost, and proves the requisite level of culpability, I would support a rule change to clarify that the spoliating party, in order to avoid sanctions, must demonstrate that there has been no substantial prejudice to the innocent party caused by the loss of the information or that the information lost was not relevant.

I see my time -- it's not quite up. It is up.

JUDGE CAMPBELL: Yeah, the number is going up, actually.

MR. BUTTERFIELD: Yes, sorry.

JUDGE CAMPBELL: Mr. Butterfield, are you going to put these specific suggestions in your written comments?

MR. BUTTERFIELD: I will. I haven't even begun to get through everything I would like to say. But, yes, I will put those suggestions in.

JUDGE CAMPBELL: Questions?

JUDGE KOELTL: Mr. Butterfield, the issue of phased discovery, the judges have the power to do that now, right? And in the employment area there is the employment protocols that Mr. Garrison worked on as well as defense counsel which effectively does phase discovery.
It would be very difficult in terms of a national rule, with all kinds of different cases, to establish any form of phased discovery for all cases on a national level. Judges have the power to do that as part of case management.

The question is whether we should do anything else to encourage that in the national rule.

And the second question I would just ask is my understanding, and you can correct me if I'm wrong, from the Sedona materials, is that so far, what we've heard from the various inputs from Sedona is that Sedona agrees with the amendment to 26(b)(1) with respect to proportionality. So two issues.

MR. BUTTERFIELD: Judge Koeltl, as to phased discovery I understand and agree that judges have that power now. In reality, however, a lot of times the local rules really don't let them do it.

And I can give you an example. I litigated a case in Florida. And the District Court there had a rule that once the clock started running on discovery, so once you, I think, had your 26(f) conference, all discovery, and this was
a complex case, you know, lots of things at stake, lots of parties. All discovery had to be completed in one year.

In reality, that does not permit phase discovery, even though the judge might have the power to order it.

So I don't have the legislative answer for you, but it's a new way of thinking, I think, and it's an alternative to further reductions of presumptive limits which frankly in my world, I look at the rules for guidance, and they give no guidance in my world. When I have 40 parties in a case and when it says I can take five depositions, that is not a meaningful rule anymore. And the rules in my opinion ought to be meaningful.

As to what Sedona said, as I said, I don't agree with everything personally. You know, it's important to note that the way Sedona approaches this, number one, this came from the steering committee, not the working group, all right. And the steering -- and the steering committee members made it clear that they were not to be bound by positions taken as a whole and in order to reach consensus as a whole, and in some cases, they had very real differences with the positions taken on
a consensus view.

JUDGE CAMPBELL: Other questions?

All right, thank you very much,

Mr. Butterfield.

We will resume at five minutes past one.

For those of you looking for lunch, Washington, which is the street just north of the building, if you go east on Washington Street, so go out the doors of the courthouse and keep going, there's a lunch shop across the street at the first intersection.

If you want to walk ten minutes down to Central and Washington there's a bunch of lunch places.

If you're dying for a Big Mac, there's a McDonald's up 7th Avenue to the north.

We will see you at five minutes past the hour. Thank you very much.

(The noon recess was taken.)

JUDGE CAMPBELL: All right, I think we are ready to resume. Welcome for all of you who just arrived. We've been at this a bit this morning, but we are happy to have you here and look forward to hearing your comments.

As mentioned earlier, we are busy enough
with folks to speak to us today, that we have to
hold folks to a total of ten minutes. So there is
a light on the lectern that goes on after three
minute have passed, and a red light after five
minutes. The idea being if you keep your comments
to five minutes there will be time for questions.
But don't feel you have to stop midsentence when
that red light comes on.

So we are going to begin and go in the
order that the witness list has been published so
the next speaker will be Ms. Sanguinetti.

MS. SANGUINETTI: Thank you. Good
afternoon. I want to first of all thank this
panel for allowing me to come speak. My name is
Elise Sanguinetti. I practice in Oakland,
California. I'm a partner at Khorrami, Boucher,
Sumner and Sanguinetti. One hundred percent of my
practice is focused on representing individuals in
wrongful death and catastrophic injury cases.

When I am in federal Court, I am
representing people who are individuals that are
taking on usually large corporations for the
wrongful death of a family member or a very
serious injury to themselves.

My perspective, I've been listening to all
of the people speaking today. And I wanted to
give you the perspective of the individuals who
would be affected by these rules changes.

The people that I represent I represent on
contingent fee basis because none of my clients
could afford to pursue litigation on their own.
And this is the only way that they can -- they can
pursue justice for the wrongful act of others.

One example I want to give you of a recent
case that I had in federal court was a family that
brought an action on behalf of the husband of the
family that passed away in a scuba diving
accident. He -- there was a problem with the
swivel joint on a pressure gauge, it
malfunctioned. And when the case came to us, we
knew that there was a potential problem, but we
didn't know what the problem was.

And we were tasked with representing these
individuals, coming into federal court, and asking
for information. And what I wanted to talk to you
about today to start off were the limitations on
the depositions and restricting the Rule 30,
moving the deposition number from ten to five.

In that particular case, there were issues
involving not only manufacturing defects, but also
design defects of the valve, causation, and disputes regarding damages.

In that case, we -- the defendant had very critical information that wasn't produced to us in the initial disclosures, and we had to spend significant time tailoring our discovery, which we did do. It was still necessary. We had over five witnesses that were witnesses to the actual incident that we needed to depose, and we also had to depose -- we deposed five witnesses on the technical information. We were very, very tailored to what we needed to do.

If this rule change went into place, we would make an attempt to work with the other side, but I've run across roadblocks many, many times in trying to negotiate above the number of the amount that's allowed by the rule.

So what this would do is it knocks down in half the amount of depositions that we are able to take. And from a plaintiff's perspective, a single plaintiff -- a lawyer representing single plaintiffs, we are very, very conscious of not wanting to overtake depositions, because in the end, I'm having to explain to the clients the costs that I had to spend on their case and why
that reduced their recovery.

So I'm very, very careful and so are my partners and my colleagues in making sure that we are tailoring our depositions to the depositions that we really need.

But our cases oftentimes, especially when it's a product liability case and we are taking on a large corporation, it becomes necessary that we need to take depositions on many different areas. And we have to take more than five.

With regard to interrogatories, reducing the number from 25 to 15 is very dramatic. For us trying to figure out what was wrong in this particular case, on both a manufacturing perspective and a design perspective, we did spend specific time tailoring our interrogatories. But moving that number to 15, I can't see how that would be plausible just to be able to come up with the amount of questions that we need to get answered, to avoid, hopefully, taking additional depositions, or asking for documents that aren't relevant.

Interrogatories are such an inexpensive way for us to be able to obtain information. And in a single-plaintiff circumstance, they are
really critical for us to be able to keep costs down.

With regard to the requests for admissions, they are tools that we use often. I -- the number itself is not a specific number that concerns me. Aside from the fact that anytime there's a limitation on us being able to narrow down the issues that are ultimately going to be at issue at trial, that is what concerns me. It's rare that I'm going to be asking more than 25 requests for admissions. But if it were necessary in a case to be able to tailor exactly the information that I'm trying to know what the defense is going to raise at trial, I want to be able to do that, because it's going to save my client money and it's judicial efficiency, because we will be able to make the case shorter.

And lastly, and most importantly, actually, is the proportionality. That is, you know, I heard earlier today that it's not a radical change. But then yet in the same breath, they said that the change of moving proportionality up to the front was -- was not a big deal, but it has been living in obscurity.

Well, it is a radical change. It has
been, if they want to say it's been living in obscurity, they are showing that by moving it up front, it's a radical change.

It's very concerning to plaintiffs. And I want to just make sure the factors is specifically with the amount of -- amount in controversy is a major problem for cases such as mine where I'm representing individual plaintiffs. And maybe the amount of a wrongful death lawsuit is a minimal amount of what we would be able to recover or a catastrophic injury case in comparison to what I need to find out or the burdens on the defendant to find out what happened to this product that caused my client's death.

But if I am not able to get to the bottom of that, if they are considering the amount of controversy, I have to be able to obtain that information. They are the ones in control of it.

So I know I'm past my time and I don't want to run too far past. But I appreciate very much you giving me the opportunity to speak today. And I would be happy to answer any questions.

JUDGE CAMPBELL: Questions?

Rick?

PROFESSOR MARCUS: Could I get you to say
a little bit more about the concern you have with proportionality. Because my reaction is unlike other kinds of cases we've heard about, I would expect often your prayer for damages looks like a fairly large number. So maybe proportionality would cut in favor of broad discovery in your case.

   MS. SANGUINETTI: I would be doubtful of that. My concern right now is that the way that the rules work is that we don't have to sit down with the other side and say: Let's go through these factors. Generally speaking, we are able to come to agreements with -- with defense counsel on discovery that we need.

   In this case, what I see what's going to happen is that we are going to hear -- we already hear that things are burdensome but we are usually able to come up to an agreement. I think what will result is we are going to hear from the other side: We can't give you all this information you need because it's stored in a difficult way, it's going to be very expensive, and, therefore, you can take it to a judge. That's what I'm concerned about.

   And so every single time I have to go in
and file a motion, and I think this is going to
create a lot of law and motion work that wouldn't
otherwise be necessary. That would be my big
concern.

I think that with these factors, it's not
only amount in controversy alone, I think it is
significant, because they aren't always
high-dollar amounts. Sometimes these injury cases
that end up in federal court are not very
high-dollar-amount injury cases. They just make
the minimums of the court, but we've got diversity
jurisdiction so we are going to be in federal
court. And it doesn't always justify -- it
wouldn't necessarily in and of itself show that
we've -- that the amount in controversy exceeds
amount of discovery that we are looking for.

And I think the same is true for the
importance, the factor, let's see, the importance
of the issue at stake in the action, and the
burden of expense versus benefit. The problem
with those two factors is that it's oftentimes so
early in discovery for us to be able to prove what
benefit we are going to get from the discovery we
are asking is very, very challenging for
single-plaintiff cases.
JUDGE CAMPBELL: Other questions?

Art?

JUDGE HARRIS: To the extent that you have a choice between federal and state forums, does the discovery and limitations and federal procedures have any effect in your choice?

MS. SANGUINETTI: Yes. Yes. Very much so. In California, our rules follow the rule that we've been talking about earlier, which it's broad discovery. In fact, it's interpreted very, very broadly in California. Every judge will always err on the side of allowing discovery.

And so that's a very important factor for us. We are always in a position of trying to obtain information that we otherwise wouldn't know.

It's not a two-sided situation in plaintiffs' cases such as the ones I represent. Because the only thing the defense is usually interested in is damages. And we are very forthcoming with those. But the burden is on us to prove that there's a product defect either in design or manufacturing in product cases, and we have to get that information from the defendants.

I would prefer a California court because
I'm unlimited in my access to obtain that information. But in federal court, I do have limits. At least within the limits that exist right now, I'm able to obtain the information. I'm very concerned about what's going to happen in the future.

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

Ms. Dickson?

MS. DICKSON: Thank you, Your Honor. I'm Kathryn Dickson. I've been a board member of NELA and the California Employment Lawyers Association for a number of years. In a more bipartisan role, I'm a member of the governing council of the ABA labor and employment law section.

I've practiced law since 1976. And I represent plaintiffs in employment discrimination, wrongful termination, whistle-blower, and harassment cases. I come from a very tiny firm, three lawyers. And I want to tell you what it's like.

And I try cases in state court, federal court, and increasingly, it won't surprise you, in arbitration. And I want to talk to you about what it's like to be a lawyer practicing in a tiny firm
representing individuals under the discovery regime that exists and the one that's being proposed here.

I also want to say that I love eDiscovery. I think in the 35 years I've practiced, it was the single most important development to level the playing field for me in my cases. The single worst development has been Rule 56 and the interpretation of Rule 56. That's the 800-pound gorilla in this room, and that's what's driving cost.

The first 15 years of my practice I never had a summary judgment motion filed because I choose my cases carefully and develop them well.

Then in the '90s, they started coming and in the last ten years, in every single employment case I have, there's a summary judgment motion. That's where the cost is.

I also read all 351 pages of what you heard in D.C., so I am going to try to address what it seemed like you wanted to hear.

I need discovery for three purposes. I need discovery to assess the case for settlement. I need discovery to oppose the inevitable summary judgment motion. And I need discovery to put on a
good trial to win that case for my client.

The changes that are being proposed here are only sufficient for the first purpose, assessing the case for settlement. In fact, they are almost identical to the agreement that I arrive at with most defense counsel to look at the case to prepare it for an early mediation. They will take the plaintiff, maybe half of the plaintiff's depositions or the whole thing. I'll take the decision maker, an HR person, maybe an important coworker or some other witness. And then we can try to mediate the case.

If these rules were set up so that in that -- I agreed with Mr. Butterfield, if they were set up so that that was stage one, and that would take care of many, many, many cases because a lot of them settle.

But we don't stop there. Next we have to move on to summary judgment and trial. So the proposed changes on the number of depositions and the length of depositions, is that a radical change people ask.

Okay, I'm a trial lawyer. I am fairly analytical. So what those changes do, you've gone from ten depositions of seven hours to five
depositions of six hours. You have gone from 70 hours of deposition preparation for trial to 30. You have slashed our depositions more than in half. And they are the most important thing there is for preparing for trial.

So the restrictions don't provide enough discovery in most employment cases for us to prepare.

I believe in Irving Younger's Ten Commandments for Cross-Examination. I believe what I was taught by judges and law professors. How do you do a trial? Preparation, preparation, preparation.

I have never seen an employment trial where the defense put on five or fewer witnesses. So I'm standing there and there are these beautifully scripted defense witnesses. I have nothing to impeach them with, nothing to shake their credibility.

In my last case, with the coworkers who said my client was a problem, certain coworkers said that I wouldn't have known that one's husband had just been hired by the company before her deposition. That another coworker, he had just been promoted right before his deposition.
So we wouldn't have the evidence that we need to really have the jury understand whether these people are credible or not or what their biases are.

And do judges want to see -- do you all want to see focused cross-examination, nice, sharp examinations at trial? There's a lot of complaint about the lack of trial advocacy quality now. If you limit discovery, that will not improve trial advocacy in your courts. And it's not good for you and it's not good for the juries.

I looked at my most recent trials, because I saw that you were interested in statistics. And these are the past five years or so. The number of combined depositions before trial was in the range of 22 to 28 for those cases that went all the way through a trial or plenary hearings in the deposition -- in the arbitration.

The defendants proposed trial witnesses in their last pretrial statements were typically in the range of 18 to 38. So they are proposing 38 witnesses for trial and I've had five depositions. They, of course, put on fewer than their 38. That inevitably happens. But they always put on somewhere between 10 and 15.
That's in the cases that I've done in the last several years. And these were individual employment cases.

So plaintiffs almost always need more than five depositions. The categories, you've heard what the categories include, harasser, perpetrator, decision maker, human resources, supervisors, both current and former, higher ranking people if you're going to be able to make a case for punitive damages, comparators, and any investigators.

No one has talked about the importance of videotaped depositions as the actual testimony that is shown at the trial. So if witnesses are going to be put on at trial, we use videotaped depositions. Both sides do. So that's how we get the trial testimony. It's not just discovery.

I can give you more statistics if any of you are interested. I took one of my cases and just analyzed exactly how many witnesses there were.

And I just want to say two other brief things. One is I read in the materials and it sort of disturbed me. Somewhere it said that NELA members thought discovery was overly costly and
abusive.

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

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

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

My corporate executives know a lot and can give me informal discovery. They know the names of people. They know how things are organized. My farm workers generally don't know the last name
of their supervisor. He's the mayordomo. He's
Jose, you know. They don't know anything about
the structure of the company.

So it's the people at the bottom sometimes
who need the most discovery. So that's just one
more different comment on proportionality.

JUDGE CAMPBELL: Thank you, Ms. Dickson.

Paul?

JUDGE GRIMM: Just a quick question,
Ms. Dickson. In the current limitations in the
rules of ten.

MS. DICKSON: Right.

JUDGE GRIMM: It sounds like you would
need more than the ten in a number of the cases
that you have.

MS. DICKSON: I analyzed it. It's between
10 and 15 in each case, occasionally even a little
bit more than 15 depending on what the defendant
says, and what their -- what the pretext fight is
about.

JUDGE GRIMM: How difficult do you find it
in your practice to get more than ten in the cases
that you have? Because it sounds like probably
you have more experience on a consistent basis
with cases that need more than the limit, whether
it would be five or ten. I just am curious about your experience.

I think I got a flavor of how you might get reactions from opposing counsel. But what about with the court? How much difficulty is it from the court when you make the comments like you've made to us to convince them over the objections of your adversary that you need 15?

MS. DICKSON: I have been denied ten. In fact, including within the last year. I asked for ten. I said I really need more than ten, but I will try to limit it ten, and I was given seven.

Opposing counsel and I agreed before we went in for our case management conference that we both thought that it was appropriate to have 10 to 15. And the trial judge said no. With a stipulation, and he said no.

JUDGE GRIMM: That was in federal court?

MS. DICKSON: Yes. It was a federal judge.

Yes?

JUDGE KOELTL: Have you used the employment discovery protocols in California?

MS. DICKSON: I was involved in helping to develop them, and I like them very much and have
tried to prod our judges to use them. And I know
that Judge Gonzalez Rogers is using them. And I
think some of our other judges are considering
them.

I think they are excellent, they are truly
what initial disclosures are supposed to be. They
would be very helpful. They haven't come up in my
particular cases. I -- I like them. And I think
they are very good.

Also, I'll recommend the Northern District
ESI guidelines. I worked on those. I was on the
committee to put those together. And if the word
"cooperation" is in there once, it's in there 15
or 20 times. And if we could have legislated
cooperation in those, we would have. And if we
could have imposed sanctions for lack of
cooperation, we would have.

And I as a mother know that serious
sanctions can actually change behavior.

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

Mr. Coben.

MR. COBEN: Thank you. My name is Larry
Coben. And I practice law both here in Arizona
and Philadelphia and around the country. I'm here
today speaking as a civil litigator but I'm also
here today in a representative capacity. I serve
as, and have for the last decade, the chief legal
officer for what is called the Attorneys
Information Exchange Group.

The AIEG is a litigation sub group of AAJ
but actually has its own independent board. We
are a group of approximately 700 civil litigators
across the United States. And have since the
late, around mid 1970s to late 1970s, represented
consumers and almost always involved in litigation
against motor vehicle manufacturers.

Our clients are in the tens of thousands.
And have been over these years representing people
who have been the victims of Ford Pintos, Ford
Explorers, GM pickup trucks, Toyota sudden
acceleration vehicles, et cetera, et cetera.

Our members probably litigate more complex
products liability cases than any other
organizational membership in the country. And so
I'm here today to try to explain to you the issue
only related to proportionality and the idea of
launching or moving the question of
proportionality from an objective standpoint to
what appears to be a burden of proof standpoint.
And I thought that the best way to do this was to kind of take you back to an earlier time, and that is when I first had my first Ford Pinto fire case. And I wanted to let you see the application of what I perceived these rule changes will do to determining what information would be available in the ordinary discovery practice.

And the reason I think that's important, and I have a little board I'm going to go over with you in a minute, is that it's not just representing an individual. Because there were many folks who suffered minor as well as catastrophic injuries from that product. But it's also the societal benefit that was ultimately obtained by the discovery that was acquired in that case and how it literally changed the design of motor vehicle fuel systems for every vehicle in this country.

But that was predicated upon the fact that we were able, after years of fighting, to break down the doors and get broad discovery, broad discovery which I submit to you if we were to have a new Pinto case today for the first time, we would never see.

So, let me show you. I don't think you
will all be able to read this.

JUDGE CAMPBELL: Could you please try to speak into the mic as you do that?

MR. COBEN: I will, I will.

I just want you to assume that we had a case involving a 1978 Ford Pinto. And the question in discovery is the design process and the testing process for this vehicle to gauge its safety through the manufacturer. It doesn't have to be a Ford Pinto, but since I'm familiar with it and many of us are, I thought this would be appropriate.

Now, ordinarily under the ordinary rules of discovery, we would be able to obtain discovery of prior similar models, that is the design of the forerunner to the Pinto, to find out through its design analysis within the company how they went about studying the safety of the fuel system. We would be able to look at testing. We would then be able to look at the development of the Ford Pinto through its various iterations, through design committee work, through testing work, to see its performance.

We would then be able to also look at equivalent type vehicles made by the same
manufacturer, same size vehicles with
alternatively designed fuel systems that could
provide different levels of protection under the
same circumstances.

Now that's a very broad -- I'm making a
very broad statement, but I can tell you that
typically, that would be the scope without any
difficulty. There would be some complaints, there
would be some arguments about it's too many pages
of material, et cetera, et cetera. But that would
be worked out. But that would be the general
scope.

Now, that's based upon not knowing what we
are going to find. And that's important. Because
now when we look at proportionality and what you
are asking to make changes, now the burden is on
the plaintiff to prove what we don't know.

So, the first question is going to be, or
at least that I would ask if I was the defense, is
why do you need information about other model
vehicles? We are talking about a 1978 Ford Pinto.
Why do you even need it for the 1974 model? Why
do you need it for other types of products that we
design, other types of vehicles? Think of the
expense.
Well, if your client, for instance, has suffered minor burn injuries, let's talk about that issue. If we are going to talk about the cost to the defense of producing all of these materials, hundreds of thousands of dollars perhaps. And if you're talking about someone who does not have catastrophic injuries but yet is burned because of a design flaw, where is the line going to be drawn? How is the plaintiff to draw that line?

Under these circumstances, with your various different elements of proportionality, let me show you a document that would never have been obtained.

This is a 1978 memorandum that is no longer confidential from Ford Motor Company. This memorandum is a generic memorandum developed by the Ford engineers to discuss fuel system design, integrity and safety. It was revealed in the discovery in the Pinto litigation.

I submit to you that because it doesn't involve specifically a Pinto, this has to do with fuel system integrity, generally, and the recommendations about how to design to prevent the leakage of fires and the -- leakage of fuel and
fires.

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

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

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

How will the court be able to judge without looking at the documents? How would any court know that this document existed, that this document would be relevant to challenging the design of a Ford Pinto if in fact proportionality requires that you narrow scope and not make more work than is necessary.

And that's a real hard problem, because you don't know. And when you place the burden on the plaintiff, as opposed to the defendant, it turns it upside down.

In every case now, a defendant can come in and say: We object, we think your scope is too great. Here's an affidavit from an engineer explaining why the Ford Comet isn't relevant to the Ford Pinto, even though they are similar in sizes. There are all differences.

And then once we've seen documents to explain that legitimizes to some extent an objection, then the plaintiff can come forward with their own expert. But what you are doing is you are putting the cart before the horse.

By changing where proportionality is studied, you're placing a burden on plaintiffs
that they are not going to be able to meet. And you are challenging judges to make decisions, factual decisions about the scope of discovery without knowing what exists.

And those things will make it very, very difficult, if not impossible, to be able to prove what we needed to prove in the Ford Pinto and in other product cases.

JUDGE CAMPBELL: All right. Thank you very much for your comments, Mr. Coben. We are past ten minutes, so I think we need to move on to the next speaker.

Mr. Weiner.

MR. WEINER: Good afternoon. My name is Paul Weiner. I'm a shareholder and National eDiscovery Counsel at Littler Mendelson.

I want to open by commending the Committee on the outstanding work that it has done with its rules proposals. I know firsthand how challenging and at times polarizing these issues can be from my work as a steering committee member of working group one of the Sedona organization as well as being a cochair of the advisory board of the Georgetown Law Advance eDiscovery Institute. And the Committee has done a masterful job of
synthesizing the issues and proposing solutions.

My law firm is the largest management side labor and employment law firm in the world. We have over 1,000 lawyers practicing in 60 offices across the globe. From a litigation standpoint, we handle cases in every district and every state in the country from administrative charges to bet the company class and collective actions. In the last five years, Littler has handled more than 1,000 class and collective styled matters.

My primary goal today is to underscore the crushing eDiscovery burdens facing employers in today's digital world that cry out for a need to amend the rules along the lines the Committee has proposed. Moreover, in asymmetrical cases, and we mostly deal with asymmetrical cases, eDiscovery oftentimes morphs into improper gotcha tactics instead of a legitimate advancement of the merits of the parties' claims and defenses. The proposed rules remedy this as well.

To illustrate the crushing burdens facing employers in modern litigation I would like to use a concrete example from a series of publicly recorded decisions in the case of Pippins versus KPMG. This was a hybrid FLSA collective action
and Rule 23 class action that was filed in the Southern District of New York.

I need to note my firm had no involvement in this case, so by talking about it, I am not revealing any confidences or attorney/client material. However, as I noted, given our experience, we face similar factual scenarios every day.

FLSA collective actions are opt-in cases. If a specific individual does not affirmatively opt into the case, they have no right to relief and are never a party in the case. This is important because experience demonstrates that opt-in rates are oftentimes less than 30 percent. More often than not, that means that 70 percent of the potential collective action members never choose to participate in the case.

The complaint in Pippins essentially alleged that salaried audit associates working for a Big Four accounting firm were misclassified as exempt under the Fair Labor Standard Act and thus were entitled to overtime pay. When the complaint was filed, three named plaintiffs were listed.

The magistrate judge and then the district judge held that on day one of the lawsuit, before
any type of class was certified, when there were
three named plaintiffs, the duty to preserve
extended to all putative collective action members
nationwide, which included at the time an
estimated 7500 current and former employees.

   In support of a motion for a protective
order, the defendant presented an affidavit that
stated it would cost over $1.5 million to comply
with this very broad preservation burden to
essentially preserve hard drives of the party
employees. The courts denied that motion citing a
lack of information as to the contents of the hard
drive.

   Fast forward to later in the case. The
defendant files a motion for summary judgment and
wins. The case is dismissed, subject to an
appeal.

   In response to language that suggested it
could do so from the original preservation
opinion, the defendant asked the court to transfer
the cost of preservation to the plaintiffs during
any appeal, presenting an affidavit detailing that
its cost for preservation as of the date of
summary judgment, when the case was dismissed, now
exceeded $2.36 million and those costs would
continue during the appeal. That motion was
denied.

We also need to -- the record also
demonstrates that at the time summary judgment was
granted, notice had been given to about 8800
potential putative collective action members, yet
only about 1300 of those had opted into the case.
So remember I said opt-in rates were low. Here it
was 15 percent.

We also need to factor into the equation
that there's an ongoing debate among circuits
about whether eDiscovery costs are recoverable as
a taxable cost to the prevailing party pursuant to
28 U.S.C. Section 1920. The leading case that
says they are not is Race Tires America from the
Third Circuit.

So let's look at the situation. A
defendant is required to expend over $1.5 million
on day one of a lawsuit that involves three named
plaintiffs to preserve nationwide for potential
collective action involving in excess of 8,000
putative collective action members before any type
of class is certified. In fact, only 15 percent
of the potential people actually participated in
the case. The defendant wins on summary judgment
and the case is dismissed.

After it's dismissed, the defendant again approaches the court, based upon express language, asking to have the preservation burden shifted to the other side, which have now exceeded $2 million, and that is denied. And under Race Tires and its progeny, even when a defendant ultimately wins a case like this on its merits, eDiscovery costs are not recoverable by the prevailing party.

This is the example par excellence of the crippling burdens employers face every day in U.S. litigation. Now, like any case, Pippins has unique factual circumstances and it's certainly unique from a procedural standpoint, yet the crushing eDiscovery burdens faced by employers are not unique. I see this every day in our practice from state to state and district to district in cases large and small.

Just to quickly illustrate an example of gotcha tactics, I only need to point to the widespread use of overly broad, cut and paste preservation demands that normally include in serial fashion an omnibus list of data and electronic media that are wholly untethered from the facts and issues in any particular case.
At best such demands are served in a transparent fashion without consideration of cost or burden to the responding party. At worst they are used as a transparent gotcha tactic. Or as one court put it, and this is a quote, "to sandbag a party" in the event materials were not preserved.

For this reason, I have a concern about the encouragement of preservation demands and proposed Rule 37(e)(2)(C); however, I also have a proposed solution.

So that all of this leads to the question of how will the proposed new rules help. I briefly submit in three ways.

First, the rules must be amended to provide consistency across circuits. Proposed Rule 37(e) as establishment of a national culpability standard does this, and I fully support its enactment. I also support defining the term "willful" as Sedona has proposed with that language.

Second, the rule should reaffirm that proportionality in all aspects of litigation, including preservation, is a bedrock principle of any contemporary system of justice operating in today's digital world.
For those reasons, I fully support the proposed amendment to move the proportionality factors into Rule 26(b)(1); however, I would also encourage the Committee to go further and specifically reference the word "preservation" in the preamble to Rule 26(b)(2)(C) as well as in Rule 26(b)(2)(C)(1) and (3) and Sedona has also commented on that in proposed language.

Finally, I would encourage the Committee to incorporate the mandates of Rule 26(g)(1)(B)(3) and to proposed Rule 37(e)(2)(C). This could be accomplished by a cross-reference to that rule in the text of Rule 37(e)(2) or in the Committee note. While the current language provides that a preservation request must be clear and reasonable, I believe there's a need to go further.

As Judge Grimm noted in Mancia versus Mayflower, 26(g)(1)(B)(3) imposes an obligation on counsel to certify that a discovery request is proportional to the amount in controversy and the needs of the case. I submit that such reasoning applies just as strongly in the preservation context.

This addition would also make clear that knee jerk, overly broad, cut-and-paste
preservation demands that have no bearing on the claims and defenses in a case do not advance the just, expedient, and inexpensive resolution of cases and should not be considered as part of a sanctions analysis.

In closing, I again commend the Committee for their work on these issues, reaffirm the dire need for the rule amendments with the slight modifications I have discussed, and stand ready to answer any questions.

Thank you.

JUDGE CAMPBELL: We have about one minute. Any questions? Rick?

PROFESSOR MARCUS: I believe you wrote an article in the National Law Journal around December of 2011 about the preservation duties of employment litigation plaintiffs.

MR. WEINER: I did.

PROFESSOR MARCUS: I wonder if you could think out loud for us about whether there may be some impact on them of Rule 37(e).

MR. WEINER: I certainly believe that plaintiffs have preservation burdens just like the defendants do. And at the time I wrote the article, that was not a popular view. It
certainly, with cases like Honeybaked Ham, EEOC versus Honeybaked Ham, it's getting more widespread acceptance.

I do think that ultimately the factors not only on proportionality, but with respect to the -- the sanctions will help both parties. I do think they are very fair and balanced including in the proposed comment, there is a reference that specifically helps plaintiff types, the individuals that says, you should consider that they are a single plaintiff. So I do think it is very fair and balanced.

PROFESSOR MARCUS: You mean the sophistication and preservation?

MR. WEINER: Correct.

PROFESSOR MARCUS: You think that should remain?

MR. WEINER: I don't love the language, but I do point out in response to your question that there is now a specific consideration that is more beneficial to the type of plaintiffs and their preservation obligations than to the large producing defendants.

JUDGE CAMPBELL: All right. Thank you very much for your comments, Mr. Weiner.
MR. WEINER: Thank you.

JUDGE CAMPBELL: Ms. Adams?

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

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

Along with the Lawyers For Civil Justice, I do commend the Committee on these very well-drafted rules. I particularly foresee that the changes to Rule 26 by removing the subject matter language and removing the reasonably calculated to lead to the discovery of admissible evidence language will result in plaintiffs and defendants agreeing to come to the table to figure
out how best to determine what needs to be produced in a particular case rather than the current situation where plaintiffs know that they are entitled to very broad discovery and all they need to do is ask for it. I believe that judges, well meaning, feel that their hands are tied by the current body of case law that requires them to give every deference to the requesting party.

The proposed rules will make clear that everyone has an obligation to determine what is necessary for the particular case.

There's been some discussion in prior comments to this committee that some parties have been unwilling to use TAR, or technology assisted review, or predictive coding because they do not need to do so. And I think that these rules will foster the use of those tools, which I think we need to do, given the explosion of data that is -- we know is going to be a problem in current big litigation.

Although we certainly -- I certainly do support the rules and I appreciate the well-drafted rules as they are, I do have one concern with regard to the proposed change to 34(b)(2)(C), which perhaps not coincidently is the
only provision supported by the AHA which requires
the producing party to explain whether materials
were withheld based on objections. And it is
particularly relating to the use of TAR or
predictive coding which in my practice we use on a
regular basis.

You do not know if you have withheld a
responsive document if you have not identified it
or found it because you used TAR or predictive
coding. And I think that the rules for
proportionality that are contemplated can
incorporate that and it will make it clear that
they were not withheld intentionally, which the
word "withheld" concerns me. It suggests that you
already located it and are keeping it. Similar to
a privilege analysis as opposed to where the
objection at issue was overly broad or unduly
burdensome.

If the objection was that it was unduly
burdensome, you have not conducted the search and,
therefore, you do not know whether you have
withheld the responsive information.

So I do have that concern about the
implication of that rule.

I note that these rules would particularly
help the smaller case because even small cases, if
the corporate defendant is a big one, can have a
large number of relevant documents. So we will
need to use TAR or predictive coding to get to
even the smallest cases going forward.

And I think that proportionality will
evolve just -- and I think it is ripe. I think
there was some suggestion today that these rules
are not yet ripe because technology will advance
and we won't need them as we all learn to, you
know, more accurately use our data. But I think
they are ripe now, because proportionality by
definition will evolve once the technology does.

Thank you.

JUDGE CAMPBELL: All right, thank you,
Ms. Adams.

Paul?

JUDGE GRIMM: Just one quick question on
the -- by using technology assisted review at
present. If the change to Rule 34 were to go into
effect that you made reference to, would you be
concerned that if you were to answer the Rule 34
request that we have used technology assisted
review in order to achieve that cost savings and
more quickly produce the information that you have
requested that is responsive, this by definition does not involve an evaluation of every single document. And so we can tell you that there are documents that we did not produce because they were rejected by the technology assisted review as being irrelevant or being beyond the scope because of privilege or protection, but we cannot tell you that there are documents that are responsive that we did not produce because we haven't looked at the -- at what that is.

Do you believe that you would be vulnerable under the -- the new language of the rule if you had an answer that was as candid as that in telling how you used -- how you responded to the request?

MS. ADAMS: I have some concerns about revealing my entire process because to some extent how you have gathered documents is to some extent work product.

JUDGE GRIMM: That's different. That's not giving a 400-page discussion of how you picked your sample group to educate the machine to do the algorithm learning. That's just simply saying we used this process. Inherent to that process is the fact that cost achieve -- cost savings are
being affected by not having to review each one.

If you were to say that, do you feel that you would be vulnerable under that rule?

MS. ADAMS: I think that if you have under this rule as proposed it uses the word "withheld." So if you then tell the requesting party: I have withheld documents, yes, I think they will say, what documents have you withheld? And I will not be able to identify what documents I have withheld.

JUDGE GRIMM: Thank you.

JUDGE CAMPBELL: Other questions?

John?

MR. BARKETT: What is your practice now in disclosing the use of technology assisted review to support your production? I'm a little puzzled by what you are telling your opponents now.

MS. ADAMS: It is entirely cooperative at this point. You really must have the other side's agreement really to have effective use of it.

Now, I don't necessarily, when I am -- the difficulty is like when you are responding to a request for production which has -- you cannot really use predictive coding currently for. Predictive coding is good for relevance or not
relevance, but not good for assessing responsiveness to a particular RFP.

So I may, in a variety of different ways, determine which documents are responsive to a particular request for production, and that --

MR. BARKETT: So you will know you are withholding something?

MS. ADAMS: No, because I won't have found it.

MR. BARKETT: I'm puzzled. I'm sorry. How does your -- if your opponent is agreeing with you on the use of the technology there is presumably some agreement on a cutoff point and there is some number of documents that your opponent knows you are not going to look at.

MS. ADAMS: The opponent knows on relevance versus not relevance, but they won't necessarily know how you determined -- okay, you've then taken the pool of relevant documents and determined which ones are responsive to which particular RFP which the rule requires. You haven't gotten to the process of determining which of those documents and explained to them how you found those, which word searches, which particular methodologies, analytics, whatever you've used.
MR. BARKETT: It would take too much time to continue this discussion.

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

Mr. Howard?

MR. HOWARD: Good afternoon. My name is Tom Howard. I am also with the law firm of Bowman and Brooke. And I want to thank the Committee for allowing me the opportunity to address you today.

I'm relatively new to this process here, and I've learned a lot over the last couple of months. I know you've been invested in this for years. And I also want to thank the Committee for proposals to amend the discovery rules that solve problems that those of us in the trenches see every day with disproportionate discovery and costs associated with excessive preservation efforts.

But I intend today just to talk about the rules amendments for Rule 37(e). And the theme I want to follow as it relates to my practice is making sure that the rules as amended continue to be predictable and consistently applied.

My practice for almost 30 years has been representing product manufacturers in lawsuits...
where there has been an allegation of a defect in
the product.

A significant part of my practice has been
involved in discovery. I have coordinated
discovery projects for product lines, for
particular types of practice or patent litigation,
particular defect claims in coordinated federal
actions, state actions, and even local coordinated
actions as well as individual cases throughout the
United States.

The goal in any of this -- any of those
projects is to provide legitimate discovery, to
frankly avoid motion practice, to avoid the
uncertainty of motion practice, to get the
parties, the plaintiff information that they need
to resolve the case on its merits.

The discovery we are providing, frankly,
also is needed to defend our products. In typical
trials, most of the defense documents are admitted
by the defendant. It's very rare, not very often
do plaintiffs admit many defense documents.

Toward this end, it's important
that -- that there be predictability in the way
that we approach preservation. And the particular
situation I might face in coordinating discovery
is I could have a client that might produce tens
of thousands or perhaps hundreds of thousands of
particular, we will call them widgets. And those
widgets may have components that are similar
across the entire product line such that I have to
be making sure that the discovery is consistent
and the approach to discovery is consistent.

And that often means making sure that the
practices that I engage in in any particular one
lawsuit meets the most stringent standards for, in
the case of preservation, preservation, because
there is committee notes in these rules
amendments, there are some different standards in
the -- as Rule 37(e) is currently applied with
respect to preservation obligations. And where
the conduct in one particular circuit may be
acceptable, it might not meet the standards of
preservation in another circuit. And the purpose
of these rules is to avoid some of that problem,
expressly to avoid that problem.

Toward that end, there is not only current
preservation standards at least took some time to
develop, if there are uncertainties in or
potential uncertainties and inconsistencies in the
way that the current -- the proposed Rule 37 is
implemented, it will then lead to further problems where you have different cases pending on different time frames and different jurisdictions, because if there's an earlier suit with a common -- with a particular allegation in which you are following what might be acceptable conduct or practices in a particular circuit, and then later another suit is filed in another circuit that takes a different interpretation, your standard might, for evaluating conduct, is going to be inconsistent and -- with respect to document preservation obligations.

Toward that end, I would like to talk specifically about Rule 37 and the questions you asked and add another point to that. Should the rule be limited to sanctions only for loss of ESI? I would propose that from the perspective of someone in the trenches dealing with discovery, I think it ought to apply across all types of discovery -- of evidence.

Should 37(e)(1)(B)(2) be retained in the rule? A particular concern I have is that there's a problem with that rule as it relates to ESI, but I think if it's limited to tangible items, the Silvestri decision, and those type of cases will
still hold. And so I think that ought to be limited to tangible items.

Should there be an added definition of willfulness, I think the fact that there's a potential for an inconsistent definition of willfulness across different circuits or in different district courts, I would submit the court should follow -- or the rules should implement the definition of willfulness and propose the Sedona group's definition be used because that has the -- speaks in terms of culpable and conduct.

And finally, although not asking the questions, I'm concerned about the factors in 37(e)(2) and the potential again across different jurisdictions where the same product may be the subject of a different lawsuit, that there might be an inconsistent application of those factors because they are in the rules.

If they are moved to the comments, I think not unlike the illustrations of curative measures that are also provided in the comments, I think it would satisfy the needs of -- or go a long way toward reducing the potential for inconsistencies.

And with that, I would yield back the
balance of my -- actually, I'm over my time, I'm sorry.

JUDGE CAMPBELL: All right, questions? Rick?

PROFESSOR MARCUS: One reaction I have on which I would like you to expand is that my reaction is if we took out 37(e)(2) factors, and left them out entirely or said something in the note that might not really be moored to the rule, how would that increase consistency in handling of these issues as compared to having those in the rule?

MR. HOWARD: Well, as the rules are implemented and interpreted, it's possible, for example, that some of those factors may be interpreted to be given greater weight in certain decisions. While the list is clearly provided now as an illustrative list of factors, it's possible that one or more of them might receive more attention and then become a stronger factor, if you will, in evaluating conduct.

PROFESSOR MARCUS: So you are worried about consistency?

MR. HOWARD: I'm worried about consistency.
PROFESSOR MARCUS: And you don't want it?

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

JUDGE CAMPBELL: Other questions?

All right. Thank you very much,

Mr. Howard.

Mr. Hunter.

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

As a businessman, I applaud your proposals to amend Rule 26 because I believe that efforts to reasonably reduce the scope of discovery will result in a reduction in the cost of discovery. The cost of discovery is important to us. It's the single largest external legal spend that I have.
I spend more money on discovery than any other thing in my legal budget externally. In fact, I spend more money on discovery than I spend in settling claims or paying judgments.

Over the last five years, I've paid to claimants through settlements or judgments 61 percent of the amount that I've spent on discovery. And what you might call the most efficient year, 2010, I spent 76 percent on settling claims. In 2012, I spent twice as much on discovery as I paid to claimants through settlements or judgments.

What does this mean in an industry like ours? Well, our market is finite, and it's low five digits of new products annually. That means I'm -- obviously you do the math, if you sell a thousand products and your discovery cost is a million dollars, either you have to raise the cost of each product by an average of a thousand dollars, or you have to impose on your shareholders a reduced return on investment, which discourages people from coming into the industry or staying in the industry, which is exactly what has happened.

In 1977, when Altec entered this industry
as a manufacturer, there were 28 competitors in the market. 25 years later, there had been a 75 percent attrition rate and only seven of those competitors remained. Today it's four.

In Europe, there's still over 20. They are not faced with the discovery cost we face here. We can't sell our products as a practical matter in Europe, because our products cost too much. The price is too high.

They don't bring their products to the United States, because they are coming into a finite market where they may sell three digits or four digits if they are really good. If they add to that the cost of discovery they will incur by coming here, the return on investment is such that they simply, it would not be a good business decision for them to come to the U.S. and so they don't.

I also applaud your efforts to revise Rule 37(e), although I don't think you solve the problem. The reason I applaud your efforts is because you will now include tangible evidence along with ESI. But the problem I have now is the risk of being sanctioned for innocent conduct.

While I'm speaking to you today in over
200 locations throughout this country, an Altec employee is servicing or repairing a product we manufactured. Yes, if that employee has reason to believe that there's been an incident that might lead to litigation, that employee has a duty to preserve whatever components he's taking off that unit, whatever fracture surfaces there might be.

But, that employee will ask the service manager or the fleet manager who has requested the service: Has there been some incident? Has somebody been hurt? And he has to rely on that answer, which often is no, or, I don't know. And I think our employee should be entitled to rely on the answer given.

Years from now, in hindsight, we may look back at what the employee is doing right now as I'm talking to you in throwing away components or welding over fracture surfaces and say what that person did is willful. It was intentional. He intended to throw those parts away. He did so without any idea there might someday be a claim, without any idea that he was impacting anyone's ability to pursue or defend a lawsuit. Yet, we might be subject to sanctions as it's written now where it's willful or, and where willful is not
defined. What our man does is intentional.

Similarly, what he's done is irreparably deprive everybody, plaintiff and defendant, of the ability to see the component he threw away or the fracture surface he welded over. But he did so innocently.

And so I would encourage you while amending 37(e), yes, it should include things other than electronic discovery. Please protect those who act innocently.

JUDGE CAMPBELL: Questions?

Yes, sir.

JUDGE KOELTL: How would you define willful?

MR. HUNTER: I would require some knowledge that what is being done is going to impact a claim.

JUDGE KOELTL: A claim or some other obligation, some known duty to preserve?

MR. HUNTER: Right.

JUDGE CAMPBELL: Other questions?

PROFESSOR MARCUS: Can I speak?

JUDGE CAMPBELL: Yeah.

PROFESSOR MARCUS: Can I ask a clarification question if I followed correctly.
What I followed was that you said in some period you checked that the amount you spent to settle cases was 61 percent of the amount you spent on discovery in litigation?

MR. HUNTER: That's correct.

PROFESSOR MARCUS: Is that because you win most of your cases and so you pay nothing in settlement of those cases, or is that because you generally spend a lot more on discovery than to settle a case?

MR. HUNTER: I guess it's a combination of everything. We do have a good success in defending our lawsuits.

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

Judge Pullan.

JUDGE PULLAN: Good afternoon. My name is Judge Derek Pullan. I am a state district court Judge in Utah and a member of the Utah Supreme Court Civil Rules Committee. I'm sorry to say this, 23 years ago Judge Campbell was my civil procedure teacher in --

JUDGE CAMPBELL: I'm sorrier than you are to say that.

JUDGE PULLAN: I'm sorry I have to say it
was 23 years ago. But it's great our paths have
crossed again.

This Committee has proposed comprehensive
amendments aimed at civil discovery reform and I'd
like to limit my comments just to the issue of
proportionality.

As you know, proportionality is not new to
the Rules of Civil Procedure. Rule 1 has long
sought the speedy and just and inexpensive
determination of every cause.

Since 1983, the rules have permitted
parties and the court to limit discovery that has
been unreasonably burdensome. Sadly, that
provision, very deep in the middle of Rule 26, was
never enforced with the vigor contemplated. A
later effort to give proportionality teeth in 2000
was largely ineffective.

In the end, proportionality limitations
could never counterbalance the broad reasonably
calculated language which has been interpreted to
define permitted discovery. The proposed
amendments considering -- that the Committee is
considering would change that.

Parties would be permitted to discover any
matter relevant to a claim or defense and
proportional to the needs of the case in light of certain express considerations. And I would add none of which are primary.

In making this proposal, the Committee is not inventing the wheel. And that's what I'm here to testify about.

For more than two years, Utah Rule 26 has allowed litigants to discover relevant material but only if the discovery satisfies the standards of proportionality. Discovery in Utah is proportional, and you'll find this familiar, if reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving those issues.

But what about cases in which one side has access to all relevant materials, such as employment cases, or cases in which nonmonetary relief is the critical question? As here, some Utah attorneys express concern that in these cases, a proportionality standard would unfairly curtail discovery.

To address this concern, Utah placed in the definition of proportionality a requirement
that courts consider a litigant's, quote, opportunity to obtain the information, taking into account the parties' relative access to the information.

Under new rule -- Utah Rule 26, the party seeking discovery always has the burden of showing proportionality and relevance. Before this time, the burden was on the responding party to seek protection from the court from unduly burdensome requests.

I would submit that reversing that burden is critical to managing discovery costs, especially in light of the exponential growth of retained data.

Further, to ensure proportionality, the court in Utah may enter orders under Rule 37. And those orders include a cost shifting for discovery based on the -- as justice requires.

In a further effort to achieve proportionality, Utah divided litigation into three tiers based upon the amount in controversy. We imposed, as you are considering, presumptive limits on deposition hours, interrogatories, requests for production and requests for admission. These presumptive limits are by rule
deemed proportional. Unless the parties agree or one party moves for more discovery. And we call that in Utah extraordinary discovery.

The days to complete standard discovery are limited, parties must disclose more about their case in chief earlier so that discovery requests shoot with a rifle, not a shotgun.

Failure to make timely initial disclosures means you don't use the undisclosed document or witness in your case in chief.

In the spirit of federalism, Utah is a laboratory with more than two years of experience testing the very proportionality framework under consideration by this Committee. But Utah is not alone. Federal circuit and district courts have implemented pilot programs and local rules using proportionality as the key to managing litigation costs. 21 other states today have either adopted or are in the process of considering extensive civil discovery reform.

This is a critical time. It's an ideal time for federal rule makers to provide a proportionality based framework and bring uniformity to these grass roots efforts.

Having noted earlier notwithstanding the
grand vision of Rule 1, few in the United States would describe civil litigation as speedy and inexpensive. Burgeoning discovery costs openly undermine equal justice under the rule of law. Parties with meritorious claims but modest means are denied access to the courts. Specious claims settle to avoid the discovery bill.

Requiring the discovery costs to be proportional to what is at stake in the litigation restores balance to a system which aspires to the just and the speedy and the inexpensive determination of every cause for all people.

I will submit my opening statement into the record together with a law review article that I coauthored with Philip Favro called New Utah Rule 26, a Blueprint for Proportionality Under the Federal Rules.

And I will take your questions at this time.

JUDGE KOELTL: Two questions. First, do you have any information about how the Utah revised rule is working out?

And the second question is you said it was important that the party seeking discovery have the burden of showing proportionality. And I'm
not sure I really understand that.

There's no specific burden in the -- in the federal rules. The federal rules give, even the proposed rule gives a series of factors to be considered, one of which is the burden or expense of the proposed discovery, whether it outweighs the likely benefit.

The only source of the information for the burden or expense of the discovery is the person producing it. So that's where you're going to need that information.

And ultimately, when we talk about burdens of proof, we all know the burden of proof only has an effect if everything is in equipoise, which it seldom is. So the judge is going to have to consider all of these factors and make a determination if there's a motion to allow or not allow or limit or expand the discovery.

So it's not clear to me why you say the burden of -- of showing proportionality is so important.

So two questions.

JUDGE PULLAN: With respect to what information do I have about Utah's experience, the Institute for the Advancement of the American
Legal System in Denver is helping us track changes. And we are two years into that. It's included right now surveys of attorneys who have practiced with cases under the new rules. Sadly, response rates aren't what we would like them to be, but they are fairly significant.

And what we are finding is you have generally the younger class of the bar really likes the changes. We have, consistent with our collective personalities, many who are reserving judgment. That's probably what attorneys do most. And then we have some who stand on the dock complaining about the ship that has sailed.

And so I think -- but certainly a high percentage of attorneys have not realized their fears. They have found them to be -- in fact, I spoke with an attorney who practices in the federal courts in Utah yesterday. And he says I actually prefer the rules and under the state courts and we are more and more advising our clients to file in the state court rather than federal court because discovery costs are more predictable.

With respect to equalizing the factors, my sense is that with respect to many of the factors,
the requesting party is in the best position to be able to advise the court early on in litigation about those factors. Certainly some fall into the -- where the responding party would have more information. But we've heard today that, you know, costs of -- or the -- one of them is more weighty than another. Certainly Utah's rules doesn't read that way and federal rules don't read that way.

JUDGE KOELTL: Why is there any issue with respect to burden of proof?

JUDGE PULLAN: It's the language of the rule, and we will be experiencing that in Utah.

JUDGE KOELTL: But there is no language of the burden of proof in the federal rule.

JUDGE PULLAN: There is not. There is in the Utah rule. I have quoted the Utah rule directly where we do have a burden of proof.

JUDGE CAMPBELL: Peter, do you have a question?

MR. KEISLER: That's what I was also trying to understand. As I heard your description, Judge, there is a burden on the propounder of the discovery. And it sounds much more explicitly so than anything that would be in
the rule change we are talking about.

But you also said there's some proviso that says but if a propounder has not yet gotten access to the kind of information that would be needed to support such a burden, there will be certain presumptions in that party's favor, which sort of sounds to me in the end like what it might shake out to is like what one of the witnesses said this morning which is that, you know, federal judges in discovery disputes aren't really focusing on, you know, you had the burden of showing something, you haven't, you get more. Okay, what's reasonable on these different factors of relevance and burden and things like that.

And I'm wondering if in practice that's how it works in your court or if there really is a kind of rigorous you had the obligation to make a showing, there's nothing here. I don't have to worry whether it's rebutted. I mean, the kind of thing that happens more on the merits of the case.

JUDGE PULLAN: I would say it's burden of proof soft. What you say is exactly true. And Utah's rule has other factors other than what you've proposed to determine proportionality. And I mentioned one of those.
THE COURT: Gene?

JUDGE PRATTER: First thank you very much for coming and giving us the benefit of all of this.

My question has to do with whether or not there was anything you did in Utah to educate the bench as you -- as you initiated Rule 26, or are the judges so quick there, that they are learning on a case-by-case basis?

JUDGE PULLAN: I preach the gospel of proportional discovery to our bench. It is consistently a subject of judicial education at every conference. And it is -- proportional discovery will represent a cultural shift on how we look at civil litigation. And that cultural change has to happen within the judiciary as well. And any change of this nature, there has to be a committed education effort to the bench.

JUDGE PRATTER: Thank you.

JUDGE CAMPBELL: Sol?

JUDGE OLIVER: You talked about burden of production -- I'm sorry, burden of proof and there's been some comment from Committee members that there's no burden of proof in our rule.

But would you find it significant that
there was kind of a burden of production, for example, on the civil rules, whether you move for protective order or you're filing a motion to compel makes a big difference in terms of where you stand when you are before the court. So whether you call it a burden of proof or not, the question is who has to initiate, you know, the proof or would that make a difference anyway?

JUDGE PULLAN: That's a good question.

And we dealt with that very issue. In Utah, the rule says the party -- the requesting party always has the burden of proof. Whether that -- and what we interpret that to mean is, any time proportionality becomes an issue in the case, whether it's in a motion to compel, a motion to quash, a motion for extraordinary discovery, if proportionality is inserted into any of them, the requesting party addresses it first.

JUDGE CAMPBELL: Paul.

JUDGE GRIMM: Just a quick question. You mentioned that you've had, in addition to the work that you've done on infusing proportionality, that you've had some disclosure obligations that each party has to disclose information to the other. It was sort of an aspiration of 26(a)(1) changes
back in 1993 that got removed in 2000.

Have you had enough time with your new rules to determine whether or not that disclosure -- affirmative disclosure obligation, separate and apart from any response to a discovery request, whether that has helped in the evaluation of proportionality because they have actual information upon which they can make the arguments not in the abstract but with what they've already gotten?

And secondly, does the disclosure include adverse information that's clearly relevant to what the other side has asked for or only information that would support what you intend to prove?

JUDGE PULLAN: With respect to the last question, it's only information that would be supportive of your case in chief. And we did beef up initial disclosures. You now have to disclose -- you have to identify a witness with a short summary of anticipated testimony as well as a copy of all documents that would come in your case in chief.

And I would add that if you fail to timely do that, we have a sanction that says you don't
use it and it's not a Rule 37 sanction, it's a Rule 26 sanction. So there's no willfulness standard. Initial disclosures means something in Utah now.

Have we had enough time to see what effect? No, but anecdotally, or at least theoretically what we anticipate is the more you know earlier, the more focused discovery efforts will be.

JUDGE GRIMM: And therefore, more proportional?

JUDGE PULLAN: Yeah.

JUDGE CAMPBELL: Thank you very much, Judge Pullan.

Mr. Hamilton?

MR. HAMILTON: Thank you very much. I'm before the Committee today principally in my role as an eDiscovery educator, both at Bryan University where its principal office is located here in Tempe university (sic) where we have graduate and undergraduate eDiscovery programs, and at the University of Florida Law School where we have a robust eDiscovery education program and project.

I view the rules as guidance as an
educational vehicle in many respects for the bar and for aspiring attorneys and professionals in the field. Yes, it sets the rules of the game. I've been a litigator for 30 years, so I can appreciate that aspects of it. But it's also guidance in helping us to establish best practices and raise the level of practice that we see out in the field.

I also think that the core of the rules since -- since December 1st, 2006, has been a focus on Rule 26(f). That's, to my way of thinking, the heart of what we are doing in eDiscovery is early meaningful disclosure.

And I believe that's what the prior witness was talking about. Because that makes proportionality possible. It avoids downstream train wrecks and disasters and allows early judicial recollection. And I applaud this Committee for all its work it's done in that regard.

What I am concerned about is the impact and every day I would like to talk to the Committee about is the impact of the change and really an absence of information in Rule 26(b)(1) that's being proposed and how that may impact Rule
Let's take a hypothetical example that we probably think is beyond doubt at this stage of the game, that in Rule 26(f) I'll sit down with the other side and I'll say let's talk about your e-mail systems, and the witnesses that participated in those e-mail systems.

What kind of server do you have? Who's the manufacturer? How does it deliver it? Assuming it's perhaps a Microsoft system, do you have IMAP, or do you have POP delivery? Is it Internet-based mail system? Are PSDs created? Are OSTs created? What's the backup rotation? Do you have an archiving system that's put in place.

You would think that there would be an immediate response by the opposition to that. However, the state of eDiscovery practice is not that high, regardless of what we would like to hope. In fact, for the medium-size case, and I speak to you as a litigator of some experience handling not only significant cases, but many medium-sized cases during my career, unfortunately that is not so.

Often I will encounter objections such as: That's my work product, you'll never get that
except over my dead body. We'll respond as we
deem appropriate.

Now, we all know that Rule 26(f) has
aspirational guides to it that the parties will
discuss this, that they will go over it together.
But in practice, there are huge obstacles.

That's why at Florida, at Bryan and at
Georgetown and Seventh Circuit, there's a
tremendous focus on how do you do the 26(f)
conference properly. It's a hurdle we have to get
over and the vast bulk of practitioners simply
aren't there.

So what do we do in practice? How do we
get them there? We get them there, one, by
turning to the rules. And there's a principle
provision in the rule that I found very effective
in dealing with the opposition, why they don't
want to go in front of the local district court
judge, because they know I'll win and they will be
embarrassed.

And that's the provision that's been
excluded by the Committee, which says that
discovery can be had including the existence,
description, nature, custody, condition and
location of any documents.
That is a powerful tool out in the field. I would urge the Committee to reconsider its exclusion of that provision.

When you go to the comments, you address that. And you say -- and you cite that principle that I just read. And then your conclusion is discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples.

I respectfully submit to the Committee that you've overestimated the level of practice for the vast majority of cases out in the field. It overestimates the level of practitioners that I deal with on a regular basis. It's not there. We need the additional language in the rule.

Now, here's the worst part of it. By removing that language, what happens is we give the opposition that doesn't want to participate in a Rule 26(f) conference more ammunition. Now it's absent. And they, as we all know litigators that don't want to participate, will point to that absence and say: The Committee took it out because of a reason.

Of course, if you go back and study the report as we all have and there's a reason, you
realize that nothing is being changed. But the
point of the matter is, is when the new rules are
published and presumably adopted, and I applaud
them. You all have done wonderful work. When
they are published and the comment is published,
the reason for the exclusion is not going to be
there. It will cause mischief.

Much of your work that you have tried to
accomplish here in Rule 26(b)(1) is to take the
kernel of the rules that we thought we had and
emphasize things better, removing -- removing
26(b)(2)(C)(3) up to the front.

We are doing that because its impact was
missed. We are making some other changes with
respect to taking out "reasonably calculated"
because it missed relevance.

So what we are doing is -- you're doing is
tweaking the rule so that it makes sense and
brings home its original mission. We will take
out a provision that's going to allow for mischief
and perhaps undermine the very changes that you
wanted and something else that is very important.

So the solution is very simple. We don't
need to go back to the rule, just insert your
reason into the comment so we can point to people
and, no, see, the reason it's excluded is because it's so darn obvious. And how can you be so silly as to object to a discussion about it.

But absent the provision and the comments, I guarantee you on the everyday medium-sized case, we will be dealing with practitioner after practitioner that misunderstands what happened with the rules with respect to that provision.

Thank you very much.

JUDGE CAMPBELL: If I can ask a clarifying point. I think you made this clear, but I just want to make sure that I got it right.

You're saying that you're okay with us taking that language out, provided we say in the advisory committee note this stuff is still discoverable?

MR. HAMILTON: Yes, sir.

JUDGE CAMPBELL: Other questions?

Thanks very much, Mr. Hamilton.

MR. HAMILTON: Thank you.

JUDGE CAMPBELL: All right. We are going to go ahead and take a break. We will break until ten minutes to the hour and we will resume at that time.

Thank you.
(A recess was taken.)

JUDGE CAMPBELL: If you take your seats, we will get started.

Our next speaker will be Mr. Avelar.

It doesn't appear he is here, so let's move on to Mr. Canty.

MR. CANTY: Good afternoon. My name is Dennis Canty. I am a partner with Kaiser Gornick LLP, a San Francisco firm representing plaintiffs.

I practice primarily in the area of mass torts involving pharmaceuticals and medical devices. I serve on plaintiffs' leadership committees in MDLs and state coordinated proceedings nationwide.

One of my primary responsibilities is the negotiation of scope of preservation and the scope and format of production in those types of cases.

Thank you for the opportunity to address you today.

Currently, Rule 26 (b)(1) and Rule 26(b)(2)(C) dictate that the scope of the discovery and preservation is relevance unless and until the court makes a limiting determination.
However, proposed changes to 26(b)(1) and 37(e) seem in effect to say keep what's relevant unless you can make a case that it is too expensive or burdensome. And even if you make a bad call, you won't face sanctions later unless your opponent can prove the content of what you destroyed and your intent to destroy it.

It is apparent from the record of these proceedings that these changes are driven by claims of enormous and disproportional discovery and preservation costs.

Also it seems apparent from the record there's a lack of empirical data to support those claims or to show that the preservation costs are not simply high, but more importantly, disproportionate to the stakes and the amount in controversy.

There is a couple of examples. You heard today from in-house counsel from Boston Scientific. I want to take this example because it is typical of what we are seeing.

Boston Scientific is a big fan of proportionality and wants to see it in 26(b)(1), and it came here with only half of the proportion. It talked about millions of dollars in costs and
terabytes of data. But similar to the Lawyer for Civil Justice Survey, it fails to provide this Committee with any information about the stakes in the litigation in which those costs are incurred.

Counsel didn't mention that four months ago Boston Scientific subsidiaries paid $30 million to the Department of Justice to settle allegations that it knowingly sold defective heart devices to health care facilities, in 2008 that it paid $240 million to the patients that were injured with those defective products.

Those are settlement figures. Amounts in controversy are multiples of that. One litigation.

Microsoft. Microsoft put up a pretty picture detailing the numbers of pages, not documents, pages that it preserves and produces.

The Committee asked about Microsoft's pretty picture. What types of cases do your data pertain to? The response was the data is in the aggregate, all litigation, from large patent claims to employment claims.

I encourage the Committee to ask Microsoft the next question. And that is: What is the aggregate amount in controversy of those cases?
How are your costs not just high, but disproportional to the stakes?

Pfizer's counsel attended the last hearing and bemoaned the cost of 36 point something million dollars in the Prempro litigation. These were incurred simply to buy and store some backup tapes that were never accessed.

She said, quote, we never went back to those backup tapes to retrieve a single document. Not once, as the information on those tapes was completely redundant.

What counsel did mention was that as of June 2012, Pfizer had committed more than $1.2 billion to resolving the claims of the women that were injured because it put profits over patient safety. Again, this --

PROFESSOR MARCUS: Counsel, I'm sorry, could you -- this relates, I'm sorry to interrupt you at that point. But this relates to something I asked somebody earlier.

How do you think proportionality should work in the kind of cases you talk about, which I would assume often have billion-dollar possibilities. What should it mean? Shouldn't it mean very large preservation?
MR. CANTY: Absolutely it should. Absolutely.

PROFESSOR MARCUS: So in those cases it sort of helps you.

MR. CANTY: The idea that discovery should be proportional, yes. Absolutely.

What I'm suggesting is that the premise for the rules, the rule changes, which are suggested, are that these preservation costs are high, and the intent and he effect of the rules is to limit that which is preserved. That's what will happen. That's the intent.

And what I am saying is before we jump into that, before we make a decision like that, we ought to have some data to tell us that these costs that -- the problem that we are trying to fix exists. But the problem is there's a disproportional amount of preservation costs. That's not in this record that I can see.

When the -- but the Prempro example is more important for another reason. And that's because, and I didn't participate in the litigation but I did go back and look at the docket. I reviewed the court's order at docket number 162.
The court, in its preservation order, specifically provided that alternative to backup tape preservation is to arrange for the preservation of complete and accurate duplicates of each material -- of such material. It also provided the party may seek relief from preservation obligations upon a showing of undue cost, burden or overbreadth.

When this Committee is told that high costs are disproportional and due to overbroad discovery or preservation -- overbroad scope of discovery, the Committee, I think, needs to question that.

When this committee is told that the high cost of -- that the concepts of proportionality are not currently significant factors in discovery, and so changes are needed, the Committee needs to question that. And I think you can't logically make those rule changes without those answers.

Final comment. We heard reference to the Pippins versus KPMG decision as a poster child for overbroad discovery. This, I think, exemplifies where the problem really exists.

The case isn't about that. The case is
about KPMG's failure to cooperate with plaintiffs. I believe that the court's adjectives in describing KPMG's conduct were unreasonable, nonsense, inappropriate behavior, smacks of chutzpah, and KPMG's ongoing burden is self-inflicted because of its recalcitrance.

I'll echo the comments of others here today. If you want to make changes to the rules to reduce the costs of eDiscovery, add sanctions for failure to cooperate.

Thanks for the opportunity to be here.

JUDGE CAMPBELL: Thank you, Mr. Canty. Are there questions from members of the Committee?

MR. BARKETT: Is your position that there should be no changes to the Rules of Civil Procedure beyond adding sanctions for failure to cooperate? Is that -- I'm not sure where you're coming down, that's what's confusing me.

MR. CANTY: What I'm saying is that the effect of the proposed changes to the rules are to limit and -- what is discoverable and what is produced. When you do that, you run a risk, a very substantial and real risk that relevant evidence will be lost, irretrievably.
MR. BARKETT: So your suggestion is that there should be no changes to Rule 26, to 30, to 33, to 36, 37?

MR. CANTY: Nothing to 26(b)(1), nothing to 37(e).

JUDGE CAMPBELL: Any other questions?

All right. Thanks very much, Mr. Canty.

Attorney General Horne?

ATTORNEY GENERAL HORNE: Thank you, Mr. Chairman and members. I'm Tom Horne, the Arizona Attorney General, but I'm here not as the Attorney General but in my individual capacity based on my 30 years of experience in private practice before I went into public service.

And I'm here in support of the changes to Rule 26(b)(1), which would require that discovery be for relevant and material matters. I have no comments on the preservation issue.

But in 30 years of private practice, I saw many, many cases where people were unable to seek justice because they were told that a lawyer giving honest advice that the other side had much deeper pockets and they would run them into the ground and the attorneys fees would exceed what was in dispute, and it simply would not be worth
it.

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

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

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

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

And finally, I wanted to comment on the proposal to reduce the time from the -- the number and time of depositions. The -- under the Arizona rules, in state court, depositions are limited to four hours, and you're presumptively only entitled
to depose parties without permission of the court.
And I think that's a very good rule and would help
to make the discovery process more reasonable.

And that's all the comments that I have.

JUDGE CAMPBELL: All right. Thank you.

Are there questions from members of the Committee?

JUDGE KOELTL: Do you have any experience
with whether people choose the state courts as
opposed to the federal courts based upon what are
the currently more restrictive Arizona discovery
rules?

ATTORNEY GENERAL HORNE: I don't have any
experience in that. When I was in private
practice, the state courts were quicker, so we
tended to choose the state courts if we were the
plaintiffs.

JUDGE CAMPBELL: John?

MR. BARKETT: What are the disclosure
obligations under the Arizona rules?

ATTORNEY GENERAL HORNE: A full disclosure
statement has to be filed.

MR. BARKETT: It's very different from 26(a)(1)?

ATTORNEY GENERAL HORNE: I don't remember
if it is different.

JUDGE CAMPBELL: It is. It is quite a bit broader and it's not limited to information supporting a party's position.

And I will say that it's not uncommon in federal court here for me to have parties come in and stipulate to four-hour depositions because they've really grown to like them in state court, without me raising it. It happens in maybe a third of my civil cases.

ATTORNEY GENERAL HORNE: Well, it's a particular problem if one party is trying to wear out the other party because they have greater economic resources. And I think the four-hour limitation, the presumption of only the parties and needing court approval for other depositions and much stricter materiality rules I think would help very much to make it possible for people to get justice even if the opposing party has deeper pockets.

JUDGE CAMPBELL: Are there other questions?

All right. Thank you very much.

ATTORNEY GENERAL HORNE: Thank you.

JUDGE CAMPBELL: Mr. Sneath?
MR. SNEATH: Good afternoon, and thank you for the opportunity to address you, and I commend you for your hard work.

I'm a principal shareholder in a 15-lawyer litigation boutique in Pittsburgh, Pennsylvania. We handle primarily complex business litigation matters, intellectual property, patent and trademark litigation, and environmental toxic tort suits and products liability work. Our commercial work is both for plaintiffs and defendants for corporations, big, medium, and small.

I also served as president of DRI, which is the counterpart to AAJ on the defense side in the year 2011 and '12. And I speak for that group and its 22,000 members around the country.

I also serve on our local patent rules committee in Pittsburgh, which is a set of rules that have been enacted to try to do a lot of what your proposals would do to build proportionality into the patent cases by staging discovery and doing things to make sure that claim construction can occur early when many cases tend to be sort of decided or settled. So I have some experience in the rule-making process. And I respect what you're doing.
I wanted to talk, because I'm late in the day, I figured I would talk about a slightly different perspective than I either read about in the first set of hearings or now. And that is on behalf of small businesses, small and medium-sized businesses who are involved in business-to-business litigation which, as I read the statistics, is a pretty large percentage of what's going on in the federal courts. And it's a different dynamic than the traditional plaintiff versus defendant that we've heard a lot about today.

Small businesses may have to produce lots and lots of documents unlike a personal injury plaintiff. And so they run into the same problems as Microsoft or the big corporations. In fact, they might be being sued by a big corporation or having to sue a big corporation.

So as somebody mentioned earlier, I like to look at it as requester and responder versus plaintiff and defendant. Because I think that's sort of artificial, it's always plaintiff versus defendant, doesn't really work in a lot of cases.

I support the rules changes almost completely. A few things that I would suggest be
We represent large corporations but many times we get calls from start-ups. Pittsburgh is a high-tech town these days, the Silicon Valley of the east, so we have lots of start-ups and growing and emerging companies. And they have intellectual property issues, they have start-up issues of one kind or another. And as defendants, they can be crushed in litigation.

Many of them have no legal departments. They don't have general counsels. They've never been advised on preservation of documents. They have no idea what litigation in the federal courts entails. And so the first time they hear about it is from me.

And so when I talk to them and explain what can happen, both as a defendant or as a plaintiff, that's when they begin to realize that they've got to make some very serious decisions about how to get justice.

We represented one corporation, for example, that was defendant in the case that -- and they were a fairly successful
medium-sized corporation who were spending about
50 to $60,000 a month to pay for database and
costs in the litigation to house millions of
documents that the parties had to exchange and
produce.

Despite efforts to limit search terms,
limit numbers of witnesses, and cull it back, it
still amounted to extraordinary expense both to
store and manage the database, to hire contract
lawyers to review the documents and code them, to
manage them and create layer upon layer of access
to the database so that experts could only see
certain documents, clients could only see certain
documents, lawyers certain documents, all of which
was governed by a five or six-page protective
order that was a small industry in itself to
figure out how to comply on an ongoing basis with
the protective order. And that becomes a huge
problem in litigation just in and of itself.

As plaintiffs, for example, I got a call
recently from a nonprofit, a business incubator in
Pittsburgh, whose job it is to provide seed money
to start-ups. They create jobs. And they
were -- there is a very wealthy Asian businessman
set up a website with the exact same name as their
company who wants to provide capital and funding
to companies in America. And they would like to
sue him for trademark infringement.

    And when I began to -- they have no
in-house department, no legal counsel, no anything
in-house telling them how to do it. They've never
been involved in litigation. I sat down with them
and I explained, this is what you potentially
face. And here's what it might cost. And the
other side can turn around and try to
contend -- contest your mark, and then you would
have to go back and get documents from years ago
that discuss first use in commerce.

    And their eyes glazed over and they looked
at the expense, and they said we don't have a
budget for that kind of thing. Our money is
restricted. We would have to find where we get it
to even able to be able use it. How do we get
justice because this guy is going to crush us?

    I'm still waiting to hear back from them.
They have no idea what to do. And it really all
stems from, it's not an access to the courts
issue. You know, Iqbal, Twombly, the rules guide
us on how you get into court.

    And it's what happens after you get into
court and that's where the problem is. And that's what you are addressing. It's this false issue and it's all about access to the courts. It's not all about access to the courts, you can get in there.

But it's about how you streamline the practice to make people get back to the concept of being efficient lawyers, ethical lawyers, and doing their responsibility to produce documents initially like they are supposed to.

And so I wanted to present that perspective and say that there is a whole constituency out there that we really haven't talked about that I think are an emerging part of the court docket. So thank you.

JUDGE CAMPBELL: Mr. Sneath, let me ask you a question, if I can.

MR. SNEATH: Sure.

THE COURT: That I've had on my mind when others have spoken and I've not asked it but we did talk about it in a previous meeting we had.

Some portion of this enormous cost of managing information is the result of the explosion of information in the digital age. And it will be there no matter what we do with the
rules or with litigation.

Some portion, we are told by credible sources, is due to the preservation rules and the discovery rules.

Do you have any sense for how we figure out if trying to do something with the discovery and preservation rules will reduce half the cost or ten percent or five percent? In other words, are we really going to help these people you talked about, or is their problem the result of fact that they've got more information than they can effectively manage in any dispute, just because of all of the information we are storing these days?

MR. SNEATH: Well, the companies who have been advised about preservation have done what you've heard companies talk about here all day. And they are the companies who have never even heard that they have to do it or don't know that they have to do it. So you have to decide a starting point, particularly if they are going to be a plaintiff. You know, and there's no lawsuit against them.

So I do think that if you move the goalpost closer, and force lawyers to have
discussions with those goalposts narrowed, that lawyers will do -- the good lawyers, as you've heard mention, will do what they are supposed to do, and that is to work out an arrangement that will be sensible to both sides.

There is pressure on every lawyer in this room who works for a company to reduce costs. And that's on both sides of these business-to-business cases. So we all have pressure to talk. We all have pressure to negotiate, to come up with reasonable limits, to come up with reasonable search terms.

And you're right, there's a ton of information. But I think if you narrow the goalposts as your proposals do in large part, that you give the starting point for the discussion at a much better place to allow the lawyers to serve their client, particularly smaller and medium-sized businesses.

JUDGE CAMPBELL: Other questions?

All right, thank you very much for your comments, Mr. Sneath.

Mr. Twist?

MR. TWIST: Thank you, Mr. Chairman and members of the Committee. First let me apologize
for my rather casual appearance. My left arm had an unintended discovery experience with my garage floor over the Christmas holiday, and I apologize.

My name is Steve Twist and I serve as general counsel for Services Group of America, which is a privately held corporation in the food distribution sector of the economy. We provide food service to our customers, tens of thousands in 18 states around the country. And we do that through over 4,000 associates who depend on the health of our company and our economy for their continued employment.

My background is set forth a little more fully in the written comments that I've submitted and will upload onto your website.

But in my current and past roles, I've had significant experience currently with SGA and formerly I was counsel for Dial Corp., which became Viad, a publicly traded corporation. And I've had enough experience over the almost 40 years of my practice to know that or conclude that the current civil justice system is dysfunctional, particularly when judged against its fundamental purpose stated in Rule 1, which is to provide for the just, speedy and inexpensive determination of
every action and proceeding.

The costs and burdens of discovery now drive dispute resolution, rather than the merits of cases. Such a system is neither just nor speedy. And it most certainly is not inexpensive.

Let me explain briefly why I say this. My company spends more money on preservation and discovery than it does to pay claims. Our IT department reasonably estimated for me that just to maintain the preservation and search functions that are required of us costs us more than a quarter million dollars every year.

The leading factor in litigation strategy is cost, not the merits of claims of defenses. Every time I sit down with company executives to talk about litigation that we are or may be involved in, invariably the question is what will be the costs. And invariably, that is a significant factor in the decision about when or how to proceed.

In the last year -- in the last two years alone, we've been involved in litigation, and I'm citing only three matters, in which attorneys' fees and costs related to discovery alone have exceeded well over $1 million. And in deference
to my -- or your earlier presenter, I can tell you that the amounts at issue were less than that.

In none of these cases has there been a finding of responsibility against the company.

Let me disclose, in fairness, that these cases have been in state court, not in federal courts, but I dare say that the costs would have been higher. And more importantly, the power of the changes in the federal rules that you're contemplating will encourage similar improvements by states around the country.

In addition to the IT costs, the energy in preserving every conceivable record, every iteration of every e-mail and every version of every document places an enormous burden on any party. Litigation takes unforeseen tolls beyond simply the cost of attorneys. It robs company employees of time. It eliminates our ability to budget properly. It impedes our ability to grow, to hire new employees. It has a definite effect on the bottom line.

The triumph of cost over merit is a direct result of the current rules and how they are applied in practice. That's why I strongly support the company's (sic) efforts and I thank
Specifically the scope of discovery, as defined in Rule 26(b)(1), promotes a litigation strategy designed to bring opponents to their knees rather than bring facts into light. The Committee's proposal to redefine the scope of discovery is a much needed and appropriate reform.

Much of the cost and burden of discovery has been caused by the broad scope of discovery defined in the terms "subject matter involved in the action", and the notion of evidence that's "reasonably calculated to" the discovery -- "lead to the discovery of admissible evidence."

The proposal to move the proportionality language would result in parties and judges paying needed attention to the standard, being more focused on the standard.

I'm aware that opponents have alleged that moving the language will shift the burden of proof and impose an inappropriate burden on plaintiffs. I think that argument is incorrect.

First, changing the scope of discovery does not change the legal burden.

Second, currently the burden of ensuring proportionality falls upon both requesting and
responding parties. The committee's proposal does not change that.

Third, if what the opponents mean by shifting the burden is a possible increase in motions to compel compared to motions for protective orders, I don't see that as a major factor.

Reforming the scope of discovery to ensure proportionality is worth it. The current proportionality rule has failed. The proposed new Rule 37(e) is also a much needed reform. Although the proposal holds great promise, two parts I would commend to your attention before the rule will have its intended effect.

First, the Committee should remove the word "willful" making clear that the test is bad faith. This is crucial because some courts interpret "willful" to simply mean "intentional." And under that definition it will remain impossible for companies like ours to make reasonable decisions about preservation.

The second needed repair is to eliminate the exception for the loss of information "irreparably deprives" a party of any ability to present or defend a claim in the action. Although
the Committee intends this exception to apply in only the very rarest of situations, it's likely that courts would use the exception to avoid the primary rule.

Mr. Chairman and members, thank you very much for the opportunity to present to you.

JUDGE CAMPBELL: Thank you, Mr. Twist. Questions?

Sol?

JUDGE OLIVER: I think you indicated that someone in your company indicated that you had one quarter of a million dollars that you use for preservation costs. Is that what you said?

MR. TWIST: Yes, sir.

JUDGE OLIVER: What would you estimate the cost would be if there was a rule change, 37(e) was promulgated and became part of the rules? I mean, how would you do things differently? How much would you save?

MR. TWIST: Well, that's an excellent question, and I haven't taken the time to sit down with our IT people to figure that out, but I certainly would and before the Committee's deadline for public comment will submit something on that point.
JUDGE CAMPBELL: Any other questions?

All right. Thank you. Thanks so much, Mr. Twist.

I understand that Mr. Avelar has arrived; is that right? Let's take you next, Mr. Avelar.

MR. AVELAR: Thank you, Your Honor. My name is Paul Avelar. I am an attorney with the Arizona Chapter of the Institute for Justice, a nonprofit public interest law center dedicated to protecting constitutional rights.

Thank you for the opportunity to testify here today. And thank you to the advisory committee for its extensive work in preparing these reforms.

Although IJ welcomes the amendments encouraging early and active judicial case management, we are very concerned about the proposals to narrow discovery and limit the use of discovery devices. These measures will cause serious problems in constitutional litigation and contrary to their intent, will in most cases profoundly increase the frequency and intensity of discovery disputes as well as litigation costs.

Since 1991, IJ has represented individuals, small businesses, and other groups in
federal courts across the country to enforce constitutional rights. IJ represents both plaintiffs and defendants to protect these constitutional rights.

For example, IJ Arizona has represented several individuals and groups in constitutional challenges to Arizona campaign finance laws, and at the same time, we have also represented parents as intervenors to defend Arizona school choice programs.

Most IJ cases are moderate in size. Typically they are resolved on summary judgment, but when required, IJ cases typically last between one and five days of trial.

Whether representing plaintiffs or defendants to protect constitutional rights, there is an asymmetry in access to information with the government in sole possession of the information and facts generally needed to prove constitutional violations. Based on this perspective, I offer testimony opposing the proposals related to discovery, the limitations on discovery.

First, the proposed proportionality requirement you have heard quite a bit about already. Our concern is that the proportionality
is dependent on five subjective and fact dependent
criteria. And a government defendant can simply
resist requests for information needed to prove a
constitutional claim on the grounds that it is not
proportional.

The amount in controversy in a
constitutional case may be low or even nonexistent
where the suit is primarily aimed at injunctive or
declaratory relief. How will that play into the
proportionality issue?

Moreover, as the advisory committee notes
make clear, the proposal shifts the burden from
defendants to proof that discovery requests are
disproportional to plaintiffs to prove
disproportionality.

Contrary to the intent of the amendments,
this requirement will increase litigation costs.
It is readily apparent that there will be a
barrage of motions to compel and the need for
judicial intervention to spring from this proposed
change.

Second, the proposals to reduce the
numerical limits on discovery devices are also
counterproductive to the goals espoused behind the
proposals. Constitutional litigation requires us
to navigate between Scylla and Charybdis. To
draft discovery requests narrow enough to draw a
meaningful response, broad enough to fully capture
the relevant information, but not so broad as to
be objectionable. This is especially true where a
case implicates government behavior across a
number of years, across a number of agencies.

Further limiting the number of requests
permitted will only encourage broader requests for
discovery and thus more objections.

Moreover, the limits to request for
admission are particularly troublesome. There has
been no problem with burdensome or abusive
requests for admission so far as I know. These
admissions -- these requests for admission are
very useful tools that decrease
judicial -- judicial time and decrease litigation
costs. Admissions narrow the issues in litigation
and they also facilitate proof with respect to
remaining issues.

This is particularly true in
constitutional cases such as we litigate, for
example cases subject to the rational basis
standard of review.

We find that carefully crafted requests
for admission can obviate the need for depositions of some, restrict or limit the amount of deposition needed of others or even prevent the need for a trial at all by facilitating motions for summary judgment.

In Nevada, for example, Nevada Federal Court, IJ effectively used Rule 36 to obtain numerous admissions to prove material facts about the lack of any health or safety justification for the restrictions that we were challenging. And we did this after state witnesses did not clearly admit to those facts in deposition. By filing these requests for admission, we were able to move for summary judgment, and that motion is at this time still pending.

Our concern is thus that far from fostering cooperation, limiting requests for admission will encourage gamesmanship, which is obviously not the point of the federal rules. The fair administration of justice requires striking a balance. Defendants should not fear harassing litigation designed to extort settlements, but the doors of justice must be opened wide enough to hear meritorious cases.

Thank you very much for your time and
attention today. And if I can answer any
questions, I'm more than happy to.

JUDGE CAMPBELL: All right. Thank you.

Any questions?

John?

MR. BARKETT: I'm wondering, I was just
looking as you were talking and I pulled out Rule
26(g)(1)(B)(iii), and it says with respect to a
discovery request, response or objection, every
lawyer that issues a request for production has to
certify that those requests are neither
unreasonable nor unduly burdensome or expensive
considering the needs of the case prior discovery
in the case, the amount in controversy, and the
importance of the issues at stake in the action.
And the sanctions under 26 are mandatory, they are
not discretionary.

So I'm just a little puzzled by the
statement that you made about changes that would
occur. If you have to certify to this now before
you issue a discovery request, what's the problem
with what's been proposed? I didn't quite get
exactly what your point was given the existing
obligation.

MR. AVELAR: So the existing obligations
require the proponent of the discovery to say we
don't think that these are unduly burdensome. We
think that they are appropriate for the case. Not
surprisingly, the other side often disagrees with
that assessment.

    The problem that we face is that coming
into the court as plaintiffs against the
government often times requiring or having a
burden of proof placed upon us is that we need the
information that is in the government's
possession. They are the only ones who have it.
So our need for it is quite a bit heightened,
maybe, than in an ordinary case.

    So our concern is that if you switch the
burden of proof, if you say that it is now on the
plaintiffs to prove that their requests are
proportional as opposed to --

    MR. BARKETT: What do you think 26(g) now
says?

    MR. AVELAR: Your Honor, I do have --

    MR. BARKETT: You are faced with the
potential for mandatory sanctions if that's not a
true statement.

    MR. AVELAR: Yes, Your Honor. When we
file requests, as I think every good lawyer does,
we absolutely believe that they fall under that requirement under 26(g), that we have met the burden or we have -- we have made sure that we are not sanctionable. But the other side invariably disagrees that something that we have requested is either overly broad or unduly burdensome. They have a different perspective on how do we need the information, how burdensome is it for them to retrieve it.

MR. BARKETT: And that gets resolved by a judge?

MR. AVELAR: Ideally, Your Honor, yes.

MR. BARKETT: Nothing changes. It will still get resolved by a judge.

MR. AVELAR: Your Honor, I think the same is, as with any burden of proof, the question is who has the obligation to come forward and affirmatively make their case first.

As with any burden of proof, the burden of proof itself tends to affect who has the advantage or who has -- who has the, I won't say advantage, in the question to be answered just as a burden of proof does in regular litigation.

JUDGE CAMPBELL: Judge Koeltl.

JUDGE KOELTL: You said that the advisory
committee notes shifts the burden. And I'm not sure where in the advisory committee notes it says that. If there's some specific language that's a problem in the advisory committee notes, it would be helpful to bring it to our attention.

MR. AVELAR: The -- the -- it is our position that there is a -- that the advisory committee notes do switch the burden by increasing -- by saying -- I'm sorry, by saying it is -- the burden is on the proponent of the discovery.

JUDGE GRIMM: Where does it say that? Can you point us to where that is?

MR. AVELAR: I'm sorry. I don't have the language in front of me, Your Honor.

JUDGE CAMPBELL: If you could put it in written comments, that would be helpful to us.

MR. AVELAR: Yes, Your Honor.

JUDGE CAMPBELL: We would be interested in where you -- I don't know that we intended it, but if it's being read that way we sure want to know it. So that would be really valuable.

MR. AVELAR: Yes, sir.

JUDGE CAMPBELL: All right. Thanks very much for your comments, Mr. Avelar.
MR. AVELAR: Thank you.

JUDGE CAMPBELL: Ms. McIntyre?

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

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

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

Deciding the scope of preservation is hard because discovery often is too broad. In my experience it's difficult to advise clients about preservation obligations even in one jurisdiction, particularly before a lawsuit is filed.
The "reasonably calculated" language is used in our state to circumscribe permissible discovery which leads to an ingrained expectation of overly broad preservation. Those high expectations can become particularly problematic in a jurisdiction somewhat known for being a proving ground for novel claims, and where one prominent plaintiff's firm has advertised its sanctions practice.

Removing the "reasonably calculated" language from Rule 26 will, at the very least, encourage lawyers to consider why the language was ever there in the first place and perhaps to reevaluate whether their beliefs about the scope of discovery are founded.

Moreover, our state Supreme Court clearly has a great respect for the federal rules and intends to follow their interpretation, if not to adopt the rules wholesale.

Clarifying the applicability of proportionality to the scope of discoverable information is an important step forward. With the amendments, parties and potential parties can be confident that what they need to preserve is something less than all potentially relevant data.
Another point that I would like to make is that the Rule 26(g) standards mentioned during the last comment are powerful and perhaps underused. One commenter during the Washington session suggested that under a cost-benefit analysis, sanctions are required to force companies to make good faith disclosures of damaging evidence.

I don't buy that. Lawyers are and must be held accountable as officers of the court to convey and uphold their disclosure duties. We certify that disclosures are complete and correct to the best of our knowledge, information and belief formed after a reasonable inquiry. And as long as courts are taking seriously their mandatory duty to sanction under Rule 26(g)(3), we do not need a section in Rule 37 for anything other than an intent to deprive.

My next point is that preservation itself begins as an onerous prospect and that therefore the substantial prejudice standard is the right standard in Rule 37.

Drilling into a shelved set of data to determine what part of that data is relevant to claims or defenses is not cost effective. And by in large, it is not done. Parsing archived data
and active data to determine what part of it might be relevant to claims or defenses is only slightly less difficult.

The cost of preservation arises not from storage, but from the evaluative activity, including interviewing, planning and organizing a collection plan, creating an environment for the data, careful transfer of that data into a review tool, obtaining subject matter, expertise, culling, conducting searches, teaching the machine, et cetera.

No company is going to make a detailed proportional preservation cut unless suit is practically certain or warranted by some other risk.

If a body of data -- as it stands now, if a body of data might be the sole source of relevant information, one simply considers the value of that data to the potential case based on a proportionality principles and the risk of not preserving it.

If the risk of having a court agree that a company destroyed something it should not have destroyed, if that is the risk, the company is going to keep that data. For this reason, the
substantial prejudice required by the proposed
rules assuages concerns about making a bad
decision and may allow companies -- should allow
companies to preserve less. More big chunks of
data, not looked at carefully, but big chunks of
data should pass that risk test.

What will be the effect? A commenter
during the Washington, D.C. -- maybe today, a
commenter today suggested that a reduced access to
documents equals or results in reduced access to
justice. And I don't believe that's necessarily
so.

Take the Microsoft data that was discussed
earlier today. My belief is that reducing what is
preserved is going to significantly bracket this
top level of the funnel. That's not going to
result in a huge cost savings, because this is
simply storage. Storage is cheap. The cost of
storage has fallen a hundred thousand times since
1990.

It is going to circumscribe these next
three layers: Collecting and processing,
reviewing -- next two layers, collecting and
processing and reviewing by some degree. This is
where the cost inures in preservation, the cost of
collecting and processing the data you've preserved and the cost of reviewing the data you've preserved. Once you've gotten to producing, heck, how much does it cost to make a dual layer DVD and stick it in the mail.

So the cost of preservation will fall because of the changes in the rules, due to the proportionality considerations that allow parties to preserve less here and to deal with less here in the middle section.

I would be happy to answer any questions.

JUDGE CAMPBELL: All right. Thank you.

Questions? Rick?

PROFESSOR MARCUS: I would just like to follow up on something you mentioned. As I understand it, what you're saying is the substantial prejudice feature of 37(e) will enable you to limit preservation in ways that you can't do presently, in that it will do that either in addition to or better than the culpability provision which has been discussed a lot today.

Am I understanding you right and could you elaborate on how that would work?

MS. McINTYRE: The culpability part of 37(e), of the revisions, is the part that allows
us to be confident in the reasonable decisions that we make to preserve one item of potentially relevant data and not preserve another item of potentially relevant data.

Not preserving one item of potentially relevant data based on a reasoned decision can be argued to cause prejudice. You don't get to discover everything. The discovery that your opponent gets is not perfect.

Just because it's prejudice doesn't mean it's substantial prejudice that affects that opponent's case so seriously that he or she or it cannot prevail. That is what I mean by having the standard of substantial in there, because I think that -- that you'll receive an argument that any destruction of relevant evidence causes some prejudice.

JUDGE CAMPBELL: Any other questions?

All right. Thanks very much, Ms. McIntyre.

Mr. Paul?

MR. PAUL: Good afternoon. My name is Patrick Paul. I am a partner with Snell & Wilmer here in Phoenix. We are a full service law firm with nine offices throughout the southwest. We
regularly represent businesses of all sizes in litigation, primarily from the defense side. I'm a past president of Arizona's Association of Defense Counsel and a former board member of DRI.

I sincerely appreciate the opportunity to testify here today. And I want to thank the Committee for that opportunity and for the hard work that has occurred and will continue to occur in this process.

This process is one that is relatively new to me, and I've come to learn a lot about it recently and really tremendously appreciate what you all have done and what the many interested parties have contributed to date.

Last summer, I wrote a -- an op ed piece for our local newspaper which talked favorably about our judicial system and the public's faith in it based upon some empirical data that I had reviewed. And I believe it's processes like these in which we take an introspective look and suggest changes to improve and enhance our system that I think allows all of us to continue to provide the public with the confidence in our system.

I'm here this afternoon in my personal capacity to urge the Committee to adopt the rules
with those modifications suggested by the Lawyers For Civil Justice. My own practice involves generally environmental, pollution, and toxic-related claims, usually from the defense side. I have represented small and large businesses in state and federal courts primarily in Arizona and California.

This afternoon I would like to focus my testimony on the proposed changes to Rule 26, while also briefly mentioning my support for the suggested presumptive limits.

Like many others who have testified or provided comments on these changes, I enthusiastically endorse the goal of early case management and more particularly a proportional discovery.

As you have heard time again and as I will further attest, increasingly the cost of discovery is driving litigation decisions and not the legal merits. Consequently, in many cases, prohibitive discovery costs may result in a denial of justice.

The rapidly increasing cost of discovery, in my opinion, should not be a reason for compromise, settlement, or perhaps a decision not to litigate a legitimate claim in the first place,
particularly when the vast majority of information requested often is entirely unused during litigation and trial of that matter.

For these reasons, I support eliminating the phrase "appears reasonably calculated." I agree with many prior witnesses that the substantial time and money saved would ultimately inure to the benefit of litigants on both sides of the case.

Although the concept of proportionality already exists in the rules, moving that language as proposed certainly would seem to result in reminding parties that the proportionality principle applies to all discovery, and further would seem to encourage litigants and judges to adopt a pragmatic approach as to the scope of discovery in each individual case.

As I read the proposed amendment, it does not change any procedural burden related to the scope of discovery. However, it amends the substantial -- the substantive definition of that scope.

Also, the proportionality concept itself is unchanged by the proposal; only its location is different. This change in location seems to me
should assist in limiting the problems of overly broad discovery by heightening its visibility and importance.

Here it seems the proportionality language would allow advocates on both sides to benefit earlier in the life span of a case and create discovery requests that more truly reflect the facts in dispute and the issues contained in the pleadings themselves.

Although some have maintained that the proposed amendments related to the inclusion of proportionality in the definition will have a burden shifting impact, I respectfully disagree. The proposed amendment would not change any procedural burden related to the scope of discovery, but rather would simply amend the substantive definition of that scope.

Again, the concept of proportionality remains unchanged by the proposal. Ultimately any burden relating to proportionality falls equally upon both requesting and responding parties.

As Mr. Barkett recently noted, Rule 26(g) specifically requires the attorney’s signature on the discovery request as itself a certification that the document is consistent with the federal
rules and not otherwise for any improper purpose.

No changes to this rule or its related requirements are suggested in the proposed amendments. Ultimately the burden of establishing the proportionality of a particular discovery request will fall equally to both parties.

Similarly, the discovery process itself will continue to require good faith on both parties, and the proposed amendments will not impact that reality. Counsel can and should continue to work to achieve agreement under the proposed revised scope of discovery just as they do under existing requirements.

I similarly support the proposed reductions in presumptive limits. The proposal encourages efficiency in planning and execution of deposition and related discovery without limiting any party's access to greater inquiry when appropriate.

Once again I sincerely appreciate the opportunity to speak and the hard work of this Committee. And I'm happy to answer any questions.

JUDGE CAMPBELL: Thank you, Mr. Paul.

Any questions?

All right, thank you so much for your
Ms. Anderson?

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

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

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

Today, however, I want to focus on the proposed changes to Rule 26(b) and Rule 34, because I think in many respects they go hand in hand, and give you a few examples from my practice that I hope will illustrate my concern that the proposed changes to Rule 26(b), however unintentional, may unfairly and negatively impact Americans' access to the justice system and why Rule 34, I believe, will increase efficiency and
reduce costs at the same time.

As you've probably gathered from the comments to date, the plaintiffs' bar is almost uniformly opposed to the proposed changes to Rule 26(b) because we are concerned that it unfairly shifts the burden to show that the discovery is proportionate from the defendants to the plaintiffs.

The reason for that concern is because today in practice under the current rules, how it works is I, under Rule 26(b)(1), show the court that the discovery that I am seeking is relevant. And then under Rule 26(b)(2), the burden shifts to the defendant to articulate their objections with specificity. And that would include any objections as far as an undue burden is concerned.

So the concern -- because that's the way the courts have been applying the rules for so many years, the concern is by moving the proportionality from part two to part one, that it will be interpreted that that now becomes plaintiff's burden because (b)(1) has frequently been interpreted as setting forth what plaintiff must show to justify their discovery.

I would like to give an example from my
practice of how devastating such an interpretation
of the proposed rule, if it were adopted, would be
to some of our cases.

For the last five or six years, my firm
and others have been litigating a series of cases
around so-called option arm loans. These are
loans where they advertised and promoted them as a
one percent loan and provided potential borrowers
with a three to five-year payment plan with low
payments.

What it didn't disclose is that by
following that payment plan, negative amortization
was sure to occur on the loan and ultimately when
the loan recasts, foreclosure was all but certain.

The defendant sold these loans directly,
but it also sold them through a series of 12,000
so-called correspondent lenders.

There was a fundamental disagreement on
the scope of the case which led to a fundamental
agreement about what discovery was proportionate.
Defendants took the position that, look, you are
only going to be able to certify a class on the
best day of the loans that were sold through the
one channel that your named plaintiff purchased
from. In California, that was about 2500 loans.
We took a different position. We took the position that the loans were designed by the defendants and they were exactly the same no matter which correspondent lender sold the loan, and so, therefore, we were entitled to receive class certification and discovery for all of the loans. In California, that was over 75,000 loans.

So we sought discovery on all of the loan files. We proposed to defendants a reasonable sampling, which was rejected, and we ultimately moved to compel all loan files.

Now, I understand that the Committee is very concerned that the proportionality concept is not being honored or enforced adequately by the courts today. That is not my experience. And in this case -- my experience is that the judges are very concerned about keeping discovery proportionate. And the same is true in this case. The judge was extremely concerned that there be proportionality. But under the existing rules, he correctly looked to the defendants for information to assess that.

He asked the defendants to specify their projected costs of responding to the discovery with specificity. He asked defendants to accept
the random sampling that plaintiffs had proposed
and agreed that that random sampling would be
binding on both parties, not just the plaintiffs.

And defendants also had every opportunity
to show that the documents we were seeking would
not support our motion for class certification.

Despite the court's order, the defendant
failed or refused to meet any of these standards.
The judge didn't need to know anything else. The
loan documents were ordered produced, and we
certified a class of over 75,000 borrowers who all
got relief under a settlement.

So had the rule, the proposed rule been in
place and interpreted the way we fear, plaintiffs
would be left with nothing -- with no evidence to
show the court, and the court would be left to
make decisions regarding the merits of the entire
case without the benefit of any evidentiary
record.

I am not surprised that the defense bar
largely supports all of the proposed changes that
restrict discovery further. However, I do find it
ironic that they rely on the cost arguments to
support their position. Because in my personal
experience, many of the inflated discovery costs
are inflicted by the defendants on themselves.

And that brings me to Rule 34.

In almost every class action that I have litigated, discovery works this way: I receive the initial disclosures, which are virtually meaningless. And I serve discovery. I get responses back from the defendants which include two to three pages of objections for each request, two to three pages of objections, and not a single document produced. Then I spent months, literally months meeting and conferring with the defendants begging them to please tell me what do you mean by expensive? What is your estimated cost? How many documents are you talking about?

Real-life examples are so absurd, you are going to find them hard to believe. Recently in an antitrust case we were disputing whether certain hard copy documents need to be reviewed. And I asked them to just tell me how many documents are we talking about. Are you talking about a Redweld, or are we talking about five rooms of documents? The response to that query was it's not a Redweld, it's more than a Redweld. Not helpful.

In another case regarding electronic
discovery, we were seeking records in a database from a car manufacturer on a defective product thing, could not get information about how many records relate to the automobile applying plaintiff's search terms versus defendant's search terms. Would not give us that information until we moved to compel.

In each of these instances when we moved to compel, in my experience the defendants are almost always unable to articulate that the burden that they face is truly undue in light of the relevance of the documents that I am seeking. And the discovery is ultimately ordered to be produced.

However, that is not until the parties and the court have expended enormous amounts of energy and time and money on these disputes, and Rule 34 would vastly truncate and streamline that procedure.

I have no more comments, and I'm happy to address any questions that the Committee may have.

JUDGE CAMPBELL: All right. Thank you.

Judge Koeltl and then Peter.

JUDGE KOELTL: You said that now the plaintiff only has to show relevance and that
under the proposed rule, the plaintiff would have to show that what the defendant's costs are going to be so that the judge can make the proportionality determination.

Why do you -- why do you -- why do you assume that? To take your example, if there's a dispute with respect to discovery and production, it has to come before the judge in some way. There has to be a motion either to compel or to strike or for a protective order. And the judge will then have to look at all of the evidence before the judge.

And if in your case the defendant has refused to present any evidence of cost or burden, there will be nothing before the judge to weigh against the asserted value and importance of the information that's sought.

It's not clear to me where you -- how you interpret the rule to say that under those circumstances, the judge has to presume that this will be costly or burdensome if the defendant is standing there and saying: We are not going to present you with any evidence of cost or burden. It's the plaintiff's obligation to show how costly and burdensome it will be to us, the defendant.
Does that seem like a reasonable judge?

MS. ANDERSON: Well, let me answer your question in multiple parts.

First of all, the concern is not just that we would have to suddenly come up with numbers that are defendant's cost, but the whole proportionality standard is now suddenly in our column, that being (b)(1), because that's traditionally then how it's been interpreted.

JUDGE KOELTL: But why, I mean you have a burden under (g)(3) to in good faith make sure that your request is proportional. And if there's a dispute then with respect to the scope of your -- of your request under (b)(2)(C)(3), the judge must impose a proportionality standard and decide it.

So it is interesting that the judge in your case really was on top of all of the rules. There has been, you know, some have said that some judges really don't apply the proportionality standard. You say this judge did.

And it's not clear to me how then if the judge is faithfully following the rules and following proportionality, the result of putting it in the first sentence would change anything in
your case.

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

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

So I am not saying that an engaged judge would not interpret this rule in a way that is not harmful. I'm worried about unintentional consequences. And I would ask that if this shifting in burden is not intended, that it be expressed.
And I think that the sheer number of comments from the plaintiffs' bar expressing concern over this demonstrates how sincere the concern is. And we would just ask for, you know, that the rule or the comments be very clear in this respect.

JUDGE CAMPBELL: Peter, did you have a question?

MR. KEISLER: Judge Koeltl's question covered what I was going to ask about.

JUDGE CAMPBELL: All right. One other question. Gene?

JUDGE PRATTER: I don't see how there would be a different result to your circumstance about the snarky response from the defense saying it's not a Redweld, it's more than a Redweld.

I don't care who has to bring it to the judge's attention. A, it has to be brought to the judge's attention by somebody. And I don't think that the result would be different under the proposal or from the current -- the current situation.

MS. ANDERSON: Well, I --

JUDGE PRATTER: Frankly, I think that's part of the problem with some of the -- you're too
young to remember this -- some of the
Queen-For-a-day issues that we've been hearing or
the examples we've been hearing. And that's a
good example. I don't see it being a different
outcome.

MS. ANDERSON: Well, my hope would be that
changes to Rule 34 would encourage more candid
exchange of this type of information. Frequently
I don't understand until after months of meeting
and conferring what objections are you withholding
documents on and what is the exact basis.

So Rule 34 would affirmatively require the
responding party to state the objections with
specificity from the outset, I would hope, and
then also identify which object -- what is the
basis of the objection. Are you withholding
documents because of privilege or is it an undue
burden? And if so, let's talk about that undue
burden.

I don't want defendants to produce, you
know, an incredible number of irrelevant
documents. I want to try to be reasonable. But
when I'm not given any information about the basis
of the burden, it's simply impossible to forge a
reasonable solution without court intervention.
And my hope is that Rule 34 will encourage more candid exchange early on in the process.

JUDGE KOELTL: You support the change to Rule 34?

MS. ANDERSON: Yes.

JUDGE CAMPBELL: All right. Thank you very much for your comments, Mr. Anderson. Ms. Bays?

MS. BAYS: Good afternoon. My name is Lea Bays. I'm of counsel at Robbins, Geller, Rudman & Dowd. Among other things, the firm represents investors in securities class actions.

I strongly support the rule changes that promote cooperation and transparency between the parties as this is the best way to reduce the costs of discovery. However, I believe that the change in the scope of discovery does not further these goals. The change is unnecessary and will only spur adversarial and costly discovery disputes.

The assertion that the change is necessary because the proportionality language from Rule 26(b)(2)(C) has not been sufficiently utilized by courts or counsel is not accurate from my experience.
I mainly -- in my practice, I mainly consult with other attorneys or am involved in the eDiscovery process. Almost every single conversation I have is about burden. And every discussion I have with opposing counsel is about how to negotiate that burden while still being able to gain access to the information that we need. Almost all the discovery disputes that go in front of judges has to do with that language.

So the fact that -- that there is some impression that this isn't being utilized, I think it is. I think that the rule is actually working and we are using it in the meet and confer process, which is where I think it should happen.

I don't think that the change will actually lead to more tailored discovery and only seeking the most relevant information. Instead, I think it will lead to defendants trying to strong arm unilateral and sometimes arbitrary narrowing of the search methodology, which I think will go against everything that we've been trying to do as far as encouraging cooperation, in coming to agreements on search terms, custodians, date ranges, and sources of electronic information.

As already noted in many of the comments,
it seems that it shifts the burden. I understand that some are confused as to why that is read, but that is how people are interpreting it.

Any amendment should not encourage any sort of blanket and unsupported burden arguments. It should encourage cooperation and problem solving among the parties to be able to expedite the review process.

Any claim of burden should be substantiated by the opposing party with actual evidence. And I'm going to explain why this is important and why it's important before getting to court.

Yes, when you go to a judge, they will have to present information about their burdens. I think it's important for them to be doing it beforehand, during the meet and confer process, so we can actually avoid discovery disputes getting in front of a judge.

I believe there was a question with how things would be different or resolved now versus if the language was changed and there was an idea about a burden shifting in there.

If someone comes to me and says: This is going to cost millions of dollars or it's
terabytes of data, I follow that up with requests for actual information. What kind of sources are you searching? What are your electronic systems? Have you duplicated everything? If so, how have you done that?

If you have search term hit lists, give me an idea of that. And if there are ones that seem to be overly broad, let's work with that and do a sampling. Do you want to do a sampling of a source that's extremely expensive to access? Then let's do that. And I'm willing to cooperate on that.

If the defendants are actually transparent with this information and are willing to cooperate, I can either see that the burden is greatly exaggerated or completely unfounded or we can work to solve the problem without limiting my access to relevant information.

My fear is if the burden is even perceived to shift, all of this transparency and cooperation goes out the window.

This fear is exasperated by the removal of the current language recognizing the relevance of matters related to the existence, nature, custody, condition of and location of documents. I've
already heard panelists at eDiscovery conferences saying that after this rule change, they will no longer have to provide any information on electronic systems or any storage of ESI.

I think that is extremely dangerous and goes -- that is what we turn to because as other people have commented, defendants are often extremely resistant to providing information on their electronic systems or their burden until the motion actually goes before the court.

If this is taken out, then there's nothing that we can point to to incentivize defendants to give us this information beforehand. It also helps with being able to assess the adequacy of the production before the production -- after the production is made.

If the intent is not to shift the burden, I will echo that this should be expressly stated either in the rule or the comments. And that it should also encourage transparency about electronic systems and ESI storage.

I'm going to make one more point and then I will stop. Regardless of where the proportionality language is, I think that any assessment of proportionality has got to include
the willingness of the producing party to use the tools that are already available to them to reduce the burden. Although ESI has increased, so have the tools that we have available to us to deal with them.

We have deduplication, we have analytic tools of e-mail threading, concept searching, clustering, and predictive coding, which I do not find that a lot of defendants are even considering using.

In addition, judges have encouraged and promoted the idea of using 502(d) orders to reduce the burden of privilege reviews. I don't see this being utilized. We are often open to it, but it's not being utilized.

For my -- if our -- I don't think that our clients should be penalized by limiting the scope of discovery when the producing party is not using the tools available to reduce the burdens by other means.

Thank you very much.

JUDGE CAMPBELL: Thank you.

Paul? And then Parker.

JUDGE GRIMM: Just a quick question. I want to just make sure I sort of get an idea about
how the collection of proposed rule changes and
the existing rules that are not proposed to be
changed are all intended to work together and not
in isolation.

MS. BAYS: Right.

JUDGE GRIMM: So you've heard Mr. Barkett
say and a number of people referred, that since
1983, every plaintiff that asks for any discovery
request has certified, whether they realized they
have or not, that they have considered the
proportionality factors which are the exact same
factors that are referred to in Rule 26(b)(2)(C).

It hasn't been discussed here today, but
historically, the origin of Rule 26(b)(2)(C) was
the very next sentence after the scope of
discovery and it started off in 1983 as a
limitation on the scope of discovery and it was
only removed later. So it had started out exactly
where it was proposed to be put back.

When you are asking for information that
leads to this dialogue about whether it is
available or not available, and whether they've
deduped, or whether they've used computer-assisted
review, it is in the context of your asking for
Rule 34 responses.
The changes to Rule 34 say and a defendant under Rule 26(g) certifies by making an objection that they have done the proportionality analysis, which means that if they are following that rule, they have to have a basis, not just go fish. And you now have a rule -- proposed change to Rule 34 that says if they make boilerplate objections and they don't back it up, that they have an obligation to do that.

Now, when they give you something that which -- does not explain to you that they deduped, that they've done the most efficient means possible to be able to reduce it, and you stand your ground and you go to a judge and you say: Judge, they had to certify under Rule 26(g) that they made a proportionality analysis. They've not told me those numbers. They've made boilerplate objections under Rule 34, I certified as to why I think it's proportional, the ball is in their court, they haven't done it.

How is it that you feel that that's going to put you in a worse situation than you are now?

MS. BAYS: First of all, again, like I said before, I would like to be able to take care of this before going to a judge. I really think
that we've made extreme, extreme progress in being able to cooperate with opposing counsel about these issues and never have to make a discovery motion. So I would like to be able to do it before then.

And I don't think that that argument would carry too much weight with defendants from what I have seen.

So and as far as our certifications, we make certifications based upon what our knowledge is. We don't know what the other side's burden is. They make certifications based upon what their knowledge is. They may have a very different idea about what is overly burdensome for them.

So I think that it has to be backed up by actual evidence to be able to assess that and look at all of the factors together with all of the information.

JUDGE GRIMM: Isn't that what you have in 34? So if they are not going to be persuaded by -- they need to be specific under Rule 34. They are not going to be persuaded by the certification requirement under Rule 26(g). They haven't given you the particularized information,
then what is it about that situation that gives
you a glimmer of hope that you are going to be
able to persuade them to cooperate without going
to the court, and if they get to the court, tell
me the judge that you've bumped into under those
circumstances that's going to go their way and not
yours.

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

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

They are not saying they are not going to
give us information on this particular category.
They are saying: We will give you that
information, but we don't want to give you all of
it because it's too expensive.

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

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

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

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

And then but usually when I point to the rule and we discuss this and we discuss cooperation, or I can say then that's fine, if you don't want to give us that, then you can't make
any burden arguments. That's fine. And then, therefore, that's how it's been working. And I think it's been working well.

JUDGE CAMPBELL: Parker, did you have a question?

MR. FOLSE: I was just going to ask whether -- my experience is much the same as yours, that when there is more information exchanged about what a requesting party wants and about what a responding party will have to go through to get it, that there's a greater likelihood of agreements being reached about how to achieve what we've been talking about, which is proportionality.

So I wondered whether you had given any thought to specific changes that you think we should be considering to promote that exchange of information, to increase transparency, you know, to use your word, which is a good word, that is not reflected or that may be undermined by what's before us right now.

MS. BAYS: I have always thought -- I think that the -- the checklist, the meet and confer checklists that have gone into effect in the Northern District of California and now -- is
it Minnesota? That -- that discusses all the
different things that you should be discussing, I
don't think it gets as detailed as I would like,
and I would want to put in more things about
specifics about electronic systems.

But I think if you keep that in the meet
and confer process, and you make that mandatory
before anyone that you have to have discussed
these things and you have to have been given this
information before ever making a motion in court
whether to protect from discovery or to compel
discovery, that you should have exchanged all of
this information.

And there are certain district courts that
do require, you have to explain what sources
you're going to go through, you're going to have
to discuss electronic systems.

I find that incredibly, incredibly useful
in getting this conversation up front, and it
usually does avoid any disputes.

So I think if there was more of that or if
there was more explicit stuff in the 26(f) saying:
Look, you need to exchange all of this. And
that's part of when you say you've met and
conferred before filing a motion, then that
includes all of this. And I think that would be really extremely, extremely helpful in avoiding that.

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

Mr. Sturdevant.

MR. STURDEVANT: Thank you, Mr. Chairman, and members of the Committee. My name is James Sturdevant. I'm the principal of the Sturdevant Law Firm, a plaintiffs' law firm located in San Francisco, California.

I'm pleased to be a participant and witness at this hearing and hope to offer useful testimony to the Committee as it considers whether to adopt the proposal to amend Rules 26, 30, 33 and 34 of the Federal Rules of Civil Procedure.

By way of background, I've been in practice actively since the spring of 1973, first as a legal services lawyer in Connecticut and later in California representing low and moderate income individuals and classes of individuals, principally in federal court during that time.

I specialize bringing cases concerning statutory benefit programs, federal housing, and unemployment programs, food programs, and
constitutional rights.

Thereafter I've been in private practice
since -- fully since 1980. And I have specialized
representing plaintiffs in class action litigation
involving a wide variety of subject matter claims
emphasizing consumer protection, unlawful and
fraudulent business practices, employment
discrimination, harassment, civil rights,
including the rights of institutionalized
individuals, Title IX, and the rights of Americans
with physical and mental disabilities.

I've litigated cases involving financial
services, insurance products and services, ERISA
claims, and claims of state, federal wage and hour
violations in employment.

I have tried and settled many class
actions exceeding a hundred million dollars and
nationwide injunctive relief.

I will provide a more detailed description
when I submit more detailed comments before the
deadline in mid-February.

Counsel who represent plaintiffs in
employment civil rights and consumer protection
litigation, as I do, almost exclusively handle
those cases on a contingency basis. That means
that they advance all or almost all of the costs, including costs related to discovery.

These include obviously deposition transcripts, videotapes where videotaped depositions are taken, document production costs imposed on the plaintiff, and expert witnesses fees, among many others.

These are significant costs imposed on plaintiffs and plaintiffs' counsel which deter any but the irrational from taking more discovery than they believe is necessary to preparing, prosecuting and trying their case.

The proposed rule changes, like their predecessors in 1993 and 2000, will, in my view, incentivize defendants to oppose almost any discovery beyond the significant limitations proposed in the rules. Defendants will be motivated to challenge relevance, breadth, and scope issues much more aggressively, obliging overworked judges and magistrate judges to resolve multiple discovery issues frequently at an early stage in the litigation when relatively little is known to the plaintiff and to the court about both the legal and factual issues involved in a particular case.
The proposed amendments will impose significant additional delays in the judicial process as a result of motion to compels to get discovery or to try to get discovery. And will create additional significant costs which, as I said, plaintiffs' counsel will be forced to bear in order to obtain access to the information which is essential to prove the case, obtain class certification, and resist summary judgment on the evidentiary basis required.

The proposals to restrict presumptively allowable depositions from ten to five and interrogatories from 25 to 15 send an unmistakable message to federal judges and magistrates, let alone defense counsel, that discovery should be restricted both in numbers and categories.

So does the insertion of a specific new proportionality standard in the rules. That places a standard that obliges federal judge and magistrates, not simply the lawyers who practice before them, in deciding whether or not discovery should be allowed.

The increased cost of motion practice and the denial of necessary discovery will favor existing -- pre-existing economic advantages of
defendants and the firms which represent them.

And as all of us know, in the great majority of cases now being litigated in federal courts involving civil rights, employment issues, and consumer protection, the bulk of information is possessed by the defendants, not the plaintiffs.

Public litigation involving public as well as individual rights must afford all parties with equal access to available information so that the courts and juries receive the information they both need to decide the cases fairly.

Let me give you a couple of case examples very briefly. One is an individual case and one is a class action which would be adversely affected by the rules.

The first is a multiparty, multidefendant mortgage servicing fraud case litigated in the Northern District of California. The plaintiff alleged in the case that material information was concealed from her about the owner of her loan. And she was directed by the mortgage servicer to communicate and deal solely with the owner of the loan with respect to mortgage modification.

When she went to the entities that she was
told by the mortgage servicer owned her loan, each of them denied it. And each of them concealed material information that they were parties to a trust instrument in which they had invested and financial interest in the mortgage loan itself.

One of the entities to whom she was referred, a national bank, did not tell her that it was the master servicer under the trust instrument and had plenary responsibility and obligations to oversee all aspects of the trust, including what the servicer did and didn't do.

The other entity also denied that it had any ownership role in the loan and provided no information to her.

There were five named defendants in the case. In addition, there were employees and contract workers of one of the defendants who needed to be deposed as well as third-party entities who took part in the transaction but were not named defendants.

In sum, the plaintiff took more than ten depositions, some multiple-day depositions of percipient witnesses and would and should have taken more but for the discovery cutoff in the case.
The defendants resisted the production of each and every document that the plaintiff asked for in connection with Rule 30(b)(6) depositions, and the defendants resisted the taking of a single 30(b)(6) deposition.

A motion to compel was required and after extensive briefing. The magistrate judge authorized all five 30(b)(6) depositions to go forward and ordered the defendants to produce more than -- each to produce more than 50 categories of documents.

The documents and the depositions proved the elements of the case with respect to aiding and abetting the concealment of material information, the financial incentives to each and all of the defendants collectively.

The case also involved substantial notarial fraud and what has been publicly called robo signing. Robo signing is a practice where a defendant in the process authorizes some individual working for another entity to sign documents on its behalf. We demonstrated through the discovery and the deposition process that we would not have otherwise gotten under the proposed rules that robo signing had occurred, that the
person who authorized the foreclosure had no legal authority to do so.

The second case involves a class action involving what I call predatory lending. It's presently pending in the Northern District of California. And the class -- a statewide class has been certified. The class consists of thousands of borrowers. The substance of the case is that they were offered loans of $2600 with interest rates of 96 percent and above payable over a period of 42 months.

If you do the math, you will find out that the borrower, if they stayed -- if they paid fully under the 42 months, would have paid nearly four times the principal value of the sum loan.

The sole issue in the case on a classwide basis of relevance here is unconscionability, whether there were procedural elements of unconscionability, surprise, oppression, and whether the loans in terms of all of the factual circumstances of their terms and what the lender knew and what -- and when did the lender know it, how much profit it was going to make, when were the loans going to be paid off, all subject to discovery. None of that information known to any
individual borrower or any collection of
individual borrowers.

We were -- we needed to take multiple
depositions. We ultimately took eight, more than
the pre-existing limit.

We also had a number of expert
depositions. The defendants took the depositions
of all three plaintiffs and nearly ten depositions
of absent class members. Those would not have
been allowed under the proposed rules.

Those are simply two examples. They are
exemplary. One is an individual case involving
multiple defendants. One is a class action
involving a single defendant.

But they aren't any different from
standard, routine employment discrimination and
harassment cases which you've heard a good deal
about in the hearings today and previously where
the facts and legal questions are inherently
complex and require and involve multiple
depositions to explore the facts and observations
of coworkers, managers, and human resources
personnel as well as the decision makers.

JUDGE CAMPBELL: Mr. Sturdevant, we are
beyond ten minutes, so if you could wrap up your
comments, that would be very helpful.

MR. STURDEVANT: Artificial prescriptive
limits in and of themselves are misdirected in my
opinion at the goal of obtaining justice in the
civil system and have an interim effect on the
judges charged with implementing them.
I urge you not to adopt them, and I will
submit much more extensive comments before
mid-April.
I'm happy to answer any questions that any
of you may have.

JUDGE CAMPBELL: Thanks, Mr. Sturdevant,
for those comments.
Mr. Rosenthal?

MR. ROSENTHAL: Only a few more to go.
Good afternoon. My name is John Rosenthal. I'm
an antitrust and commercial litigator by trade. I
also am a chair of Winston & Strawn's eDiscovery
information management practice group, a group
that last year spent over 100,000 hours on the
preservation, collection, processing, posting and
production of electronically stored information.
I'm also national eDiscovery counsel to
several Fortune 500 corporations in various
industries. And I am on the steering committee of
the Sedona Conference working group one.

At the outset, I would like to thank the Committee and the AO's office for their dedication and tireless work on these proposed rules. Your work is both recognized and appreciated by many.

Overall, I strongly support the proposed package. The rules changes will bring some rationality to our discovery system in order that we can stem the rising costs of eDiscovery and particularly the burden of overpreservation.

I do disagree with those that have given testimony and submitted comments that the contemplated changes, particularly to Rule 26(b)(1), will in any way close the doors of the courts or inhibit the ability of anyone to put on their claims or defenses of the case. That's simply not the case.

This rules package is modest. It's designed to reduce costs. It will not close doors. To the contrary, I think it will open doors to many litigants.

It's telling in my estimation that when you look back two years, many of the people now appearing before the Committee and submitting comments opposed and said no to these rules before
they saw the first draft rule. I think that's very telling.

I'll be submitting written comments on the whole package, but I would like to focus my comments here today on Rule 37. Proposed Rule 37 attempts to bring some reasonableness to the issue of sanctions. The explosive growth of the ESI, the absence of a uniform standard, and the tactical use of sanctions or the threat of sanctions by requesting parties has forced corporations to overpreserve ESI. It has raised the overall cost of litigation.

The proposed rule will allow corporations to take steps to reduce the cost and burden of overpreservation, establishing predictability and providing protection from sanctions or the threat of sanctions where a party acts in good faith.

With this said, I do suggest that the proposed rule should be further refined to ensure clarity, and as Robert Owen said this morning, avoid wiggle room.

I cochaired the Sedona Conference's drafting team for Rule 37 and was intimately involved in all of the submissions the Sedona Conference has made here. I would urge the
Committee to take a close look at those
submissions and in particular give careful
consideration to the alternative Rule 37(e)
proposed by the Sedona Conference in our December
2012 submission.

With respect to the Committee’s instant
draft, I have some comments. On the issue of
curative measures, which has really flown under
the radar here, I do have some concerns.

And I would suggest that the current
version with respect to curative measures in
37(e)(1)(B) be abandoned.

The rule should exclusively focus and set
forth the sanctions standard predicated on the
showing of both culpability and prejudice. The
notion that sanctions and curative measures are
different is a false distinction unsupported by
decades of case law. In the overwhelming majority
of reported decisions, the sanctions handed down
by courts are now what the Committee is referring
to as, quote, unquote, curative measures.

The problem is compounded by recent
efforts by certain courts to describe such, what I
think to be terminating sanctions such as
permissive adverse instructions as no more than
curative or remedial measures. The Second Circuit's decision in Malley versus Federal Insurance Company is a prime example.

More importantly, the current draft allows for the imposition of curative measures but provides no standard as to what and when they should be issued or can be issued. The absence of such a standard in my estimation will have negative consequences, including years of litigation trying to determine when those measures are appropriate, the proliferation of various standards across the country requiring further rules amendments down the road to have a uniform standard, and I believe it will dramatically increase the cost of litigation because I think the curative measures provision will be used as a tactical weapon by parties.

More importantly, the bifurcated approach allows what I call the imposition of, quote, unquote, de facto sanctions by some courts without the showing of either culpability or prejudice. In doing so, the curative measures exceptions would substantially undermine the goals of this Committee with respect to Rule 37(b) -- 37(e)(1)(B).
If the Committee is inclined to leave the curative measures provision within the current draft, then I would suggest that a showing of prejudice should be required before any court can order curative measures.

With respect to the remaining portions of 37(e), willful and bad faith, I believe both words are subject to varying interpretations. When you examine the case law, it's not just "willful" that Learned Hand described as an awful word. When you look at the cases, "bad faith" is being construed by courts in different ways either to be intentional or nonintentional.

I respectfully suggest that the court should either adopt an entirely new term such as the good faith term proposed by the Sedona Conference or define both "willful" and "good faith" and the suggested definition would be the Sedona Conference definition that has been referenced here today.

With respect to the Committee's question on substantial prejudice, I would urge the Committee that it should go further and define substantial prejudice. And in particular, I would offer the suggestion of "materially hindered in
presenting or defending against the claims in the case."

Regarding the innocent loss provision of 37(b)(2), I would suggest that you cannot draft rules for the exception or in this case what I call the mythical unicorn. I would urge the Committee to limit this provision in its entirety.

And instead, I would urge the Committee to consider the absent exceptional circumstances language that is suggested by the Sedona Conference and put that as a predicate to (b)(1) and eliminate (b)(2).

I would also ask the Committee to consider whether there should be additional elements to be considered in the rule with respect to the issuance of sanctions. And in particular, whether or not there should be a requirement that any sanctions motion should be timely. Second, whether a sanction motion should be predicated or the -- the issuance of sanctions should be predicated on the issuance of the least severe sanction to remedy the failure to preserve, a standard that is now in almost every circuit in the country and is not referenced in this rule package.
Finally, I would suggest a factor should be considered that the -- whether or not the sanction is proportional not only to the loss but the culpability and the prejudice.

Regarding the factors, I do suggest the factors should be further refined in order to avoid both ambiguity and protracted litigation over what those factors mean and I would refer the Committee to the Sedona Conference's submission in that regard.

Thank you very much.

JUDGE CAMPBELL: All right. Thank you, Mr. Rosenthal.

Any questions? Parker?

MR. FOLSE: I wasn't sure that I understood the point you were making about curative measures versus sanctions. I think you stated that the idea that there is a real difference or a meaningful difference between the two is a misunderstanding.

Are you suggesting that the rule be changed so that even curative measures could not be ordered by a court absent a finding of culpability?

MR. ROSENTHAL: Yes, I would advocate
that. I think that what -- I do not believe -- courts have available under other rules a whole variety of curative measures. They could change the scheduling order, they could order additional depositions, they could grant costs, under a variety of other rules.

I think when you introduce and try to bifurcate between the sanctions and curative measures within what has traditionally been a sanction rule, 37(e), you're going to create a whole host of problems, particularly when you haven't really articulated a standard as to when curative measures can be issued.

In terms of the false distinction, when you look, and we have surveyed extensively all of the sanctions cases, the reality is that 99 times -- 99 percent of the time, when a court says, "I'm going to sanction you," what they do is they offer additional depositions, they change the schedule, they impose additional fees as the, quote, unquote sanction, what the Committee is now calling the curative measure.

I think the better approach is what we suggested in Sedona Conference which is you lay out the whole range of quote, unquote, curative
measures and sanctions and that you say: Here's the range. And with respect to terminating spoliation instructions and terminating sanctions, you have to show culpability. And for the other ones, you have to show prejudice and loss, but not necessarily culpability.

JUDGE CAMPBELL: A follow-up question on that. If Rule 37(e) specifically said that I can't, for example, order additional depositions as a curative measure without culpability, why would I think I can go do it under another rule if it is specifically prohibited by 37(e)?

MR. ROSENTHAL: I don't think anything prohibits the court under Rule 16 or Rule 26 to order additional discovery. For example, if there's a question, for example, has there been a loss of information. Courts now regularly order additional discovery to determine that question, not necessarily under 37, but either under their inherent powers or other rules.

JUDGE CAMPBELL: Okay, thanks very much, Mr. Rosenthal.

Rick?

PROFESSOR MARCUS: I'm sorry to interrupt, but one thing that I understand you to be saying
and I want to be sure whether I'm right.

It's quite possible that if this Committee decided to do something more like what the Sedona submission urges be done, that would lead to the need to republish and start over the public comment period and put everything over at least a year. You are saying you want that?

MR. ROSENTHAL: I'm not saying I want that.

PROFESSOR MARCUS: Or are you saying you want to go forward with what we could do now or put things over at least a year to do something very different?

MR. ROSENTHAL: What I am asking the Committee is go back and look at the Sedona piece and consider whether anything done in the Sedona piece should be incorporated into this package. I don't think that would require you to restart.

PROFESSOR MARCUS: I'm not saying it would, but it might.

MR. ROSENTHAL: Well, we are certainly not advocating that. I think the solution is if you want to stay with this current package, either take curative measures out or require some kind of standard before the imposition of curative
measures, and in particular a showing of prejudice.

JUDGE CAMPBELL: Okay. Thanks very much,

Mr. Rosenthal.

MR. ROSENTHAL: Thank you.

JUDGE CAMPBELL: Mr. Benenson?

MR. BENENSON: Good afternoon. My name is Rich Benenson. I'm the national cochair of the litigation practice group for Brownstein Hyatt Farber Schreck. The firm is based in Denver, Colorado. We have about 70 lawyers in our group covering about 14 offices.

We are regularly practicing in state and federal courts throughout the country. We represent companies and individuals of all shapes and sizes often as plaintiffs, often as defendants. And I think we bring some interesting perspective to today's dialogue.

As an initial matter I wanted to thank the Committee for the opportunity to present our views today for consideration in the final rules package.

I would also like to thank the Committee for its hard work and vision with respect to this set of proposed amendments. They are welcomed by
lots and lots of folks and we hope that they get enacted.

I would like to focus my comments today on the proposed changes to Rule 26, and in particular the proposal for the express insertion of the word "proportional" to the rules.

I believe that the express insertion of the term will lead to better and more efficient litigation, and will ease some of the significant financial burdens that litigants are currently facing as part of the discovery process.

Importantly, I want to note, I do not believe that the express inclusion of that term will in any way have an impact on closing the courthouse doors or unfairly restricting discovery, at least necessary discovery.

My experience is quite to the contrary. And I base that experience on a pilot program in the Colorado state courts. The front range of Colorado, Colorado Springs up to Fort Collins, has initiated a pilot program. The thrust of the program is to resolve cases, particular business cases more quickly and efficiently. And as part of that emphasis, there's a great focus on the element of proportionality.
Rule 1.3 of the pilot program, for example, provides that at all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case. The proportionality rule is fully applicable to all discovery, including the discovery of ESI. And the proportionality rule shall shape the process of the case in order to achieve a just, timely, efficient and cost effective determination of all actions.

Under this rule, the parties are required to address proportionality first in the initial case management and the meet and confer that leads to that case management conference. But it doesn't stop there. That obligation to discuss proportionality continues through the entirety of the case.

And I can tell you from firsthand experience that the process is working. I'm currently lead counsel in a consumer protection class action case. And we've heard a lot today about class actions and the views of plaintiffs and defendants in class actions.

And I thought it was interesting that one
of the former speakers talked about the desire for
more proactive communication. Well, my experience
is that an express requirement to discuss
proportionality facilitates that exact result.

In our case, because the parties were
required at the outset, even before the case
management conference, to discuss proportionality,
it forced the parties to become better informed
and more quickly informed about the scope of
discovery, the claims and defenses in the case,
and the theories and evidence that would support
those claims and defenses. As a result, there
were productive, proactive conversations about
proportionality before we even went to the court.

Why did that happen? Because that was
required under the rules. And that was a
departure from our normal practice.

The proportionality requirement has also
forced the parties to have continuing
conversations about the need for any supplemental
discovery or supplemental depositions or
supplemental written discovery.

As a result, in our case, the plaintiffs
have received what I believe and I think what they
believe to be much more focused and relevant
disclosures and discovery, and they received that information at an earlier part in the case than they would have otherwise.

As a result, the case is proceeding more efficiently, our costs are down, and plaintiffs have gotten the information that they need.

Now, to be clear, even with proportionality, discovery in that case is asymmetrical. But I want to be clear, I'm not suggesting symmetric discovery through proportionality. I think proportionality is important as a concept, because it reinforces that discovery scope is not a one-size-fits-all proposition. Proportionality should work both ways.

We've heard about large consumer class actions. Proportionality in that context will be different than in a smaller business-to-business medium-sized case.

But by including expressly the concept of proportionality into the rules, the parties will be forced to focus on that issue. And the court, I believe, will have more discretion and authority to design discovery that is proportionate to that particular case.
I want to reinforce that I don't think proportionality only affects large class action cases. Indeed, I submit it's even more important in smaller and medium-sized cases.

The panel has heard today from several folks, and I won't belabor the point. But discovery costs have become a very large consideration in litigation. More and more of my clients are making decisions about resolution of the case, not based on the merits, but based on discovery costs and the desire to either avoid them or because they can't afford them.

I submit that if that problem is solved, access to the courts actually increases. And civil justice and the quality of civil justice actually increases.

Indeed, I am regularly in discussions with my clients about budgets, and the single most problematic piece of that is discovery. And I think that that economic dynamic around discovery affects both sides of the equation. Plaintiffs and defendants are equally impacted in these medium-size business-to-business cases. And I would submit that that's where the proportionality requirement is most needed.
I believe that by adding proportionality requirements to the rules, that discovery costs will be reduced, and the discovery phase of litigation will be made more efficient. And I do believe that this would benefit all litigation -- all litigants and would enable more access to civil justice in the courts.

Again, I would like to thank everybody for their time, and I have a few minutes for questions.

JUDGE CAMPBELL: Questions from anybody?

Yes, John?

MR. BARKETT: Is there any kind of report from the Colorado experiment, the pilot product that you described surveying the lawyers producing information on how it's worked and the like?

MR. BENENSON: The pilot program is still in its inception but the survey has started. They expect it to be completed in about 12 months.

JUDGE CAMPBELL: Elizabeth?

MS. CABRASER: Under that program, are there any presumptive limits on discovery or other -- on depositions or other discovery techniques?

MR. BENENSON: There are. One of the most
significant ones is no depositions of experts
unless the court finds, needs and grants
expressly.

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

MR. BENENSON: Thank you.

Mr. Cooke?

MR. COOKE: Good afternoon, thank you. My
name is Andy Cooke. I practice in a private law
firm called Flaherty Sensabaugh Bonasso. My firm
represents individuals, small businesses, large
businesses, and wide-ranging and diverse
litigation. My practice is primarily in product
litigation, representing manufacturers.

I'm thankful for the opportunity to speak
this afternoon as a practitioner with an active
civil trial practice for the past 20 years in
federal and state courts.

In the majority of my cases, I represent
defendants, but I also represent individuals and
commercial plaintiffs.

I appreciate and commend the extensive and
thoughtful work of the advisory committee. I know
it's late in the day, so I will be brief.

Because my experience demonstrates to me
that the interpretation and application of the current discovery rules endangers the resolution of many cases on their merits, I support in particular the proposed amendments to Rule 26(b)(1), and I will focus my comments there.

The advisory committee's proposed amendment to Rule 26(b)(1) would better define the scope of discovery to allow discovery of any nonprivileged matter that is relevant to any parties' claim or defense, and proportional to the needs of the case. This change would provide a meaningful improvement compared to the overbroad scope of discovery defined by the current Rule 26(b)(1).

The current overbroad scope is a fundamental cause, in my experience, of the high cost and burdens of modern discovery.

I also support the striking of the often misapplied phrase, "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

This language has erroneously been used to establish a very broad discovery scope. Even though it was intended only to clarify that
inadmissible evidence such as hearsay, for example, could still be within the scope of discovery, so long as it is relevant. That principle is as preserved in the proposed amendment.

I believe the changes to Rule 26(b)(1) will encourage thoughtful discovery. I believe it will encourage cooperation and potentially may result in fewer discovery motions because the rules will provide clarity and what’s permissible in discovery.

The current location of the proportionality language requiring responding parties to object has failed to limit the problems of overly broad discovery. Adding the requirement of proportionality to Rule 26(b)(1) will advance literally and practically the important principle of proportionality in civil discovery.

Let me address just very briefly a problem that I see on a week-to-week or month-to-month basis in my practice.

Too often discovery is used as a -- to gain tactical or settlement leverage for discovery on discovery or for setting up requests for sanctions. Fundamentally, the discovery rules
were adopted to promote a just outcome in a manner that is speedy and inexpensive as can be possible. The rules are there to assist the parties in preparing for trial on the merits.

Discovery should be about the legitimate search for necessary information to prepare a party's case, not about a tactic to run up costs or to gain a tactical advantage. There should be no tolerance for tactical discovery, gamesmanship, or discovery-on-discovery litigation, but it is unfortunately too common under the existing rules.

I submit that the adoption of the proposed revisions to Rule 26(b)(1) will deter parties from engaging in overly broad, unduly burdensome and vexatious discovery practices.

Too frequently litigants recognize that the current rules can be used to drive up the opposing party's costs and expose the opposing party to sanctions.

Under current practice, parties justify overbroad discovery requests by stating that such requests may lead to the discovery of admissible evidence, ignoring the rule's express invocations of relevance, and identifying a policy that's expressed nowhere in the rules themselves that
discovery should be limited and broad.

By focusing on the claims and defenses, by removing the "reasonably calculated" language and requiring that discovery be proportional to the needs of the case, parties would be required to focus on that discovery that is necessary to assert a claim or to present a defense. That is, they will be required to contemplate discovery necessary before the discovery is propounded.

The Rule 26 amendments represent a substantial step toward providing judges with well-defined and applicable guidance and in reversing the far too prevalent misconception that liberal or unlimited discovery that is reasonably calculated to lead to the discovery of admissible evidence effectively means that discovery is unlimited by anything other than well-grounded privilege claims.

Finally, and with due deference to Justice Pullan from Utah, most states have adopted the Federal Rules of Civil Procedure in whole or in part. And many would be informed by the action taken to amend the Federal Rules of Civil Procedure.

Accordingly, the adoption of the proposed
amendments could have significant effects on
discovery practices in state as well as in federal
courts.

Thank you for the Committee's efforts to
reform the Federal Rules of Civil Procedure, and I
support the Committee's aim to create procedures
that require litigants to focus on the merits of a
case.

I am happy to take any questions.

JUDGE CAMPBELL:  Questions?

All right, thanks very much, Mr. Cooke.

Mr. Scruggs.  You get the last word,
Mr. Scruggs.

MR. SCRUNGS:  Thank you.  And along those
lines, as the last witness, I hope to provide an
electric conclusion to today's events, without
repeating any arguments that you've heard so far,
or at the very least to cover that repetition in
my slight southern drawl to make it more appealing
to you.

But accent and repetition aside, my name
is Jonathan Scruggs.  I'm here on behalf of
Alliance Defending Freedom and to express our
opposition to the proportionality language that
you've heard so much about and some of the
lowering of the presumptive discovery limits that has also been discussed.

Rather than repeat a lot of the arguments that you've heard from many of the plaintiffs' counsel, I would like to reiterate those, but really kind of take it from our own I think rather unique perspective of what my organization does.

Alliance Defending Freedom is a nonprofit national legal organization that advocates for religious liberties. And one way we do that is file civil litigation on behalf of individuals and organizations. We do so for free against large governmental entities who have violated or potentially violating constitutional rights.

So, for example, we are currently representing Conestoga Wood Specialty Corporations before the Supreme Court in their challenge to the Affordable Care Acts abortion pill mandate, alleging that those -- that that mandate violates RFRA.

But we don't just represent plaintiffs. We also represent defendants who attempt -- who are attempting to accommodate religious liberties. Again, for example, we are currently representing the Town of Greece, New York, before the Supreme Court in their challenge to the

- 329 -
Court in their efforts to open up their latest legislative sessions with religious invocations.

So based on this rather, I think, unique experience, we wish to offer our opposition to really the proportionality language is what I like to focus on and the other discovery limitations. And our fear really in the context of the cases that we do, cases that really involve almost zero monetary relief or low monetary relief. In a typical case we do a First Amendment case, it usually involves a First Amendment violation and no other physical injury. And in that context, usually litigants can only get nominal damages. In fact, at most usually they can get one dollar.

So faced in the situation where there is literally very low monetary value, we greatly fear what a proportionality analysis will bear in this context, especially when that analysis is being made in the first instance by defendant's counsel, who we often find don't understand really the vital liberties at stake and the cases we do.

We've heard so much today about the multi-billion dollar lawsuit, and that's really a big impetus. But oftentimes I've personally found that when either a defendant or sometimes even
when a judge involves a -- encounters a case that we do, it's kind of a bit confusing because our clients are not seeking damages in an extreme degree, and they can't be settled on that basis. So in that context, we fear that defendants will just immediately object to seeing that we are only seeking one dollar, to object that it's not proportional and to really limit our ability to protect civil liberties, not just on behalf of our clients, but really on behalf of everyone.

So again, I'm going to be brief since I'm the last person. And end my conclusion -- end my statements there.

Thank you.

JUDGE CAMPBELL: Mr. Scruggs, as you know, in the factors that are specified in the proposed proportionality language we've included the importance of the issues at stake in the action, which is already in 26(b)(2)(C).

Why is it that you don't think you could argue that point if you're faced by a defendant who says he shouldn't get any discovery, he's only seeking nominal damages?

MR. SCRUGGS: Well, I think oftentimes
cases unfortunately get boiled down to monetary things. I think even today, look at who's come before this panel. It's people representing large clients with a lot of money at stake.

And so I think even before a judge, but even more so, with the defense counsel who has to make that determination initially and then object and then we have to bring the motion to compel, I don't see it as worthwhile, or at least it seems very risky to me unless the language is more clarified in terms of importance, not just in monetary terms being the issues, but being importance of issues whether in constitutional terms or in other terms.

JUDGE CAMPBELL: John?

MR. BARKETT: In the 1983 amendment that is what is now (b)(2)(C) as Judge Grimm pointed out earlier, it was originally part of (b)(1). And the advisory committee note has a sentence that reads that the rule recognizes that many cases in public policies fear, such as employment practices, free speech and other matters may have importance far beyond the monetary amount involved, the court must apply the standards, referring to what is now the (b)(2)(C) standards,
in an even-handed manner that will prevent use of
discovery to wage a war of attrition or as a
device to coerce a party whether financially weak
or affluent.

If you haven't had a problem under the
existing regime, why is it you think you would
have one under the proposal?

MR. SCRUGGS: I think at least in
practical terms, shifting the language forward, I
think potentially, I don't want to say alerts the
defense bar, but essentially reinvigorates the
defense bar to argue in strict proportionality
terms and in monetary terms.

That's, I think, the concern, that in
theory, while there may not be a theoretical, I
think, problem, I think in practice, that could
come up more often. And that's what we are afraid
of with the shift in the language to at least make
it more explicit.

JUDGE CAMPBELL: Any other questions?

Parker?

MR. FOLSE: Is your solution to
the -- this fear that even though the standards
may be in the rules already, that this will send
some sort of a signal that will make it -- that
will effect some change in the landscape, is your solution to recommend that the language not be moved from where it's currently located into (b)(1), or is your solution to add something to the Committee note that no such change would be intended, or what exactly would you have us do?

MR. SCRUGGS: Well, I think the preference would be to remain the same, but we would also, as a secondary request, do the second thing that you advised, I think, would be our secondary preference along these lines.

I'm glad that I am eliciting so many questions as the last speaker today. We can just be here all night maybe.

JUDGE CAMPBELL: On that note, does anybody have another question?

Mr. Scruggs, thank you very much for your comments.

MR. SCRUGGS: Thank you very much.

JUDGE CAMPBELL: And thank you to everybody who's been here. We very much appreciate this input. We look forward to receiving your continuing input.

And we will stand adjourned.

*     *    *

- 334 -
CERTIFICATE

I, MERILYN A. SANCHEZ, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 15th day of January, 2014.

Merilyn Sanchez, CRR, RMR
Official Court Reporter
401 W. Washington, SPC 37
Phoenix, AZ 85003