UPDATE OF FEDERAL COURTS AND FEDERAL RULES OF CIVIL PROCEDURE

Moderated By:
HON. GEORGE C. HANKS, JR.
Magistrate Judge
U.S. District Court
Southern District of Texas

Presented in San Antonio By:
CHARLES S. FRIGERIO
Law Offices of Charles S. Frigerio

STEPHEN E. MCCONNICO
Scott Douglass & McConnico

ANNA ROTMAN
Yetter Coleman

Presented in Dallas By:
DAVID COALE
Lynn Tillotson Pinker & Cox

JEFFREY S. LEVINGER
Levinger PC

HON. BARBARA M.G. LYNN
Judge, U.S. District Court
Northern District of Texas

ANNA ROTMAN
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Written By:
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University of Houston
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Presented in Houston By:
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Beck Redden

LONNY HOFFMAN
Associate Dean and Law
Foundation Professor of Law
University of Houston Law
Center

HON. GRAY H. MILLER
Judge, U.S. District Court
Southern District of Texas

RICHARD W. MITHOFF, JR.
Mithoff Law Firm

HON. LEE HYMAN ROSENTHAL
Judge, U.S. District Court
Southern District of Texas

State Bar of Texas
37TH ANNUAL
ADVANCED CIVIL TRIAL COURSE
San Antonio – July 16-18, 2014
Dallas – August 20-22, 2014
Houston – October 29-October 31, 2014

CHAPTER 1

Justice George C. Hanks, Jr.

Place 6

Justice George C. Hanks, Jr., is a native of Breaux Bridge, Louisiana. Prior to joining the First Court of Appeals, he served as judge of the 157th District Court in Houston. In private practice, Justice Hanks was a shareholder in the law firm of Wickliff & Hall, P.C. where he specialized in commercial and medical malpractice litigation. He previously worked at the law firm of Fulbright & Jaworski, L.L.P.

Justice Hanks graduated first in his class from Louisiana State University, receiving his Bachelor of Arts in economics, summa cum laude. Justice Hanks attended Harvard Law School where he received the Legal Defense Fund/Earl Warren Scholarship and was an editor of the Harvard Blackletter Law Journal. Upon graduation, he served as a law clerk for United States District Court Judge Sim Lake.

Justice Hanks is a member of the American Law Institute, an adjunct professor at the University of Houston Law Center, and a faculty member of the National Judicial College and National Institute for Trial Advocacy. He is a published legal author and lecturer at continuing legal education seminars throughout the country and currently serves as a member of the State Bar Committee on Pattern Jury Charges. He has served on the Texas Judicial Panel for Multi-District Litigation and the Board of Directors of the Judicial Section of the State Bar of Texas.

Justice Hanks is admitted to the Texas and District of Columbia bars and is currently a member of the National Bar Association, the College of the State Bar of Texas, the Fifth Circuit Federal Bar Association, the Customs and International Trade Bar Association, the Houston Lawyers Association, and the Houston Bar Association. He is a former special disciplinary counsel for the Texas State Bar Commission for Lawyer Discipline and a former chairman and member of the District 4F State Bar Grievance Committee in Houston.

Justice Hanks is active in the community as a volunteer and Chairman of the Board of Directors of the Greater Houston Chapter of the American Red Cross. He has also served as a volunteer and a member on the Board of Directors of Big Brothers/Big Sisters of Houston, Sheltering Arms and the Ensemble Theatre.

Justice Hanks is a private pilot, master scuba diver and student of World War II aviation history.

Recent Publications:

- G. Hanks, *"Public Service and the Law,"* 43 HOUSTON LAWYER 11 (2006)
- G. Hanks, *Contribution and Indemnity after HB4*, 67 TEX. B.J. 936 (2004)
- G. Hanks and R. Polinger-Hyman, *Redefining the Battlefield-Expert Reports in Medical Malpractice Litigation after HB4*, 67 TEX. B.J. 288 (2004)
- G. Hanks, *Gazing into the Murky Crystal Ball: The Rise of Design Professional Liability for the Criminal Acts of Third Parties* 4 HOUS. BUSN. & TAX L.J. 339 (2004)

CURRICULUM VITAE

CHARLES S. FRIGERIO

TRIAL ATTORNEY AND COUNSELOR AT LAW

Charles S. Frigerio

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A Professional Corporation
Riverview Towers
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Facsimile: (210) 271-0602
Email: Frigeriolaw1995@sbcglobal.net
www.SuperLawyers/Charles Frigerio

OVERVIEW

Mr. Frigerio is a Board Certified Personal Injury trial lawyer who has been in private practice for 17 years in San Antonio, Texas. His practice is focused on Governmental Law and Law Enforcement Litigation wherein he represents law enforcement agencies and counties and municipalities throughout the State of Texas.

Charles began his litigation career with the City Prosecutor's Office of the City of San Antonio in 1983. He rose through the ranks at the City Attorney's Office becoming Chief Prosecutor of Municipal Court and eventually Deputy City Attorney in charge of all litigation. In 1995, he opened his law practice, the Law Offices of Charles S. Frigerio, P.C. where he currently defends cities, counties and other political subdivisions throughout the State of Texas. Charles has successfully litigated over 278 jury trials in both State and Federal Court. His litigation record includes the areas of Civil Rights, Wrongful Death, Tort Claims, Medical Malpractice and Labor Law.

AREAS OF PRACTICE

- Civil Rights Law - Defense
- Labor and Employment Law - Defense
- Municipal Law and Governmental Law - Defense
- Appellate Law

LICENSURE & ADMISSIONS

- A member of the State Bar of Texas in 1982
- Certified to practice before:
  - United States Supreme Court, Washington D.C.
  - United States Court for the Federal Circuit, Washington D.C.
  - United States Court of Appeals for the 5th Circuit, New Orleans LA
  - United States Tax Court, Washington D.C.
  - United States Court of Military Appeals, Washington, D.C.
  - United States District Court for the Western District of Texas,
  - United States District Court for the Northern District of Texas,
  - United States District Court for the Eastern District of Texas
  - United States District Court for the Southern District of Texas and
  - United States District Court for the Western District of New York
- Board Certified Personal Injury Trial Law.
- Advisor on the Fifth Circuit Pattern Jury Instructions for Civil Rights.

EDUCATION

Summa Cum Laude graduate of St. Mary's University, (BA 1979), Charles attended Law School at St. Mary's University School of Law attaining a Juris Doctor in 1982.

MEMBERSHIPS & COMMUNITY INVOLVEMENT

Mr. Frigerio is a member of American Board of Trial Advocates (ABOTA), Litigation Counsel of America, and the National Board of Trial Advocates, Fellow - Texas Bar Foundation, San Antonio Bar Association, Fellow - College of the State Bar of Texas, St. Mary's University Alumni Association.

SPEAKING AND PAPERS

- Speaker, ***Jail House Rock***, Police Liability In Texas, Lorman Education Services, 2012
- Speaker, ***Section 1983 - Police Litigation***, Best Practices in Governmental Law, Texas Bar CLE, 2011
- Speaker, ***EEOC: Pattern & Practice Litigation***, TML Intergovernmental Risk Pool , 2010
- Speaker, ***Police Liability in Texas***, Texas Municipal League Intergovernmental Risk Pool, 2007
- Speaker, ***Excessive Force Issues***, Texas Defensive Tactics Instructors Conference, Austin, TX, 2005

- Speaker, ***Police Liability In Texas***, Lorman Education Services, 2002
- Speaker, ***Litigating the Excessive Force Claim***, Texas Municipal League IRP, 1998
- Frequent Lecturer at Police Academies and Institutions throughout the State of Texas, 1995 –

AWARDS

Mr. Frigerio was awarded the Super Lawyer Top Attorneys in Texas (2006 -), AV Preeminent – Martindale Hubbell, SWAT (Special Weapons and Tactics) San Antonio Police Department (2010), Texas Department of Public Safety and Texas Police Association for Outstanding Contributions (2005); Lawyer Extraordinaire by the San Antonio Police Officers Association (1996), Award from the Combined Law Enforcement Association of Texas (1992), Award from the San Antonio Police Department (1982), and Who's Who in American Law (1987).

RECENT LITIGATION AND APPELLATE PROFILE

LITIGATION

In November of 2013, our firm represented the City of Selma in a case entitled ***Fleming, et al v. the City of Selma*** concerning an Americans with Disabilities Act (ADA) case. The jury trial was before United States District Judge Xavier Rodriguez in the San Antonio Division and resulted in a jury verdict in favor of the City of Selma. This trial resulted in our Firm being named Litigator of the Week for the State of Texas in the Texas Lawyer, Issue No. November 2013.

In January of 2013, we represented Williamson County in the case of ***Michelle Sheffield v. Williamson County*** involving an alleged use of excessive force at the Williamson County Jail. The trial was before United States District Judge James Nowlin in Austin, Texas and the Jury returned a verdict in favor of Williamson County.

In June of 2012, our firm represented Williamson County in the case styled ***Ruben Yzquierdo v. Williamson County*** involving excessive force and failure to provide medical care at the Williamson County Jail. We obtained a summary judgment in favor of Williamson County from United States District Judge Sam Sparks on all claims against Williamson County.

In June 2012, our firm represented Sheriff Arvin West of Hudspeth County, Texas in a case entitled ***Michael Short v. Sheriff Arvin West and Hudspeth County***. The case was tried before United States District Judge Briones in the El Paso Division of the Western District of Texas. The case was brought by an El Paso Police Officer under 42 U.S.C. §1983 alleging false arrest and violations of Plaintiff's violations of due process. The Jury returned a verdict in favor of Sheriff West and Hudspeth County.

In March 2008, our firm represented Kerr County in the case of ***Patterson v. Kerr County*** in an Americans With Disabilities Act (ADA) case concerning the Kerr County Jail. The case was tried before United States District Judge Royal Ferguson and the jury returned a verdict in favor of Kerr County.

APPELLATE

Published cases concerning our Firm's representation include the following:

United States Supreme Court

- ***Rothgery v. Gillespie County, Tex.***, 554 U.S. 191 (2008) concerning Sixth Amendment Rights.

Texas Supreme Court

- ***Ballantyne v. Champion Builders, Inc.***, 144 S.W.3d 417 (Tex. 2004) concerning the definition of qualified immunity.
- ***In re Texas Dept. of Transp.***, 218 S.W.3d 74 (2007) regarding venue issue concerning Gillespie County.

Fifth Circuit Court of Appeals

- ***Alpha v. Hooper***, 440 F.3d 670 (5th Cir. 2006) concerning Use of Excessive Force.
- ***Shields v. Twiss***, 389 F.3d 142 (5th Cir. 2004) concerning Civil Rights Due Process.

Texas Courts of Appeals

- ***Ryder Logistics v. Fayette County***, 414 S.W.3d 864 (Tex. App. San Antonio 2013) concerning emergency vehicle.
- ***Seguin v. Bexar Appraisal District***, 373 S.W.3d 699 (Tex. App. – San Antonio 2012, pet. denied) concerning qualified immunity.

For a complete listing of our Firm's published and unpublished cases, please contact our office.

STEPHEN MCCONNICO
Scott, Douglass & McConnico, L.L.P.
600 Congress Avenue, Suite 1500
Austin, Texas 78701
(512) 495-6300
(512) 474-0731 Fax

EDUCATION

Baylor University (J.D. with honors 1976);
Editor in Chief, Baylor Law Review, 1975-1976

PROFESSIONAL ACTIVITIES

Partner, Scott, Douglass & McConnico, L.L.P., Austin, Texas
Briefing Attorney for Justice Jack Pope,
Texas Supreme Court, 1976-1977
Board Certified in Civil Trial and Personal Injury
Sustaining Life Fellow Texas and American Bar Foundations
Outstanding Young Lawyer of Austin, 1984
Austin Bar Association Distinguished Lawyer Award, 2010
Chairman, Litigation Section, State Bar of Texas, 1992-1993
President, Texas Supreme Court Historical Society, 2004-2005
President, Baylor Law School Alumni Association, 2003-2004
Baylor Lawyer of the Year, 2011
Member: State Bar of Texas;
Fellow, International Academy of Trial Lawyers;
Fellow, International Society of Barristers;
Fellow, American College of Trial Lawyers;
American Board of Trial Advocates (Advocate);
President Austin ABOTA Chapter (1993-1995);
President, Tex-ABOTA (1997);
Texas Supreme Court Advisory Committee (1984-1993).
Listed in Best Lawyers in America for Legal Malpractice Law, Personal Injury Litigation, and Commercial Litigation.
Listed in National Law Journal Who's Who of the Legal Malpractice Bar.
Listed in Texas Monthly 100 Texas Super Lawyers for 2003-2011.

TEACHING

Kleck lecturer, University of Texas School of Law on legal malpractice (1995-1996).
Adjunct Professor, Baylor Law School Practice Court (2005).

COURTS ADMITTED TO PRACTICE

U.S. Eastern District of Texas
U.S. Northern District of Texas
U.S. Southern District of Texas
U.S. Western District of Texas
U.S. Supreme Court
U.S. Court of Appeals for the Fifth Circuit
Admitted to practice for specific cases in California, Florida, North Carolina, Louisiana and Nevada.

PARTNER

Harvard Law School
J.D., 2004
cum laude

Georgetown University
B.S, School of Foreign Service,
1998, *magna cum laude*

L´Institut D´Etudes
Politiques De Paris
1996-1997
honors diploma

Law Clerk to the
Hon. Marvin J. Garbis
U.S. District Court,
District of Maryland
2004-2005

Admitted to Practice
Texas, 2004

ANNA ROTMAN

arotman@yettercoleman.com | 713.632.8064

Anna represents both plaintiffs and defendants in state and federal court throughout Texas, priding herself on carefully listening to her clients' objectives — be they achieving a quick resolution or pushing through trial and appeal — and aligning the case strategy accordingly. Anna has counseled clients on their thorniest issues arising in North America, Latin America, Europe, and Asia. She has accumulated significant experience in the area of data privacy litigation and in representing both large and small companies in the oil and gas and technology industries. Her trial experience and fluency in Spanish and French uniquely position her as counsel for international companies of all sizes seeking representation in Texas.

Recognized as a "Texas Super Lawyer" and "Texas Rising Star" by *Thomson Reuters,* and as one of Houston's Top Lawyers by *H Magazine*, Anna earned her Bachelor of Science in Foreign Service, *magna cum laude*, from Georgetown University and an honors diploma from l'Institut des Études Politiques in Paris. She worked for several years in the technology industry before earning her JD, *cum laude*, from Harvard Law School, where she was articles editor of the *Harvard Journal of International Law*. Anna clerked for the Honorable Marvin J. Garbis on the Federal District Court for the District of Maryland before joining Yetter Coleman. She serves as the firm's Hiring Partner.

Professional Honors and Affiliations

- "Texas Super Lawyer" in Business Litigation, *Thomson Reuters*, 2013
- Texas Rising Star, *Texas Monthly Magazine*, 2010, 2012-2013
- Houston Top Lawyers, *H Magazine*, 2013
- 2011 Kristi Couvillon Pro Bono Award, Texas Civil Rights Project
- Southern District of Texas Federal Bar Association, Board Secretary
- Harvard Law School Association of Houston, Co-Chair
- Association of Women Lawyers Foundation Trustee
- Texas Civil Rights Project Board of Councilors
- Texas Bar Foundation Fellow
- Hermann Park Conservancy Advisory Board

DAVID S. COALE

2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
(214) 292-3601
dcoale@lynnllp.com

EMPLOYMENT:

Partner, Lynn Tillotson Pinker & Cox, 2011-present

Partner, K&L Gates, 2008-11

Associate and Partner, Carrington Coleman Sloman & Blumenthal, LLP, 1994-2008
Chair of the Business Litigation practice group

Law Clerk, Hon. Patrick Higginbotham, U.S. Court of Appeals for the Fifth Circuit, 1993-94.

EDUCATION:

University of Texas, J.D. with honors, 1993
Order of the Coif
Chief Articles Editor, *Texas Law Review*

Harvard College, A.B. cum laude, 1990
National debate champion on #5-ranked team of the decade

REPRESENTATIVE RECENT CASES:

Representing owner of collapsed restaurant building, resolved multiparty construction defect in 2013 for over $2 million.

Representing lender, obtained and won affirmance of $8 million judgment in real estate dispute.
Parker v. Textron Fin. Corp., No. 04-12-00564-CV (Tex. App.—San Antonio March 13, 2013, no pet.) (mem. op.)

Negotiated resolution of over $2 million in claims in 2012-13 against a vocational school during its foreclosure and reorganization.

Obtained CAFA review and reversal of a remand order of a "bet the business" class action to Louisiana state court.
Opelousas General Hospital v. FairPay Solutions Inc. et al., 655 F.3d 358 (5th Cir. 2011).

RECOGNITION:

Best Lawyers in America, Business Litigation and Appellate Law

Named to every list of Texas *Super Lawyers*

Named to several lists of the city's best lawyers in *D Magazine*

Member, American Law Institute

Past Chair, State Bar of Texas Appellate Section

Editor of 600camp.com, a blog on business litigation in the Fifth Circuit

LEVINGER

JEFFREY S. LEVINGER
Board Certified Civil Appellate Law
Texas Board of Legal Specialization

CURRICULUM VITAE OF JEFFREY S. LEVINGER

EDUCATION

Dartmouth College (B.A., 1979) Magna cum laude; Phi Beta Kappa
University of Virginia (J.D., 1982) Editorial Board, Virginia Law Review (1980-1982); Order of the Coif

JUDICIAL CLERKSHIP

Law Clerk to the Honorable Patrick E. Higginbotham, United States Court of Appeals for the Fifth Circuit (1982-1983)

PROFESSIONAL EXPERIENCE

Owner, Levinger PC (2011–present)
Partner, Hankinson Levinger LLP (2008–2011)
Partner, Carrington, Coleman, Sloman & Blumenthal, L.L.P. (1990–2008)
Associate, Carrington, Coleman, Sloman & Blumenthal, L.L.P. (1983-1989)

BOARD CERTIFICATION

Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization (1989-present)
Nationally Certified in Appellate Law by the American Institute of Appellate Practice (2013)

PROFESSIONAL ACTIVITIES AND RECOGNITION

Member, American Law Institute (2000-present)
Master, Wm. "Mac" Taylor American Inn of Court (1997-present)
Fellow, Litigation Counsel of America (2010-present)
Fellow, Texas Bar Foundation (1998-present) and Dallas Bar Foundation (2001-present)
Chairman, State Bar of Texas Committee on Pattern Jury Charges: Malpractice, Premises & Products (2009-present)
Chair-Elect, State Bar of Texas Appellate Section (2012-present)
Former Council member, State Bar of Texas Appellate Section (2005-2008)
Former Chairman, Civil Appellate Law Advisory Commission for the Texas Board of Legal Specialization (2005)
Former Chairman, Dallas Bar Association Appellate Law Section (2007)
Named in *Best Lawyers in America* in appellate law and commercial litigation (2008-present)
Named multiple times by *D Magazine* as one of the "Best Lawyers in Dallas" in appellate law (2001, 2003, 2005, 2007, 2008, 2009, 2011, 2012, 2013 – not awarded in gap years)
Named by *Texas Monthly* as one of Texas's top 100 attorneys (2007, 2009, 2011, 2012, 2013)
Named by *Chambers USA* as one of Texas's top appellate attorneys (2010-2012)
Named by *Benchmark Appellate Litigation* as a "Fifth Circuit Litigation Star" (2012, 2013)

SELECTED PUBLICATIONS AND PRESENTATIONS

The Charge and Appellate Issues (co-author and presenter with John Gsanger), presented at the Fifth Annual State Bar of Texas course on Damages in Civil Litigation (March 2013)

Creative Use of Special Exceptions/Summary Judgments (co-author and presenter with Judge Ken Molberg), presented at the 35th Annual State Bar of Texas Advanced Civil Trial Course (July, August, October 2012)

The Court's Charge and the Implications of Casteel (co-author and presenter), presented at the 4th Annual State Bar of Texas course on Damages in Civil Litigation (February 2012)

Texas Supreme Court Update, presented at the 2010 Annual Judicial Education Conference (September 2010)

Changes in Pattern Jury Charges, presented at the 24th Annual State Bar of Texas Advanced Civil Appellate Practice Course (September 2010)

The Court's Charge and the Implications of Casteel, presented at the State Bar of Texas course on Evaluating, Negotiating, Proving and Collecting Damages and Attorneys' Fees (February 2009)

Pro Bono Initiatives, presented at the 22nd Annual State Bar of Texas Advanced Civil Appellate Practice Court (September 2008)

War Stories: A View From the Litigation Trenches, panel discussion, presented at the 17th Annual Dallas Bar Association Bench Bar Conference (September 2008)

Effective Courtroom Written and Oral Communications, panel discussion, presented at the 17th Annual Dallas Bar Association Bench Bar Conference (September 2008)

How to Not Screw Up Your Case for Appeal, presented at the State Bar of Texas Advanced Personal Injury Law Course (July, August 2008)

Perfecting the Appeal and Securing the Record, presented at the 21st Annual Advanced Civil Appellate Practice Course (September 2007)

Creative Interpretations of State Farm v. Campbell, presented at the 15th Annual Conference on State and Federal Appeals (June 2005)

Pondering Punitives: Issues Arising at Trial and on Appeal, presented at the 18th Annual State Bar of Texas Advanced Civil Appellate Practice Course (September 2004)

Jury Charge Under HB4 (co-author), presented at the State Bar of Texas Advanced Civil Trial Course (August 2004)

PJC Volume 3 (co-author and co-presenter), presented at the State Bar of Texas Advanced Personal Injury Law Course (July, August 2004)

What in the World Does the Charge Look Like After House Bill 4?, presented at the State Bar of Texas course on Real Damages after HB 4 (January, February 2004)

Selected Topics in Appealing Actual and Punitive Damages, presented at the 17th Annual State Bar of Texas Advanced Civil Appellate Practice Court (September 2003)

Pondering Punitives: Issues Arising at Trial and on Appeal, presented at the State Bar of Texas Advanced Personal Injury Law Course (June, July, August 2003)

FRAP Amendments and TRAPs in the FRAPs, presented at the 13th Annual Conference on State and Federal Appeals (June 2003)

Business Litigation panel discussion, presented at the 16th Annual State Bar of Texas Advanced Civil Appellate Practice Course (September 2002)

Co-Author, *Fifth Circuit Trial Practice Guide* (1998)

BARBARA M. G. LYNN

United States District Judge
United States District Court
Northern District of Texas

Barbara M. G. Lynn took the oath of office as a United States District Judge for the Northern District of Texas on February 14, 2000.

A summa cum laude graduate of the University of Virginia, Judge Lynn graduated first in her class at Southern Methodist University School of Law in 1976. Upon her graduation from law school, she joined the Dallas law firm of Carrington, Coleman, Sloman & Blumenthal, LLP, and remained there until she took the bench. She was named a partner in the firm in 1983 and served on the firm's executive committee from 1983 to 1999.

Judge Lynn served as the 1998-99 Chair of the American Bar Association's 60,000 member Section of Litigation, and received SMU Law School's Distinguished Alumni Award for private practice in 1999. She was the first recipient of the Louise Raggio award given by the Dallas Women Lawyers Association for her contributions to the profession. She was listed in the *Best Lawyers in America* in Business Litigation from 1994-99 and was designated by the *National Law Journal* in 1998 as one of the 50 most influential women attorneys in the country. In 2004, Judge Lynn was recognized as Judge of the Year by the Dallas Chapter of the American Board of Trial Advocates. In 2006, she was recognized by the Women and the Law Section of the State Bar of Texas as the Sarah T. Hughes Woman Lawyer of Achievement.

Judge Lynn is the Past Chair of the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States, Past Chair of the Federal Trial Judges Conference of the ABA Judicial Division and Past Chair of the ABA Judicial Division. She is Past President of the Dallas Chapter of the International Womens Forum. Judge Lynn has been the Chair of the Research Fellows of the Southwestern Legal Foundation, which is now the Center for American and International Law, a member of the ABA Standing Committee on Federal Judicial Improvements, and President of the Patrick E. Higginbotham Inn of Court. She is a member of the Executive Board and has been an Adjunct Professor at SMU's Dedman School of Law, is a Fellow and former Committee Chair of the American College of Trial Lawyers, and is a member of the American Law Institute. In 2010, she was recognized by the International Womens Forum with the Women Who Make A Difference Award. In 2011, a new American Inn of Court chapter in Dallas, dedicated to intellectual property, was chartered and was designated by its founding members as The Honorable Barbara M.G. Lynn American Inn of Court. Judge Lynn was the recipient of the 2012 Dallas Bar Foundation Fellows Award and the 2012 Athena Award from the Dallas Regional Chamber. She is a member of the Committee to

Select the Recipient of the Morton Brody Distinguished Judicial Service Award at Colby College.

Judge Lynn is married to Michael P. Lynn, a Dallas trial lawyer. They have two daughters and one granddaughter.

Beck | Redden

MURRAY FOGLER

PARTNER

Houston Office
1221 McKinney Street
Suite 4500
Houston, Texas 77010

Direct: 713.951.6235
Fax: 713.951.3720

Education

J.D., Harvard Law School

B.A. University of North Carolina

BEST LAWYERS IN AMERICA
"LAWYER OF THE YEAR"
HOUSTON, 2014
BET-THE-COMPANY LITIGATION

AV® PREEMINENT RATED
MARTINDALE HUBBELL

TOP RANKED INDIVIDUAL
CHAMBERS USA, 2014

For over thirty years, Murray Fogler has handled high stakes commercial litigation. Murray represents clients in all types of commercial litigation and arbitration, including breach of contract, oil and gas, legal malpractice, antitrust, construction, probate, and insurance disputes. A trial lawyer, Murray has been trying cases to verdict throughout his career.

Murray joined Fulbright & Jaworski in 1978, where he practiced until 1992. Murray then formed McDade Fogler, LLP, where he practiced for over 15 years. Murray has been a partner at Beck Redden since joining the firm in 2007.

Professional Activities and Memberships

Fellow, International Academy of Trial Lawyers

Fellow, American College of Trial Lawyers

Fellow, International Society of Barristers

Advocate, American Board of Trial Advocates

Life Fellow, Texas Bar Foundation

Life Fellow, Houston Bar Foundation

Life Fellow, American Bar Foundation

UNIVERSITY of HOUSTON | LAW CENTER

Lonny Hoffman

Associate Dean and Law Foundation Professor

LHoffman@central.uh.edu

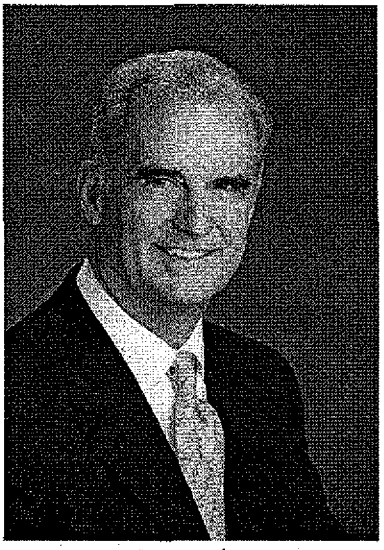
University of Houston Law Center
4800 Calhoun
Houston, Texas 77204
Phone: (713) 743-5206
Fax: (713) 743-2238
JD 1992, Texas
BA 1989, Columbia

Professor Hoffman is the Associate Dean and Law Foundation Professor at the University of Houston Law Center. An expert on procedural law in federal and state courts, he is a highly prolific scholar whose work has appeared in the leading law reviews in the country and been highly influential with commentators, lawyers and courts, including the United States Supreme Court.

In the classroom he is an acclaimed and dedicated teacher. One of several teaching awards he has won put it this way: "Professor Lonny Hoffman embodies all the qualities of a great educator. Not only does he have an astounding command of his subject area; he takes pride and pleasure in sharing that knowledge with his students. Professor Hoffman's energetic approach and 'real world' attitude to teaching bring a freshness to the classroom which inspires his students to give one hundred percent of their efforts to live up to his high standards."

In addition to his scholarly work, Lonny is actively involved in professional practice. He has testified before Congress on several occasions, spoken by invitation to federal rulemakers and lectured around the world on civil litigation subjects. In 2009, he was elected as a member to the American Law Institute. For 2012-2013, he is Chair of the Civil Procedure Section of the American Association of Law Schools. At the request of the Fifth Circuit, Lonny is currently engaged as Reporter for a project to revise the circuit's civil Pattern Jury Instructions. At the state level, Lonny has served on numerous professional committees and organizations, including his continued service on the Supreme Court of Texas Rules Advisory Committee. For more than a decade, he has been Editor-in-Chief of THE ADVOCATE, a quarterly journal published by the Litigation Section of the State Bar of Texas.

Gray H. Miller, United States District Judge



Biography

Career Law Clerk

Anna Archer
Anna_Archer@txs.uscourts.gov

Education:
University of Houston, B.S., Psychology
University of Houston Law Center, J.D.

Term Law Clerk

David Schwan
David_Schwan@txs.uscourts.gov

Education:
University of Dallas, B.A., History
University of Houston Law Center, J.D.

Case Manager

Rhonda Moore-Konieczny
Case Manager
(713) 250-5129 (voice)
(713) 250-5894 (fax)
cm4141@txs.uscourts.gov

515 Rusk Avenue, Room 9010C
Houston, Texas 77002-2605

Term Law Clerk

Heather Winter
Heather_Winter@txs.uscourts.gov

Education:
University of Texas, B.S., Government
University of Houston Law Center, J.D.

Procedures

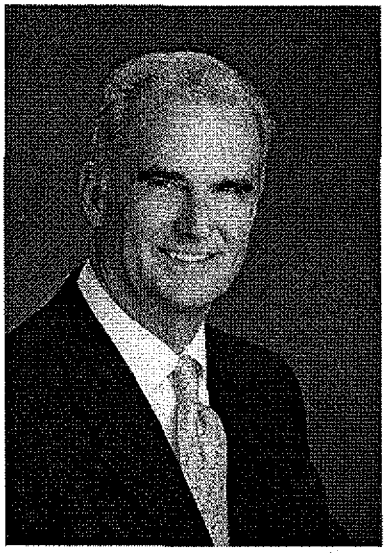
Appearances
Contact with Court Personnel
Continuances
Courtesy Copies of Documents
Courtroom Procedures
Depositions
Discovery and Scheduling Disputes
Emergencies
Equipment
Exhibits
Forms
Initial Pretrial Conferences and Docket Control Orders
Memoranda of Law
Motion Practice
Required Trial Materials
Settlements and Orders of Dismissal
Trial Settings
Voir Dire

Selected Decisions

Carico Invs., Inc. v. Tex. Alc. Bev. Comm'n
Ass'n of Alc. Bev. Permit Holders v. City of Houston
Serv. Emp'ees Int'l Union v. City of Houston
United States *ex rel* Longhi v. Lithium Power Tech.
United States v. Yanez
Aldridge v. Thaler
Fisher v. Halliburton

Judge Gray H. Miller

Biography



Judge Gray H. Miller
was appointed as a
United States District Judge
by President George W. Bush
on April 25, 2006.

Education

Judge Miller attended the United States Merchant Marine Academy from 1967 to 1969. He received a B.A. in 1974 and a J.D. in 1978 from the University of Houston, where he was a member of the Order of the Barons. He was admitted in 1978 to practice law in Texas. He is a member of the bar of the United States Supreme Court.

Work Experience

2006-present	United States District Judge, Southern District of Texas
1998-2006	Senior Partner, Fulbright & Jaworski L.L.P.
1986-1998	Partner, Fulbright & Jaworski L.L.P.
1978-1986	Associate, Fulbright & Jaworski L.L.P.
1969-1978	Police Officer, Houston Police Department

Professional Activities and Memberships

Judge Miller is a member of the Houston Bar Association, the State Bar of Texas, the Maritime Law Association of the United States, the Houston Maritime Arbitrators Association, and the Mariners' Club of Houston (Skipper 1994-1995). He has also served as a vice chair of the Admiralty and Maritime Law Committee of the Tort and Insurance Practice Section of the ABA. He is a life fellow of the Houston Bar Foundation and a fellow of the Texas Bar Foundation. He is a member of the Houston Marine Insurance Seminar Executive Committee and has served on the planning committees for seminars on Admiralty and Maritime Law sponsored by the State Bar of Texas, the University of Texas and South Texas College of Law. He is a frequent speaker at these seminars. Judge Miller is listed in the 2001-2006 editions of "The Best Lawyers in America" as one of the top admiralty lawyers in the country. He is also listed in the 2003 edition of "Euro Money's Guide to the World's Leading Maritime Lawyers" and was chosen as a "Texas Super Lawyer."

Judge Miller is Vice President and Counselor to the Executive Committee of the Garland R. Walker American Inn of Court. He is also a judicial liaison to the Federal Bar Association, Southern District of Texas Chapter and an honorary member of the Phi Delta Phi International Legal Honor Society.

Civic

Member of Advisory Board, Cavalla Historical Foundation

Life Member, 100 Club of Houston

Life Fellow, Houston Bar Foundation

Fellow, Texas Bar Foundation

Associate Member, U.S. Merchant Marine Academy Alumni and Foundation

Board of Texas Department of Mental Health & Mental Retardation (2002-04)

Board of Trustees, Harris County Mental Health/Mental Retardation Authority (1991-99), Chairperson (1997-99)

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RICHARD WARREN MITHOFF

has been described by the *National Law Journal* (September 19, 1988) as "one of the nation's highest profile litigators," and the *Texas Lawyer* (September 26, 1988), noting his "impressive trial record," has described his approach to the law as "magic."

He has consistently been named among the top trial lawyers in the country:

- Top 10 Texas "Super Lawyers", *Texas Monthly* (2003-2007, 2009)
- Top Five "Go To" Personal Injury Lawyers, *Texas Lawyer* (2002)
- Top 10 Trial Lawyers in the Southwest, *National Law Journal* (1999)
- Top 10 Trial Lawyers in the United States, *Forbes* (1989 and 1995)
- 2006 Outstanding Trial Lawyer of the Year – Texas Bar Association
- Best Civil Lawyer in Houston, *Houston Press* (1998 and 2004)
- *Best Lawyers in the U.S.,* (1989-2010)
- American College of Trial Lawyers
- International Academy of Trial Lawyers
- International Society of Barristers
- American Board of Trial Advocates

In naming Mr. Mithoff the "Best Civil Lawyer" in Houston in 1998 and again in 2004, the *Houston Press* described his courtroom style as "dazzling his opposition with pretrial maneuvers and connecting emotionally with any juror he needs," while noting that he has "earned a reputation for honesty and forthrightness with clients, judges, and the media."

Practicing in the area of general civil litigation, the Mithoff Law Firm has focused on personal injury and commercial litigation, including products liability, aviation, admiralty and medical malpractice cases. Mr. Mithoff and the firm have tried and settled a number of multimillion dollar personal injury and commercial cases, and have successfully defended a number of clients in commercial cases involving claims of several hundred million dollars in the areas of breach of contract, antitrust, trade secrets, and patent infringement.

His diverse list of clients has included San Diego Padres owner John Moores, the family of former Houston Oilers owner Bud Adams, the family of police-shooting victim Pedro Oregon, the Democratic Party, J. P. Morgan Chase in the Enron litigation, Momentum Operating Co. in the Texas Panhandle oil and gas dispute, the families of five men killed in the 2005 BP Texas City explosion and the families of six elderly people burned to death in the 2005 Hurricane Rita evacuation bus fire.

Background

A native of Lufkin and reared in El Paso, Mr. Mithoff attended the University of Texas at Austin, majoring in business administration. After graduating in 1968, he enrolled in the UT Law School, graduating in 1971. He was Project Editor of the *Texas Law Review* in his final year at UT. Following graduation, he clerked for U.S. District Judge William Wayne Justice. In 1974, he went into practice with legendary trial attorney Joe Jamail with the firm that later became Jamail, Kolius & Mithoff. In 2006 he established the Mithoff Law Firm.

Mr. Mithoff has endowed a series of scholarships at his alma mater, the University of Texas at Austin, including a Presidential Scholarship in law for educationally, socially and culturally disadvantaged students at the UT Law School, a Presidential Scholarship for disabled students at UT Business School and an endowed professorship in neonatal/perinatal medicine at the UT School of Medicine. The UT Medical School endowment funded community outreach perinatal centers, as well as the Life Flight program to bring injured babies quickly from outlying community hospitals to major medical centers.

Active in State Bar committees and Continuing Legal Education, Mr. Mithoff has served on the Supreme Court of Texas Committee on Judicial Appointments, on the State Bar of Texas Committee on Pattern Jury Charges, and as Special Assistant Disciplinary Counsel to the Texas Commission for Lawyer Discipline. He has also been a guest speaker at many seminars on a variety of topics throughout the country. He has served as president of the Houston Chapter of the American Board of Trial Advocates and president of the Houston Trial Lawyers.

In 1997, Mr. Mithoff was awarded the Jurisprudence Award by the Anti-Defamation League in recognition of his “immense talents, persuasive ability, and energy to fight for the principles enshrined in the Constitution and the League’s mission--justice and fair treatment for all.”

Richard and Ginni Mithoff were awarded the first Ben Taub Humanitarian Award by Harris County Hospital District Foundation in 2000 in recognition of their philanthropic endeavors as exemplified by the “generosity, interest and advocacy for health care” of the late Ben Taub. The hospital district named its world-class trauma center the Ginni and Richard Mithoff Trauma Center at the Ben Taub Hospital in 2007.

Mr. and Mrs. Mithoff were selected as Honorees at the Children at Risk Accolades Luncheon in 2002 for their "continuous commitment and service to the children of Houston" and were honored by County Judge Robert Eckels and the Harris County Commissioners Court with a Proclamation that Wednesday, October 2, 2003, be Ginni and Richard Mithoff and Children at Risk Day, in recognition of their efforts, "making a positive difference in the lives of the children of our community." The couple was honored in 2003 with the Samaritan Spirit Award in recognition of their "significant contributions to human health and growth" and in 2007 by Family Services of Greater Houston as the 2007 Family of the Year.

In 2008, Mr. Mithoff was awarded the *2008 J. Chrys Dougherty Good Apple Award* by Texas Appleseed in honor of "his commitment to justice, his work to enforce the highest standards for the legal profession, and his generosity in giving back to the community."

Mr. Mithoff enjoys skiing and mountain climbing. His summits have included Mt. Kilimanjaro in Africa and the Grand Teton in Wyoming, as well as numerous climbs in Patagonia in South America as well as the Pyrenees in Spain, the Mont Blanc range in France, the Drakensberg range in South Africa, and numerous rock climbs in Wyoming and Colorado. He and his wife, Ginni, have two children, Michael and Caroline, and five grandchildren: Mia, daughter of Michael and his wife, Melissa and their twin sons, Max and Matthew, and Isabella and Alejando, daughter and son of Caroline Mithoff and her husband Scott Perez.

Hon. Lee Hyman Rosenthal

Born 1952 in Richmond, IN

Federal Judicial Service:

Judge, U.S. District Court, Southern District of Texas
Nominated by George H.W. Bush on March 20, 1992, to a new seat authorized by 104 Stat. 5089. Confirmed by the Senate on May 12, 1992, and received commission on May 13, 1992.

Education:

University of Chicago, B.A., 1974
University of Chicago Law School, J.D., 1977

Professional Career:

Law clerk, Hon. John R. Brown, U.S. Court of Appeals for the Fifth Circuit, 1977-1978
Private practice, Houston, Texas, 1978-1992

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I. INTRODUCTION

In April 2014, the Judicial Conference Advisory Committee on Civil Rules recommended proposed revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37 of the Federal Rules of Civil Procedure. The Committee on Rules of Practice and Procedure then approved these recommendations in May 2014. The proposed amendments will now become effective if they are approved by the Judicial Conference and the Supreme Court, and if Congress does not act to defer, modify, or reject them. Provided these conditions are met, the amendments will become effective on December 1, 2015. It is important to note that these proposed rules have not been adopted at the time of this writing (June 2014) and are accordingly subject to modification.

Since their publication in August 2013, the proposed amendments have been the subject of considerable public debate. The proposals were examined at three capacity-filled public hearings in November (Washington, D.C.), January (Phoenix), and February (Dallas), where a total of more than 120 witnesses provided testimony. During a six-month public comment period concluding in February 2014, over 2300 comments were submitted to the Advisory Committee. Of particular controversy during the public comment period were proposed amendments placing numerical limits on some forms of discovery and new standards for discovery sanctions. After the public comment period, the Advisory Committee withdrew the proposed discovery limitations and substantially revised the proposed discovery sanctions rule. Otherwise, the Advisory Committee recommended adoption of the remaining proposals, with only minor changes.

II. PROPOSED RULE CHANGES

Below are summaries of the proposed rule changes currently under consideration. The summary is followed by two sets of public comments that were submitted as part of the public debate. They are included to illustrate the arguments being made in favor and against the proposed rule changes. The first, submitted by a group of law professors including Professor Lonny Hoffman of the University of Houston Law Center, argues against the proposed rule changes. The second, submitted by Brad Berenson, Vice President and Sr. Counsel for Litigation and Legal Policy on behalf of the General Electric Company, argues in favor of the proposed rule changes.

A. Rule 1 (Scope and Purpose).

Under the proposed amendments, new language would be added to Rule 1 providing that the rules should be "employed by the court and the parties" to secure the just, speedy, and inexpensive determination of every action and proceeding. The accompanying Committee Note explains that the purpose of the amendment is to emphasize that the parties share with the court the responsibility to "construe and administer these rules to secure the just, speedy, and inexpensive determination of every action."

B. Rule 4 (Summons).

The proposed amendment would reduce the time for the service of a complaint and summons after the filing of the complaint from 120 days to 60 days.

C. Rule 16(b) (Scheduling Orders).

Under the proposed amendments, the issuance of scheduling orders would be modified in several respects.

To begin with, the provision of Rule 16(b)(1)(B) allowing for consulting at a scheduling conference by "telephone, mail, or other means" would be eliminated. According to the Committee Note, a scheduling conference is more effective if conducted through "simultaneous communication," which may include "in person, by telephone, or by more sophisticated electronic means."

Second, the timing of the scheduling conference, which is governed by Rule 16(b)(2), would be conducted within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared. Currently, a scheduling conference is held within the longer timeframe of 120 days of service of the complaint or 90 days after the appearance of a defendant. Under the proposed amendment, a scheduling conference may be delayed for good cause.

Finally, proposed amendments to Rule 16(b)(3)(B) would modify the "permitted contents" of a scheduling order in the following three respects: (1) allow the order to address the "preservation" of electronically stored information, in addition to existing provisions for "disclosure" and "discovery"; (2) specify that agreements reached under Federal Rules of Evidence 502 related to privileges are among those agreements that the scheduling order may include; and (3) add new sub-part (b)(3)(v) whereby the court may direct that a movant is required to request a conference with the court before filing a discovery motion.

D. **Rule 26 (General Provisions Governing Discovery).**

The proposed amendments to Rule 26 embody a number of changes to the conduct of both discovery and case management.

Perhaps most noteworthy are those changes intended to limit the scope of discovery by, among other means, emphasizing the requirement that discovery must be "proportional" to the case. To that end, Rule 26(b)(1) would be amended to require that discovery must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." This language is taken from existing Rule 26(b)(2)(C)(iii) which imposes on the court the duty to limit discovery where the burden or expense of proposed discovery outweighs "its likely benefit." As amended, Rule 26(b)(2)(C)(iii) would cross-reference the "proportionality" standard set forth in Rule 26(b)(1). The intent behind transferring this language, according to the Committee Note, is to "restore the proportionately factors to their original place in defining the scope of discovery."

Under the proposed amendments, the scope of permissible discovery would further be limited by deleting a sentence from Rule 26(b)(1) which authorizes the court to order discovery, where good cause is shown, of any matter "relevant to the subject matter involved in the action." Instead, according to the Committee Note, the scope of discovery should be governed by the requirement found elsewhere in current Rule 26(b)(1) that discovery must be "relevant to any party's claim or defense."

Proposed amendments to Rule 26(b)(1) would also eliminate the "reasonably calculated" standard in the current version of the rule which provides that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." In its place, the revised rule would provide: "Information within this scope of discovery need not be admissible in evidence to be discoverable." This proposed change also may have the effect of limiting the scope of permissible discovery. The Committee Note states that the phrase "reasonably calculated" has been used "incorrectly" to define the scope of discovery. Nevertheless under the new proposed language, discovery of inadmissible evidence remains available "so long as it is otherwise within the scope of discovery."

Other proposed amendments to Rule 26 would allow earlier service of requests for production and modify certain provisions of discovery plans and protective orders.

New section 26(d)(2) would permit "early Rule 34 requests." Under the proposed new rule, a party may serve a Rule 34 request after the expiration of 21 days from the time the summons and complaint are served on a party even though the parties have not yet had a required Rule 26(f) conference. The receiving party must respond within 30 days, measured from the time of the first conference. Under current practice, parties may not serve discovery until after the conference is conducted, subject to certain limited circumstances.

Amendments to Rule 26(f)(3) would require the parties' discovery plans to state views and proposals on two additional matters. Under sub-part (C), the parties would be required to address issues about the preservation of electronically store information, in addition to currently-required issues related to disclosure and discovery. Pursuant to sup-part (D), the parties would be required to state views and proposals on whether any agreement related to privileges should be included in an order under Federal Rule of Evidence 502.

Finally, a proposed amendment to Rule 26(c)(1)(B) would expressly allow the inclusion in protective orders of a term allocating discovery expenses among the parties.

E. Rules 30 (Oral Depositions).

Pursuant to proposed amendments to Rule 30(a)(2) and Rule 30(d)(1), where a party must seek leave to take a deposition or seeks leave for additional time to conduct a deposition, the court must grant the requested relief to the extent consistent with the proportionality requirement in Rule 26(b)(1). Initially, there were proposed amendments that would have reduced the presumptive limits on the number of depositions from ten to five for both oral and written depositions. These changes were eliminated, however, from the package of proposed amendments forwarded to the Standing Committee and were not transmitted to the Judicial Conference. The proposed amendment reducing the presumptive limit on an oral examination from one day of seven hours to six hours also has been eliminated.

F. Rule 33 (Interrogatories).

Pursuant to a proposed amendment to Rule 33(a)(1), where a party seeks to serve additional

interrogatories, the court may grant the requested relief to the extent consistent with the proportionality requirement in Rule 26(b)(1). Initially, there were proposed amendment that would have reduced the presumptive limit on interrogatories from 25 to 15. These changes were eliminated, however, from the package of proposed amendments forwarded to the Standing Committee and were not transmitted to the Judicial Conference.

G. Rule 34 (Requests for Production).

Under the proposed amendments, new language would be added to Rule 34 altering existing practices for requests for production in several respects.

First, where pursuant to the new Rule 26(d)(2) requests are served on a party 21 days after the service of the complaint and summons, the party to whom the requests is directed must respond within 30 days after the parties' first Rule 26(f) conference.

Second, new language would be added to Rule 34(b)(2)(B) requiring a responding party to state "with specificity the grounds for objecting to the request," thus adopting the language of Rule 33(b)(4) which requires specificity in interrogatory objections.

Third, Rule 34(b)(2)(B) would further be amended to reflect the common practice of producing copies of documents or electronically stored information rather than inspecting documents. Under the proposal, a responding party must state that copies will be produced and then must complete the production either by a reasonable time identified in the response or by the date for inspection contained in the request.

Finally, Rule 34(b)(2)(C) would be amended to provide that an objection "must state whether any responsive documents are being withheld on the basis of that objection." According to the Committee Note, this amendment is intended to end the confusion caused when a responding party states multiple objections and still produces information, leaving the requesting party uncertain whether responsive information has been withheld on the basis of the objections.

H. Rule 37(a) (Motion to Compel).

Under a proposed amendment to Rule 37(a)(3)(B)(iv), a party seeking discovery may move for an order compelling production where a "party fails to produce documents." The Committee Note states that this amendment reflects "the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection."

I. Rule 37(e) (Discovery Sanctions).

Under the proposed amendments, Rule 37(e), which addresses the failure to provide electronically stored information (ESI), would be superseded by a new version of the rule.

Current Rule 37(e) provides: "Absent exception circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." According to the Committee Note, "Federal circuits have established significantly different standards for imposing sanctions or curative measures who fail to preserve electronically stored information." As a result, litigants expend "excessive effort and money" on preserving ESI to avoid the risk of sanctions. Proposed Rule 37(e) is intended to address this state of uncertainty by setting uniform standards for discovery sanctions.

The proposed new rule is triggered where the court finds that ESI that should have been preserved in the anticipation or the conduct of litigation is lost because a party failed to take reasonable steps to preserve the ESI, which cannot be restored or replaced through additional discovery. The Committee Note states that the duty to preserve is based on the existing common law duty to preserve relevant information when litigation is reasonably foreseeable; it does not attempt to create a new duty to preserve. Among the factors relevant to determining the reasonableness of preservation efforts is the sophistication of the parties and the proportionality of the preservation requests to the parties' resources. The proposed rule also directs, as the Committee Note explains, that upon a finding a party failed to take reasonable steps to preserve ESI and that the information is lost as a result, "the initial focus should be on whether the lost information can be restored or replaced through additional discovery."

If the information cannot be restored or replaced by additional discovery, then the court may resort to the measures specified by proposed Rule 37(e)(1), but only "upon finding prejudice to another party from the loss of the information." According to the Committee Note, the rule leaves courts with discretion to determine how best to assess prejudice in particular cases, including whether the party who did not lose the information bears the burden of proving prejudice. Once a finding of prejudice is made, the court may order measures "no greater than necessary to cure the prejudice." The Committee Note states

that the severity of the measures must be "calibrated in terms of their effect on the particular case."

In the alternative, pursuant to proposed Rule 37(e)(2), if the court finds that the party "acted with the intent to deprive another party of the information's use in the litigation," it may order, in the words of the Committee Note, "very severe measures" to address or deter failures to preserve ESI. The measures specified by sub-part (e)(2) are three-fold: (1) presume that the lost information was unfavorable to the party; (2) instruct the jury that it may or must presume the information was unfavorable to the party; and (3) dismiss the action or enter a default judgment. The Committee Note states that the proposed rule is intended to provide a uniform standard for use of these measures and rejects those cases where the measures have been imposed on a finding negligence or gross negligence.

APPENDIX I

Joint Comments by Professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure

Submitted February 5, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

To the Committee on Rules of Practice and Procedure:

We write to urge this Committee to reject the proposed amendments that redefine the scope of discovery, lower presumptive limits on discovery devices, and eliminate Rule 84 and the pleading forms. The undersigned are law professors who teach and write in the area of federal civil procedure. Each of us also litigated in the federal courts prior to entering the academy, and remain actively involved in professional practice.

In our judgment, two key issues bear close consideration by the Committee as it considers how to proceed: (1) What problem does the Committee seek to solve? (2) On balance, how likely is it that the proposed amendments will improve the status quo? As in 1993 and 2000, the Committee is focused on addressing a perceived problem of excessive discovery costs. In supporting the current proposed amendments, the Committee recognizes that empirical data show no widespread problem, but nevertheless hopes that new across-the-board limits on discovery will lessen discovery costs in the small number of complex, contentious, high stakes cases where costs are high. The Committee is correct about the data: most critically, the Federal Judicial Center's ("FJC") 2009 closed-case study shows that in almost all cases discovery costs are modest and proportionate to stakes. As in 1993[1] and in 2000,[2] evidence of system-wide, cost-multiplying abuse does not exist, and the proposed amendments are not designed to address the small subset of problematic cases that appear to be driving the Rule changes. We anticipate that,

[1] Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1411-43 (1994) (strongly criticizing the "soft social science" opinion evidence used by the rulemakers behind the 1993 reforms, while noting that the findings of the methodologically sound empirical studies did not support the reforms).

[2] James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) (evaluating the RAND corporation study of the 1993 reforms, which found that under that set of rules lawyer work hours on discovery were 0 for 38% of general civil cases, and low for the majority of cases.); see also *id*. at 640 (table 2.10 shows that while discovery costs grow with size and complexity of case, the proportion of total costs they represent does not dramatically increase; the median percent of discovery hours for the bottom 75%, top 25%, and top 10% of cases by hours worked were 25%, 33%, and 36% respectively); Thomas E. Willging, Donna Stienstra, John Shepard, and Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531-32 (1998) (finding that under the 1993 amendments, the median reported proportion of discovery costs to stakes was 3%, and that the proportion of litigation costs attributable to problems with discovery was about 4%).

as with past Rule changes, untargeted amendments will fail to eliminate complaints about the small segment of high-cost litigation that elicits headlines about litigation gone wild; instead they will create unnecessary barriers to relief in meritorious cases, waste judicial resources, and drive up the cost of civil justice. The amendments are unnecessary, unwarranted, and counterproductive.

In our view, those who support major change to the Federal Rules are responsible for demonstrating that proposed amendments will, on balance, make the overall system fairer and more efficient. Perceptively, Judge Lee Rosenthal has noted that "[s]ince their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens."[3] Even assuming that a small subset of cases presents a problem that should be solved, the proposed amendments will do little, if anything, to decrease costs in these cases. As the two authors of the FJC's 2009 empirical study commented:

> Instead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more-focused reforms of particularly knotty issues. . . . Otherwise, we may simply find ourselves considering an endless litany of complaints about a problem that cannot be pinned down empirically and that never seems to improve regardless of what steps are taken.[4]

Our concern is not just that the proposed amendments will be ineffectual. Our greater worry is that they will increase costs to litigants and the court system in those average cases that operate smoothly under the current rules. In our view, the amendments are likely to spawn confusion and create incentives for wasteful discovery disputes. Even more troubling, by increasing costs and decreasing information flow, the proposed amendments are likely to undermine meaningful access to the courts and to impede enforcement of federal- and state-recognized substantive rights.

We begin by discussing the relevant data regarding costs of discovery. We then turn to the proposed amendments regarding Rule 26, the proposed restricted uses of various discovery devices in Rules 30, 31, 33 and 36 and, finally, the proposed elimination of the Forms and Rule 84.

I. Relevant Data Regarding Costs of Discovery

A. Most Cases Involve Minimal or No Discovery

Before considering each of the proposals in more detail below, it is important to begin with a discussion of the best available empirical evidence. Thanks to research conducted by the

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[3] Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip,* 87 DENV. U. L. REV. 227, 228 (2010).

[4] Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 787 (2010).

ablest of researchers, what we know is that discovery costs are not disproportionate in the vast majority of cases.[5] We will focus on one of the most recent and comprehensive studies that, as it turns out, was undertaken by the Federal Judicial Center at the behest of this Committee.[6]

In late 2008, this Committee asked the FJC to look closely at discovery costs in civil cases and to report its findings to the May 2010 conference on civil litigation at Duke University Law School. To do so, the researchers were very careful to frame their research to find cases that involved as much discovery as possible. Thus, they systematically excluded from their study any cases in which discovery was unlikely to take place. The researchers also eliminated any case that was terminated less than 60 days after it had been filed. What was left, then, was a study that likely over-represented how much discovery takes place in a typical civil case in federal court. The result is acknowledged to be a careful and exhaustive study.

The FJC analyzed thousands of closed civil cases, revealing that the median cost of litigation, including attorneys' fees was $20,000 for defendants and $15,000 for plaintiffs. These figures came as a surprise to many, particularly those proponents of reform who had long assumed that litigation costs routinely careen out of control in federal civil cases. Just as significant—and perhaps just as surprising to many observers—were the FJC's findings with regard to the overall percentage of total litigation costs attributable to discovery. Discovery costs were reported by plaintiffs' lawyers to account, at the median, for only 20% of the total litigation costs; the median figure reported by defendants' lawyers was 27%. Standing alone, these findings undercut the conventional wisdom, repeated in headlines and sound bites, that discovery costs are far-and-away the most significant part of total litigation costs in federal cases. And linked to these findings was, perhaps, the most important finding of all. At the median, the reported costs of discovery, including attorney's fees, amounted to just 1.6% of stakes of the case for plaintiffs and only 3.3% of the case's value for defendants. This means, of course, that in half of all civil cases, the costs of discovery amounted to even less than 1.6% of the case's value for plaintiffs and less than 3.3% of its value for defendants.

It is hard to overstate the importance of these data regarding discovery costs relative to stakes. The real concern with discovery costs, after all, is not that they are too high in some absolute sense. Given how widely case values vary, one cannot compare discovery costs in a $100,000 case with those incurred in a case worth $10 million or more. The real worry is discovery costs that are disproportionate to a case's value—a point that surely needs no further defending here in light of the Committee's own recognition of the critical role that proportionality plays in evaluating discovery. But the data fail to demonstrate that disproportionality is a systemic problem.

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[5] For a helpful recent summary of the available empirical evidence, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088-89 (2012).

[6] Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf. *See also* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010) [hereafter "Defining the Problem"].

B. The Minority of Cases in Which Discovery Costs Are High Will Not Be Affected by the Proposed Amendments

While there is a persistent feeling in some quarters that litigation costs are high, and that discovery costs are the biggest driver of that cost, the actual problem to be attacked is not well defined. Without more clarity about the nature or causes of the problem, untargeted changes are unlikely to succeed.

As noted above, the FJC's study found little problem in the average case. It also identified characteristics that are associated with high litigation costs. The most significant is the amount of money at stake in the litigation, with factual complexity also highly correlated with more expense.[7] Law firm economics also have an important impact on litigation costs. When other variables are controlled for, law firm size alone more than doubles the costs, and hourly billing also tends to make costs higher.[8] These findings are consistent with the results of earlier empirical studies.

Complex, high-stakes cases may be riddled with high discovery costs. Whether these costs are unjustifiably high has not been demonstrated. What is clear is that these are the cases least likely to be affected by very low presumptive limits on discovery devices or by enhanced focus on the proportionality rules. Many of the factors associated with high discovery costs will not be sensitive to changes in the procedural rules. Some disputes will always have very high stakes, making expenditures on those disputes rational. Some disputes will always be factually complex, requiring time and effort to ascertain and share relevant facts in a way that allows the parties to adequately price claims and bargain toward settlement. Some parties will always hire large law firms that bill by the hour at very high rates.

As the FJC's own researchers have noted, previous changes in the discovery rules "may have failed to reduce costs because [they did] not address the actual drivers of cost. Perhaps the procedural reforms have not reduced the purportedly high costs of litigation because those costs have a source other than the Federal Rules themselves."[9] Problems that arise outside the procedure rules cannot be eliminated through rule changes.

In summary, the data establish that there is *not* a widespread problem with discovery costs and that the traits most strongly associated with increased costs are not sensitive to procedure rules. Neither conclusion supports a major package of rule amendments, particularly when those amendments may increase costs in other ways.

II. Rule 26: Proposed Amendments Re-Defining the Scope of Discovery

Three of the proposed amendments would change the way Rule 26 defines the scope of discovery: eliminating the trial judge's discretion to allow discovery relevant to the "subject matter" of the action; eliminating the well-established "reasonably calculated to lead to the

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[7] Lee & Willging, Defining the Problem, *supra* note 6, at 783.
[8] *Id*. at 784.
[9] *Id*. at 783.

discovery of admissible evidence" language; and inserting proportionality limits into the very definition of matter within the scope of discovery. All three proposals reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable, making the amendments unnecessary. Vague complaints that the proportionality rules are underutilized hardly establish that judges are balancing improperly or are unaware of the need to do so. Yet implicit criticism of the way trial judges are managing cases and ruling on discovery issues animates the proposed rule changes, many of which claim to make little or no change in the substance of Rule 26. This is no substitute for a coherent explanation of the need for change or why the proposed changes are the appropriate tool to fix the perceived problem.

A. Rule 26(b)(1): Elimination of a district judge's discretion to order discovery relevant to the "subject matter" of the action

The Committee's current proposal to amend Rule 26(b)(1) eliminates the power of courts to grant—upon a showing of good cause—access to discovery relevant to the subject matter of the action. This proposed change is without basis, would narrow judicial discretion, and make it more—not less—difficult to carry out reasonable case management. Moreover, these changes would unduly narrow the scope of discovery and lead to additional and complex discovery disputes, while giving courts minimal guidance for resolving them.

Some historical background about Rule 26 can inform this discussion. For the first six decades of the Federal Rules of Civil Procedure, parties were permitted to seek and obtain discovery that was relevant to the "subject matter" of the action.[10] The 2000 Amendments altered this formulation, permitting discovery relevant to the "claims or defenses" in the action, with broader "subject matter" discovery available only upon a showing of good cause. Giving district judges the power to broaden discovery was recognized as necessary to ensure flexibility and encourage judicial involvement in discovery management. The Committee also recognized that defining which information is relevant to subject matter but not to claims or defenses could be difficult.[11] Accordingly, the Committee thought it important to maintain the possibility of court involvement to "permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested."[12]

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[10] In 1978, the Committee considered a proposal nearly identical to the current one, but ultimately rejected it for reasons that resonate today. The Committee reasoned that deleting the term "subject matter" would simply invite litigation over its distinction from "claims or defenses." Moreover, although the Committee was aware of no evidence that discovery abuse was caused by the broad term "subject matter," it also was doubtful "that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 627-28 (1978).

[11] Commentary to Rule Changes, Court Rules, 192 F.R.D. 340, 389 (2000) ("The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.").

[12] *Id.*

The Committee's current proposal gives little consideration to the principles that guided its decision fourteen years ago. The explanation for eliminating the discretionary power of the court is inadequate, based centrally on the conclusory assertion that "[p]roportional discovery relevant to any party's claim or defense suffices."[13] The Committee has offered no substantive reason for moving away from the discretion currently afforded the parties and the court to shape discovery according to "reasonable needs of the action."[14] We urge this Committee to reject this kind of unsupported assertion. Had there been a pattern of judicial abuse of the discretion afforded them by the current Rule 26(b)(1), one would expect that it would be evident in the case law. However, the decisions applying this aspect of Rule 26(b)(1) suggest that courts have exercised their discretion sparingly and appropriately.[15] Perhaps the Committee has a different understanding of how courts have exercised discretion under Rule 26(b)(1) but, if so, the basis for that alternative view has not been shown. Nothing suggests that the authority to allow such discovery—upon a showing of good cause—plays any role in the "worrisome number of cases" where "excessive discovery" is thought to occur.[16]

Not only is the existing evidence insufficient to justify making this change to Rule 26(b)(1), but we believe that the Committee underestimates the potential disruption the proposed rule would have on litigation. For instance, the proposed Advisory Committee Notes state that "[i]f discovery of information relevant to the claims and defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate."[17] But this is precisely the opposite of what the 2000 Committee believed would be

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[13] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 297 (Aug. 2013) [hereafter "Preliminary Draft of Proposed Amendments"].

[14] 192 F.R.D. at 389.

[15] Of the reported district court cases we reviewed interpreting the "good cause" standard, none suggests unreasonable decisionmaking. See, e.g., Jones v. McMahon, 2007 WL 2027910 *15 (N.D.N.Y. July 11, 2007) (finding good cause to permit a limited deposition regarding matter relevant to the subject matter of the action, but denying request in large part because of lack of good cause showing); Rus, Inc. v. Bay Indus., Inc., No. 01 Civ. 6133, 2003 WL 174075, * 14 (S.D.N.Y. Apr. 1, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not make "any showing of need"); RLS Assoc., LLC v. United Bank of Kuwait, PLC, No. 01 Civ. 1290, 2003 WL 1563330, *8 (S.D.N.Y. March 26, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not show that "production would serve the reasonable needs of the action"); Johnson Matthey, Inc. v. Research Corp. et al., No. 01 Civ. 8115, 2002 WL 31235717, *2 (S.D.N.Y. Oct. 3, 2002) (finding no good cause for disclosure of documents relevant to subject matter, but not to claims or defenses); Hill v. Motel 6, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (good cause not shown for broad discovery of personnel files in disparate treatment case, where discovery would relate to disparate impact, but finding good cause for the disclosure of specified employees' personnel files); Cobell v. Norton, 226 F.R.D. 67 (D.D.C. 2005) (rejecting request for discovery beyond the scope of plaintiff's statutory claim in a suit seeking an accounting of Indian trust funds. Discovery related more generally to asset management was not permissible as it was beyond the scope of plaintiffs' statutory claim); Jenkins v. Campbell, 200 F.R.D. 498 (M.D. Ga. 2001) (breach of contract plaintiff was entitled to discovery only on those claims remaining after the entry of partial summary judgment against him, although court retained authority to revise partial summary judgment order at any time prior to the entry of final judgment).

[16] Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

[17] *Id.* at 255-56.

achieved by limiting discovery to claims and defenses asserted in the pleadings.[18] It is unclear how discovery limited to what is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims. Thus the elimination of "subject matter" discovery eliminates a tool necessary to address the problem of information asymmetry that is so common when an individual or small business faces a large entity in litigation. If Rule 26(b)(1) were amended to prevent judges from ordering discovery relevant to the "subject matter" of the action, the ability to balance this informational asymmetry would be more severely limited. For example, a plaintiff who has a valid § 1983 claim against a municipal official would be hard-pressed to seek discovery relevant to a potential *Monell* claim against the municipality, absent the power of a court to grant access to material relevant to the subject matter of the action. And the plaintiff with a valid claim against the municipality may have little additional opportunity to develop information necessary to support her claim. Finally and relatedly, we have great concerns that the uncertainties that will follow from this amendment will create incentives for parties resisting discovery to file more motions to litigate relevance, increasing discovery costs and forcing judges to spend time ruling on a new group of motions. We have seen how past changes to Rule 11 increased satellite litigation pertaining to sanctions rather than improving the efficiency or fairness of the civil justice system.

In sum, the Committee has articulated no specific benefit that will outweigh the costs of altering the current framework of Rule 26(b)(1). The existing text requires an affirmative showing of good cause to justify discovery that is relevant to the "subject matter involved in the action" but not to "any party's claim or defense." Even when good cause is shown, such discovery is subject to the limits already articulated in Rule 26(b)(2)(C), and may be limited by a protective order under Rule 26(c). No adequate explanation has been offered for why these existing protections are insufficient to ameliorate any negative consequences of permitting occasional discovery regarding the subject matter of the litigation. There is no basis for believing that the proposed amendment would, on balance, produce more good than harm, and so we urge the Committee not to adopt this proposed change to Rule 26(b)(1).

B. Rule 26(b)(1): Admissibility and Relevance

As the Committee recognizes, it has long been the case that discovery is permitted even as to information that—standing alone—would not be admissible at trial.[19] Yet the Committee's current proposal to amend Rule 26(b)(1) would eliminate an important sentence that has guided courts for decades: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[20] Again the Committee's proposed amendment does not target a documented problem and runs the risk of creating wasteful satellite litigation.

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[18] 192 F.R.D. at 389 ("The rule change . . . signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.").

[19] *See* Preliminary Draft of Proposed Amendments, *supra* note 13, at 266.

[20] In its place, the proposal would add a sentence that omits the phrase "reasonably calculated to lead to the discovery of admissible evidence." *See id.* at 289-90 ("Information within this scope of discovery need not be admissible in evidence to be discoverable.").

The Committee explains that this change is not meant to modify the definition of "relevance," but rather to prevent improper use of the "reasonably calculated" language to allow discovery into information that is not, in fact, relevant.[21] As an initial matter, these concerns appear to be based on nothing more than anecdotal impressions.[22] There is no empirical evidence that this language has had the effect hypothesized by the Committee. The current Rule already makes clear that the "reasonably calculated" language applies only to "*[r]elevant* information"; that was the point of the 2000 amendment.[23]

Even if viewed in isolation, however, the phrase "reasonably calculated to lead to the discovery of admissible evidence" cannot permit discovery beyond what is otherwise authorized by Rule 26(b)(1). Under the Federal Rules of Evidence, evidence is only admissible if it *is* relevant.[24] The need to obtain information that is "reasonably calculated" to lead to the discovery of admissible, relevant evidence is especially crucial in the context of pretrial discovery. As the Committee recognized in 2000:

> A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.[25]

The "reasonably calculated" language does not give parties carte blanche, of course. All discovery is subject to the limits articulated in Rule 26(b)(2)(C), and may be limited by a Rule 26(c) protective order.

To delete the "reasonably calculated" language, by contrast, will send courts and litigants a misguided and fundamentally incorrect message: that there is some category of information that *is* "reasonably calculated to lead to the discovery of admissible evidence" but is *not* relevant to the claims or defenses and, therefore, wholly outside of the permissible scope of discovery. This will almost certainly be perceived as narrowing the definition of relevance and mandating a

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[21] *Id*. at 266 (expressing concern that the "reasonably calculated" language is being improperly invoked "as though it defines the scope of discovery" and as setting "a broad standard for appropriate discovery").

[22] Minutes of the April 2013 Meeting make reference to a survey that revealed "hundreds if not thousands of cases that explore" the language "reasonably calculated to lead to the discovery of admissible evidence," with "many" of these cases suggesting that courts thought this phrase "defines the scope of discovery." Committee on Rules of Practice and Procedure Agenda Book, June 3-4, 2013, at 147 (draft minutes of April 2013 Advisory Committee meeting). There is no indication that any analysis of the cases was made to determine whether they permitted discovery that would not be considered "relevant" under the current or proposed Rule.

[23] 192 F.R.D. at 390 ("Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.").

[24] *See* FED. R. EVID. 402 ("Relevant evidence is admissible …. Irrelevant evidence is not admissible.").

[25] 192 F.R.D. at 389.

more restrictive approach to discovery that is wholly unjustified. This proposal is a particular cause for concern because it affects the meaning of a word—"relevant"—that has been called by a leading treatise in the field as "[p]erhaps the single most important word in Rule 26(b)(1)."[26] At a minimum, the proposed change will invite wasteful satellite litigation over the amendment's purpose and effect—an unintended outcome that would undermine the goal of reducing unnecessary costs and delay.

C. Rule 26(b)(1) & (b)(2)(C): Proposal to incorporate the "proportionality" factors into the "scope of discovery"

We also oppose the proposal to move the cost-benefit considerations that are currently set forth in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). There is a serious risk that the amendment will be misread to impose a more restrictive discovery standard across the board, contrary to the Committee's intent and without any empirical justification for a more restrictive approach. There is also a danger that the rewritten rule would be misinterpreted to place the burden on the discovering party, in every instance, to satisfy each item on the (b)(2)(C)(iii) laundry list in order to demonstrate discoverability. This would improperly shift the responsibility to show burdensomeness from the party resisting discovery to the party seeking discovery, which in turn will encourage a higher degree of litigation over the scope of discovery and increase costs both for litigants and the court system. Moreover, the rule change does not explain how the cost-benefit analysis is to be undertaken or shown, and we are concerned that the requirement will create perverse incentives for the hiring of experts, the holding of additional court conferences, and the over-litigation of discovery requests.

We recognize that the Committee has not expressed the view that the cost-benefit considerations that now appear in Rule 26(b)(2)(C)(iii) should be re-balanced to make discovery harder to obtain. Rather, the proposed Committee Note states that the proposal will merely "move" Rule 26(b)(2)(C)(iii)'s already "familiar" considerations to Rule 26(b)(1).[27] During public hearings on these proposals, Committee members emphasized repeatedly that this change will not alter the burdens that currently exist.[28]

The Committee appears to believe that the cost-benefit provisions are underutilized and that they will acquire greater attention, use, and citation if relocated to an earlier portion of Rule 26. The Committee provides no evidence that lawyers and judges are unaware of the provision's current existence. It seems far more likely that the standards for proportionality are infrequently cited because—as the empirical evidence suggests—discovery is usually proportional and appropriate. Rule 26 is already crystal clear about a party's obligation to respect Rule 26(b)(2)(C)(iii)'s considerations when making discovery requests, a party's ability to object to discovery requests that it believes are excessive in light of Rule 26(b)(2)(C)(iii)'s considerations, and the court's obligation to limit discovery requests that run afoul of Rule 26(b)(2)(C)(iii)'s

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[26] CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, 8 FEDERAL PRACTICE & PROCEDURE § 2008.

[27] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[28] See Transcript of Nov. 7, 2013 Hearing [hereinafter "Nov. 7 Hearing"], at 32, 139-40, 154-56, 180-81.

considerations. Although the proposed Committee Note states that moving these considerations to Rule 26(b)(1) will require parties to observe them "without court order,"[29] that obligation already exists under Rule 26(g).[30]

Relatedly, the Committee asserts that these cost-benefit considerations are "not invoked often enough to dampen excessive discovery demands."[31] But this assertion also lacks empirical support. If the lawyers who expressed concerns about "excessive discovery" in response to the survey questions are the same ones who are "not invok[ing] Rule 26(b)(2)(C) often enough,"[32] then it is their advocacy on behalf of their clients—not Rule 26—that requires improvement. It seems especially improbable that the cases about which the Committee is most concerned—"those that are complex, involve high stakes, and generate contentious adversary behavior"[33]—are the same ones in which parties are not "invok[ing]" cost-benefit considerations often enough. More likely, lawyers complaining about excessive discovery are fully aware of Rule 26(b)(2)(C)(iii)'s considerations, but they are not uniformly successful in limiting discovery requests that *they* view as excessive.[34]

Admittedly, judges may sometimes make mistakes in concluding that a particular discovery request should not be limited pursuant to Rule 26(b)(2)(C)(iii)—just as they may sometimes make mistakes in concluding that a particular discovery request *should* be limited pursuant to Rule 26(b)(2)(C)(iii). But there is no empirical support for the idea that transplanting the same considerations one subsection earlier in Rule 26(b) will improve the discovery process. It is difficult to believe that judges and attorneys regularly fail to read past Rule 26(b)(1) and that, even when they make it that far, they deliberately ignore its explicit reference to "the limitations imposed by Rule 26(b)(2)(C)."

It would also be unwise for the Committee to proceed with this proposal on the view that, because it makes no substantive change to the discovery standard, the amendment at least would do no harm. In fact, the amendment could have serious, unfortunate consequences. The puzzling justification for the proposal is precisely why so many who have commented on it perceive it to make the overall discovery standard more restrictive than it currently is. For there is no other logical purpose for making the proposed change: judges would be hard-pressed to imagine that the goal is simply to remind them of the existence of a provision within Rule 26 that is already

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[29] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[30] Fed. R. Civ. P. 26(g)(1) ("By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, [any] discovery request . . . is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and . . . 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."). *See also* Nov. 7 Hearing, at 139, 154, 172-73 (discussing Rule 26(g)).

[31] Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

[32] *Id.*

[33] *Id*.

[34] *Cf.* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 361 (2013) ("[A]ccording to the practicing bar, . . . litigation abuse is anything the opposing lawyer is doing.").

known and employed. Because the Committee's proffered explanation for the transition is so difficult to comprehend, there is a real danger that judges will mistakenly infer that the Committee must have intended a more restrictive discovery standard, or at least one that places greater burdens on the requesting party. This would be a perverse result; but it is a quite predictable one, and one that can and should be avoided.

Accordingly, the Committee should leave Rule 26(b)(2)(C)(iii)'s cost-benefit factors where they currently reside. If there is concern that litigants are failing to realize that those considerations must be "observed without court order,"[35] then an alternative would be to suggest discussion of these factors at the preliminary discovery conference already contemplated under Rule 26(f).

III. Restricted Use of Discovery Devices: Rules 30, 31, 33 & 36 and Lower Presump tive Limits

The Committee defends proposed limits to the presumptive number of discovery devices each party can use as a way to reduce cost and increase efficiency. However, like the Committee's proposed amendments to Rule 26, they are insufficiently supported by relevant empirical evidence, and they will likely spawn more discovery disputes and undermine the Rule's goal of achieving just outcomes in individual cases. The most problematic proposal in the current package of reforms is the change from a presumptive limit of ten depositions per party to a presumptive limit of five. In certain types of cases, depositions are the most important discovery device that parties use. Thus, especially as to this discovery device, limiting access should be justified only if there is a strong basis to believe that this reform is needed and that desired benefits will follow.

It is helpful to begin this discussion by exploring the reasons that the Committee has offered thus far in support of imposing stricter presumptive discovery limits. As for the proposed limits on the presumptive numbers of interrogatories (reducing the number from 25 to 15) and requests for admission (limiting them to 25, except for requests to admit the genuineness of documents), the Committee does not purport to provide any empirical justification.[36] As for the proposal to reduce the presumptive limit on depositions, the Committee relies almost entirely on a single finding from a memorandum prepared for the Committee's April 2013 meeting by Emery Lee of the FJC. Specifically, the Committee notes that in a survey of lawyers, 40-45% said the costs of discovery become disproportionate to the value of the case when the number of depositions exceeds five.[37]

It is a mistake to rely on this single point of datum to support the proposed reduction in the presumptive number of depositions allowed during discovery. As the Committee recognizes, these data do not establish a causal relationship between disproportionate costs and more than

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[35] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[36] *See id.* at 268-69.

[37] *Id.* at 267.

five depositions.[38] Lee himself cautioned the Committee against drawing conclusions about the merits of reducing the presumptive limit as a way of reducing unnecessary discovery costs, in large part because his 2013 memorandum analyzed data from a broader FJC study that was not focused on the precise relationship between depositions and costs. As Lee said, "the proportionality question [in the 2009 survey] asked about the costs of discovery in general and not about deposition costs."[39] Thus, attorneys who reported that discovery costs were excessive "may have responded based on the cost of other types of discovery, even in deposition cases."[40] Moreover, even if one could extrapolate from the general perceptions of discovery reported in the 2009 survey to the specific costs imposed by depositions, "the relationship between the number of depositions and attorney perceptions of the proportionality of discovery is not necessarily causal in nature. Instead, it is possible that one or more antecedent variables underlie the relationship between these two variables."[41]

To understand why the data relied upon by the Committee do not support the proposed change, it is necessary to understand the precise information that would help to evaluate the question whether changing the presumptive limits on depositions will meaningfully reduce excessive discovery costs. Given that there already is a presumptive limit of 10 depositions, the relevant question is whether there is a correlation between disproportionate discovery costs and cases in which there are between 6 and 10 depositions. The data reported by Lee in his 2013 memorandum do not provide this information, however. They only suggest that, in cases that exceeded 5 depositions, attorneys were more likely to report that discovery costs were "too much" in comparison to their client's stake in the case. Notably, in every category, more than half of respondents perceived discovery costs to be "just right" regardless of the amount of depositions.[42] More importantly, assuming that perceptions of costs are reliable indicators of actual costs, the data do not distinguish perceptions of costs in cases depending on whether depositions exceeded 10 or were between 6 and 10. Thus, it is quite possible that the perceptions of high costs are concentrated in those cases in which depositions exceeded 10, a concern that already is accounted for in the existing rule.

The more fundamental flaw in the Committee's reliance on the lawyer-survey finding is that by focusing only on a single finding from the cited memorandum the Committee overlooks the real lessons to be learned from the available empirical evidence. That evidence shows, as noted above, that in the vast majority of cases discovery costs are not disproportionate to the value of the case. As far as depositions are concerned, only about half of lawyers (roughly 55%) reported one or more depositions of non-expert witnesses. To repeat: about 45%, or nearly half of all lawyers, reported that not a single deposition had been taken by anyone in their case. The FJC then asked just those lawyers who had been involved in a case in which at least one deposition of a non-expert witness was taken to report what the total number of depositions had been in their case. It turns out that among the bare majority of cases in which any deposition at

[38] *Id*. (noting that "a causal relationship cannot be established").
[39] Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 131.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 132.

all was taken, the mean number of depositions by plaintiffs was just under 4 (the median was 3); and the mean number of non-expert depositions by defendants was just under 3 (median was 2). Expert depositions were an infrequent occurrence as well. Fewer than 1 in 7 lawyers responding to the survey reported that one or more expert witness depositions were taken by any party. That is, approximately 85% of both plaintiff and defense lawyers reported no expert depositions were taken at all in their cases.

The Committee is aware of the fact that discovery costs are not a problem for the vast majority of cases; at the least, its discussion defending a lowering of the presumptive limit for depositions references a finding from the FJC study and its memorandum states that "less than one-quarter of federal court civil cases result in more than five depositions, and even fewer in more than ten." Yet the Committee's proposal is at odds with the key lesson of the FJC study—that for most cases discovery costs are not disproportionate to case values. In addition, the FJC study provides ground for concern that changing the presumptive discovery limits will have adverse effects in the small percentage of cases in which more than five depositions are sought. First, a change in the limit will predictably have unequal effects on parties, tilting in favor of a typical defendant, as in a civil rights, tort, consumer, or employment discrimination case, who starts the lawsuit with greater access to relevant information than a typical plaintiff. There is little reason to think a defendant in this situation will extend the courtesy of consenting to waive the presumptive limit, because counsel will rarely need to take more than five depositions, leaving the plaintiff to seek relief from the court and increasing litigation as well as court costs.

The proposal thus will have many consequences that are unfair and inefficient. First, it will lead to increased litigation over the entitlement to seek more than five depositions. Judges will be asked to resolve disputes over the number of depositions much more frequently. Second, there is ample reason to believe, contrary to the Committee's assumption, that the change in presumptive limits will change how courts adjudicate requests for exceptions to those limits. Well-established cognitive science literature establishes that numerical presumptions such as those reflected in the proposal create "anchors" for judicial decisionmaking.[43] By shifting the presumption from 10 to 5 the Committee is suggesting that in most cases, seeking more than 5 depositions is unreasonable. This "anchor" will then affect how judges perceive requests to go beyond those limits. For instance, a judge faced with a motion seeking permission to take 12 depositions will view the request quite differently depending on whether the presumptive limit on depositions is 10 versus 5. In the former case, the party is seeking an additional 20% beyond the presumptive limit; in the latter case, the party will be seeking an additional 140% beyond the

[43] *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19-22 (2007) (reviewing data showing that judicial decisionmaking is influenced by numerical anchors); *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing anchoring biases, among others); Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1979-80 (2013) (summarizing data showing that judges are susceptible to anchoring effect); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1669 (2013) (summarizing literature); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification--and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 748 (2011).

presumptive limit. It is likely that some judges will perceive the requests differently, based simply on the fact that the presumptive limit has changed.

The Committee, however, seems to assume that "reasonable" judges will liberally grant requests to exceed the presumptive limits. Aside from the anchoring effect referenced above (and the fact that parties seeking between 6 and 10 depositions will now incur the increased litigation cost of having to seek consent or judicial approval), the Committee's assumption does not accord with our reading of the case law that has developed since the 2000 Amendments. Far from reflecting a liberal approach to requests to exceed the presumptive limits, most reported court decisions apply an extremely strict analysis.[44] As some courts put it, the party seeking additional depositions "must demonstrate the necessity for each deposition she took without leave of court pursuant to the presumptive limit of Rule 30(a)(2)(A)."[45]

Under the presumptive limit proposed by the Committee, litigants would have to first cull a potentially long list of witnesses "to guess which of the . . . deponents are most knowledgeable" and then depose 5 of them.[46] It may generate gamesmanship on the part of those opposing deposition discovery to put forward a less-than-informed deponent in the guise of meeting the discovery request. But civil litigation should not depend on guesses or games. Guessing wrong could very well prejudice a request for additional depositions, because it might appear to a reviewing court that the party did not use the allocated five depositions wisely. But it will be precisely those litigants who guess wrong who will have the most need to seek additional depositions. Encouraging this kind of guesswork, at the same time that the Committee proposes to reduce access to other potentially informative discovery devices such as interrogatories and requests to admit, seems guaranteed to lead to outcomes that do not reflect the merits of the dispute. It was precisely this approach to adjudication that the Rules were meant to avoid when they were enacted in 1938; although we have traveled some distance from the principles that informed the Rules 75 years ago, certainly the Rules should not detract from the merits.

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[44] *See*, *e.g.*, Estate of Smith v. Marasco, 318 F.3d 497, 522 (3d Cir. 2003) (finding that district court did not abuse discretion in limiting plaintiff to 10 depositions in case involving 46 defendants); Raniola v. Bratton, 243 F.3d 610, 628 (2d Cir. 2001) (finding that record was insufficient to determine whether district court inappropriately limited discovery in multi-defendant case where court limited plaintiff to 3 depositions, "and that after defendants failed to produce one of the subpoenaed witnesses, the court reduced the number of permitted depositions to two"); Gordilis v. Ocean Drive Limousines, Inc., 2013 WL 6383973, *2 (S.D. Fla. 2013) (finding insufficient grounds to depart from deposition limits). Where courts have granted requests for additional depositions, it has been in extreme cases. *See*, *e.g.*, Thykkuttathil v. Keese, 2013 WL 6008459, *2 (W.D. Wash. 2013) ("As Plaintiffs have disclosed in excess of thirty potential lay witnesses as well as nine expert witnesses, Defendants' request to depose an additional seven witnesses is reasonable."); In re Weatherford Intern. Securities Litigation, 2013 WL 5762923, *3 (S.D.N.Y. 2013) (granting additional depositions for plaintiff because of complexity and value of case); El Dorado Energy, LLC v. Laron, Inc. 2013 WL 2237580, *3 (D. Nev. 2013) (granting additional depositions to defendant where plaintiff disclosed three experts and seven employee witnesses, interim status report contemplated 15-20 depositions and was not objected to by plaintiff, and where case was complex).

[45] Barrow v. Greenville Independent School Dist., 202 F.R.D. 480, 482 (N.D. Tex. 2001) (emphasis added); *Accord* Lebron v. ENSCO Offshore Co., 2013 WL 3967165, *5 (W.D. La. 2013).

[46] El Dorado Energy, LLC v. Laron, Inc., 2013 WL 2237580, *3 (D. Nev. 2013).

As for the proposal to reduce the number of interrogatories and requests to admit, the Committee ignores that both of these discovery devices serve cost-saving functions. For instance, interrogatories can provide a low-cost alternative to high-expense devices such as depositions. For parties with limited resources, limiting access to interrogatories may substantially limit access to court. Even when interrogatories are limited in scope by local rule,[47] they can be useful for helping parties identify whom to depose. As noted above, reducing access to interrogatories at the same time that the Committee proposes to increase the stakes in choosing whom to depose may have a perverse effect on the just resolution of cases. Reducing access to requests to admit is even more problematic, because this device is particularly useful in *narrowing* the scope of disputed issues, reducing trial costs, focusing parties on relevant discovery, and encouraging settlement. The Committee presents no basis for any concern that this device is being abused, overused or imposing excessive costs.

IV. Elimination of the Forms

Finally, we turn to a proposed change that is perhaps the simplest but most significant: the abrogation of Rule 84 and the elimination of the Forms. The Forms were once described as "the most important part of the rules," particularly for pleading, because "when you can't define you can at least draw pictures to show your meaning."[48] The Committee offers two principal reasons for abandoning them: (1) according to "informal inquiries that confirmed the initial impressions of . . . members," lawyers and pro se litigants do not tend to rely on the Forms; and (2) the current Forms "live in tension with recently developed approaches to general pleading standards."[49] The Committee's first justification is wholly lacking in empirical rigor and, moreover, ignores the fact that federal judges at every level *do* look to the Forms for assistance. The second justification is certainly accurate—*Twombly* and *Iqbal* create tension with the Forms—but that tension is not insurmountable and, even if it were, one still needs a rationale for choosing one over the other. The Committee has provided no explanation for opting to abandon the Forms rather than to reexamine plausibility pleading.

The Committee's first explanation for why it is abandoning the Forms is based on casual empiricism and self-evident bias. As we understand it, a Subcommittee to study the Forms apparently started with the intuition that lawyers tend not to rely on the Forms, and then conducted an informal survey of undisclosed lawyers—unsurprisingly concluding that their initial intuitions were correct.[50] Needless to say, this is not a valid way to answer the question of whether lawyers rely on the Forms to construct their complaint. If one starts with a bias in one direction or another, one should be extremely cautious in conducting empirical research so as to ensure that the initial bias does not influence the ultimate interpretation of the results. Given the Committee's description of its research, we are not comforted that any steps were taken to reduce the potential for this confirmatory bias.

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[47] See, e.g., S.D.N.Y. Local R. Civ. P. 33.3(a); D. Or. Local R. Civ. P. 33-1(d).

[48] Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

[49] Advisory Committee on Civil Rules, Report to Standing Committee at 60 (May 8, 2013).

[50] It is unclear how the Committee concluded that pro se litigants do not rely on the Forms. They provide no indication as to how or whether they collected data related to that question.

Furthermore, it is surprising that the Advisory Committee would rely on the supposed irrelevance of the forms, when its own staff prepared a memo for the April 2013 Meeting that summarized in great detail the numerous lower courts that have grappled with the ongoing viability of the forms after *Iqbal* and *Twombly*.[51] Although we do not claim to have conducted a rigorous survey, our examination of the case law is consistent with the material already presented to the Committee. We note that the Supreme Court has relied on the Forms in the pleading context numerous times—perhaps most significantly in *Twombly* itself.[52] Moreover, lower court opinions cite to the forms often, relying on them as indicative of the pleading required under the Federal Rules, even after *Twombly* and *Iqbal*.[53] If federal judges have found the Forms illustrative of the relevant pleading standard, as our and the Committee's research suggests, it stands to reason that practicing lawyers have done so as well. Indeed, practitioner "blogs" indicate that lawyers pay close attention to lower courts' reliance on the Forms, particularly in the area of intellectual property.[54]

The Committee's second explanation, that the Forms cannot be squared with the Supreme Court's decisions in *Twombly* and *Iqbal*, prematurely resolves a question that the Committee has yet to fully consider. As the Committee is aware, the conflict between the rulemaking contemplated under the Rules Enabling Act and the Court's decisions in *Twombly* and *Iqbal* is a live one. Indeed, the Committee has noted in the past that it will be open to considering instituting rulemaking if it is shown that plausibility pleading is having a significant impact on the business of federal courts. It is premature to call an end to the debate, especially in light of recently emerging empirical data.[55] Given that the Committee has yet to take a definitive position on plausibility pleading, striking the Form Complaints commits the Committee to a position that implicitly adopts plausibility pleading as the standard going forward. This is all the more troubling given that one trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process rather than through case adjudication.[56] If the Committee adopts this proposal, the door will be effectively shut and the pleading rules will have been altered without any of the participatory deliberation that legitimizes the Federal Rules.

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[51] *See* Memorandum by Andrea L. Kuperman at 8-26 (July 6, 2012), in Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 230-248.

[52] *See Twombly*, 550 U.S. at 565 n.10 (arguing that there was no conflict between Form 9 (now Form 11) and plausibility pleading); *see also* Mayle v. Felix, 545 U.S. 644, 660 (2005); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 513 n.4 (2002).

[53] *See*, *e.g.*, K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc., 714 F.3d 1277, 1288 (Fed. Cir. 2013) (resolving tension between Form 18 and *Twombly* and *Iqbal*); Hamilton v. Palm, 621 F.3d 816, 818 (8th Cir. 2010) (relying on Form 13); Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008) (drawing analogy from Form 9).

[54] *See*, *e.g.*, Charles J. Hawkins, *Iqbal And Twombly Notwithstanding: Form 18 Is The Standard For Direct Infringement Allegations*, available at http://www.mondaq.com/unitedstates/x/243158/Patent/Iqbal+And+Twombly+Notwithstanding+Form+18+Is+The+Standard+For+Direct+Infringement+Allegations (last visited January 23, 2014) (posting "practice note" related to intellectual property).

[55] *See*, *e.g.*, Kevin M. Clermont and Stuart Eisenberg, *Plaintiphobia in the Supreme Court*, 162 U. PENN. L. REV. __ (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347360.

[56] *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514-15 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993).

Moreover, the Committee's explanation of its proposal to abrogate Rule 84 and the Forms seems strikingly inconsistent. For although it acknowledges the tension in its report to the Standing Committee, it states in the proposed Committee Notes that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[57] This public explanation, however, flies in the face of its description of the conflict between the Forms and plausibility pleading. The real problem may be that the plausibility standard articulated by the Court is so vague, standardless, and subjective that it is at odds with efforts to provide examples of pleadings that are sufficient. At times, the Committee's report to the Standing Committee suggests this conclusion.[58] This, however, is an indictment of the plausibility standard of pleading, not of the Form Complaints. Eliminating the Forms may eliminate the conflict, but in this case conflict avoidance may amount to a derogation of the Committee's institutional obligations.

CONCLUSION

In conclusion, we urge the committee to closely attend to the two key questions that we think must be answered as it considers how to proceed. As to the first—whether the Committee is solving a well-identified problem—the empirical evidence is clear that in the vast majority of cases discovery costs are not disproportionate to their estimated value. Given the available empirical record, it appears to us that a key underlying assumption made by those who support these amendments is fundamentally called into question.

As to second inquiry—whether proponents have shown that the proposed amendments will make things better—we believe that their burden has not been satisfied. Indeed, quite to the contrary, in our judgment the proposed amendments unnecessarily risk a host of adverse consequences, including that they are likely to spawn confusion and wasteful satellite litigation, outcomes that, perversely, are contrary to the Committee's expressed intent to reduce costs and improve judicial efficiency.

Perhaps most perplexing to us is that many of the proposed amendments are predicated on a lack of faith in the ability or willingness of trial judges to manage the cases that come before them. We are aware that a majority of Supreme Court Justices in both *Twombly* and in *Iqbal* expressed their belief that "careful case management" has been beyond the ability of most district judges.[59] That view is at odds with the best current empirical evidence suggesting that trial judges are managing the vast majority of their dockets well.[60] Even assuming that a small subset of cases present problems that the current rules cannot solve, the proposed changes do not address and so cannot resolve these problems. Rather, the amendments will generate different problems and shift costs to litigants in cases where the rules are working well. We urge the Committee to reconsider and to reject the package of proposed amendments.

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[57] Preliminary Draft of Proposed Amendments, *supra* note 13, at 329.

[58] *See* Preliminary Draft of Proposed Amendments, *supra* note 13, at 276-77 ("Attempting to modernize the existing forms . . . would be an imposing and precarious undertaking.").

[59] *Iqbal*, 556 U.S. at 685 (*citing Twombly*, 550 U.S. at 559).

[60] *See*, *e.g.*, Lee & Willging, Defining the Problem, *supra* note 6, at 779-81 (summarizing empirical literature demonstrating that discovery costs are generally low).

Respectfully submitted,

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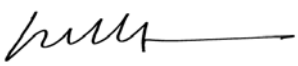

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Re: Response by the General Electric Company to the Request to Bench, Bar and Public for Comments on Proposed Rules (August 2013)

To The Federal Rules Advisory Committee:

The General Electric Company (GE) hereby submits comments for the Committee's consideration on the proposed changes to the Federal Rules of Civil Procedure. We commend the Committee for its efforts to improve the discovery process, and in particular its efforts to rationalize the scope of discovery obligations and the proper reach of sanctions. We write primarily to comment on the proposed changes to Rules 26 and 37, which address what we perceive to be the most significant shortcomings of the current system.

Given both the volume of litigation in which GE is routinely involved, as well as GE's wide exposure to other countries' court systems and other dispute resolution processes, GE has a good perspective from which to evaluate these issues. GE operates in 160 countries around the globe and is regularly involved in litigation in many of them. At any given moment in time, the company is involved in many thousands of civil cases worldwide. In part due to the costs of civil discovery, GE's litigation costs in the United States, both in the aggregate and in individual cases, greatly exceed our costs in the rest of the world.

GE strongly supports the proposed amendments, but we recommend certain changes to ensure that the purposes of these amendments are not inadvertently undermined.

Begin at the Beginning: Rule 1

In evaluating the proposed changes to Rules 26 and 37, GE believes that Rule 1 serves as a useful cynosure. Rule 1 articulates the purposes of the federal civil litigation system as a whole, and for that reason, it is rightly afforded primacy of place in the Rules. The wisdom of the proposed changes to Rules 26 and 37 is apparent when considered in light of those purposes.

The purposes of the Federal Rules are expressed as ensuring the "just, speedy, and inexpensive" resolution of civil cases in the federal courts – three distinct values to be served by the Rules. No one value could or should be served single-mindedly at the expense of the others; they form a tightly interrelated whole. Justice comes first, in the Rules and in reality, and that is as it should be. But if justice could be served only by *Bleak House*-style litigation that dragged on for decades and at a cost

that eventually surpassed the value of the case, no one would consider that true justice. At best, it would be Pyrrhic justice; at worst, it would be injustice, both for the plaintiff and the defendant. For that reason, the efficiency of the system must be considered, both in time and cost.

Justice for these purposes can be succinctly defined as reaching accurate final judgments according to law. As it relates to the amendments currently under consideration, GE is not suggesting that the value of just outcomes should be balanced against the need for speedy and inexpensive adjudication. For better or worse, the current system – at least in the realm of discovery – is in such bad repair that no such tradeoff is necessary. Instead, based on what we regularly experience in the federal courts, GE believes that the proposed changes to Rules 26 and 37, with slight modifications, will actually serve all three Rule 1 values. Not only will these changes help reduce the costs and burdens of litigation, but in doing so, they will also improve the system's ability to render accurate verdicts according to law. After providing some additional factual background, we will explain why.

The Modern Realities of Preservation and Production at GE

The Preservation Challenge: The Company and Its Custodians

GE has approximately 307,000 employees, plus another 100,000 contractors who work closely with GE employees. Currently, there are over 422,000 GE workers who have either left the Company as retirees or are otherwise entitled to a GE pension. The average yearly turnover from, for example, retirements and transfers is about 35,000 employees each year. As for GE's geographic scope, it is virtually unparalleled: GE currently operates in over 3,400 locations in 160 countries around the world. And our business footprint and structure are ever-changing: on average, GE engages in approximately 60 acquisitions and divestitures each year across the company.

Given these numbers, it is not difficult to imagine the complexity with which GE must contend when dealing with its preservation obligations. To give just one example, consider email. GE's employees heavily rely upon email to conduct their daily business activities and communicate with others, both internally at GE and externally with customers and suppliers. GE has a Microsoft Outlook Exchange email system operated at the corporate level, with 450,000 mailboxes distributed across 141 servers in 8 global locations. On a monthly basis, there are approximately 550 million emails being sent and received through those servers, much of which is not stored on them.

By GE's calculations, when it comes time to preserve data for legal holds, GE is faced with a potential universe of upwards of approximately 4,770 terabytes of email alone, in hundreds of thousands of devices across the company and across the world. To emphasize – this is email alone. Of course no case will involve even a small fraction of the total GE workforce, the total volume of electronic data in the company, or the total number of devices or locations. But each time litigation is reasonably anticipated, GE's lawyers have to define some scope for our preservation efforts, in terms of both subject matter and potential custodians. They then have to ensure that the scope is properly covered in legal hold notices, that those notices are properly communicated and maintained, and that periodic reminders are sent. Enterprise-wide, it is a herculean task. Most of the time we cannot anticipate the precise claims or defenses in whatever litigation might ultimately be filed, much less the way in which the legal and factual theories will develop and change over time. And every preservation decision made at the outset could be scrutinized years later with the benefit of hindsight in an adversarial setting, where the opposing side has powerful opportunities and incentives created by the discovery and sanctions provisions in the current Rules to allege spoliation and create satellite litigation largely divorced from the merits and designed to gain tactical and settlement advantage.

GE takes its preservation obligations seriously and works hard and in good faith to fulfill them. And GE recognizes that preservation efforts will usually be more complicated at GE than at many other companies, given the company's size and worldwide footprint. But what GE, or any other civil litigant, should not have to accept is a discovery system that turns civil litigation into a high-stakes game of "gotcha," where parties seek settlement leverage by engaging in massive, expensive fishing expeditions, and then build on and magnify that leverage by piling reputational risk, threatening sanctions if some small part of the ocean of documents in which they are fishing has not been preserved, even in good faith. That, unfortunately, is the system that has evolved under the current version of the Federal Rules, at least as interpreted by some courts.

As a practical matter, this system has led GE to engage in what by any reasonable measure is tremendous over-preservation. There are a number of factors that, taken together, lead to wasteful and expensive maintenance of enormous quantities of data for extended periods of time, the vast majority of which almost certainly will never be important to any litigation. These include the lack of clarity regarding when the preservation obligation is triggered, uncertainty regarding the scope of that obligation, the sheer volume and variety of data and potential storage media that must be considered, and uncertainty regarding when the preservation obligation ends.

The Costs and Burdens of Review and Production

For those cases that actually end up in litigation where discovery occurs, the costs and burdens become far worse. As costly as it may be to store and preserve massive amounts of data, it is even more expensive to collect, process, and review it, a task that typically requires a trained professional to examine each document that might be producible. And the purely financial cost understates the true cost, since it does not count the time lost by scores of employees who must stop doing productive work that benefits the company and its customers in order to aid in these discovery tasks.

GE of course accepts that some expense, and some amount of employee time, should and must be allocated to the task of discovery in civil litigation. But the problem is that the overbroad scope of discovery typically allowed under the current version of Rule 26 drives the costs higher than they reasonably should be, and wastes the time of far too many employees who are of no real significance to the claims or defenses at issue in the litigation.

The best way to test this assertion is to compare what we do in internal investigations to what we do when we produce documents in civil cases—in other words, compare what we do when we need an answer to an important legal question for our own purposes and what we do when the machinery of civil discovery is directed toward the same end. Although the evidence is only anecdotal and based upon my own experience and observations, it is striking: the first is far more efficient and less costly than the second. In internal investigations, we are typically able to gather the documents necessary to satisfy ourselves we know the truth of a matter efficiently and quickly, usually from a relatively small number of total custodians in a matter of weeks or at most several months. I would estimate that, in the typical internal investigation of a serious matter, we find it necessary to collect documents from approximately 20 custodians. The volumes are usually manageable, being susceptible to thorough review and analysis within six to eight weeks by a small number of internal lawyers or auditors. That is because, when we are investigating for our own compliance purposes, our incentives are to get the right answer as efficiently as possible, without waste and needless expense. We therefore target our search and review at the central actors in the drama, and at the most meaningful documents, *i.e.*, those that will actually help to answer the questions before us. We expand our search as necessary to answer those questions, but they remain our focus. We fish using lures and bait; we do not boil the ocean.

By contrast, in civil litigation, boiling the ocean is the norm. That is because our adversaries' incentives are often the opposite: particularly when there are asymmetric burdens of document production, they have an interest in seeking the broadest possible discovery. There are at least three reasons for this. First, by driving up our costs, they exert pressure on us to settle to stop the financial bleeding and business distraction. Second, by casting the broadest net possible, they increase their chances of being able to make an allegation of spoliation or discovery misconduct, which increases the pain and cost of the litigation to us in yet another way. Finally, because discovery is essentially a free good to them, carrying no marginal cost, they want as much of it as possible on the off chance they will stumble across a needle of marginally useful evidence in the haystack. Without any meaningful restraint from the Rules or the courts, the result is predictable. Vast quantities of documents are collected from a large number of custodians, reviewed and produced at great expense, and never used in the litigation—not in a deposition and certainly not at trial.

Although the aggregate volume and diversity of GE's litigation makes getting data from which to calculate company-wide averages difficult, several examples from actual cases should help give the Committee a sense of the scale of the burden and expense of current civil discovery practices in the federal courts. When GE last presented testimony to the Committee at the Dallas Mini-Conference in 2011, GE provided the Committee with three case studies drawn from our actual experience to illustrate some of the problems under the current Rules. We have now updated all three of those examples to account for the developments of the past three years. These updates illustrate the points we are making and should also help the Committee evaluate the extent to which developments in technology or otherwise over the past several years have lessened the problems. The bottom line is they have not.

Example 1. In the first example, where litigation had not yet even been filed, we reported in 2011 that GE had incurred fees of $5.4 million to collect and preserve 3.8 million documents, totaling 16 million pages for 96 different custodians. Today, the situation is worse. It remains true that no case has yet been filed, and it is quite possible that no case ever will be. Yet the obligation to preserve has remained open-ended, because there is no court to intervene and the opposing party has no interest in negotiating the scope or size of the preservation hold.

The cost to preserve and collect data, as reported in 2011, was substantial. The initial outlay of $5.4 million now has grown by approximately $100,000 per year for ongoing maintenance, culminating in a total pre-litigation discovery spend to date approaching $6 million. Most companies would consider a final judgment of that amount to be a bad result. Yet our existing discovery system has compelled the company to spend this amount before we have been sued by anyone and before we have produced a single document to the adverse party. The total number of custodians on hold has increased from 96 to 103, and these employees continue to generate data during their daily work life. Working under the constraints of a litigation hold, GE estimates approximately 500,000 new documents (paper and ESI) are generated every six to twelve months that might be subject to preservation. Given this environment, GE regularly harvests data from the custodians as part of a detailed preservation plan to minimize the impact on business operations, and stores that data.

This digital landfill just continues to grow, without any sense of whether an end – or even a narrowing of the scope – will ever be reached. And despite this effort and expense, we could still be vulnerable to spoliation claims if an adversary decides years from now, with the benefit of hindsight, that the universe of custodians should have been 104 or 105 instead of 103.

Example 2. GE reported on a second matter in 2011, where the cost to preserve and collect data was $5 million for fewer than 250 custodians. Notably, the $5 million cost cited in 2011 excluded

review, which as the RAND study and others have shown is by far the most costly part of discovery (73 cents per dollar, per RAND).[1]

As of 2013, this same matter remains active. GE has had a legal hold in place for seven years and counting. Based on changes in the litigation during the past several years, GE ultimately felt obliged to preserve the paper and ESI of a total of 815 custodians located in the US and EU. This demonstrates how difficult it can be to gauge accurately at the outset what documents and custodians will ultimately come within the scope of the claims that are eventually litigated.

Out of the total number of custodians put on hold, slightly more than 50% – 415 – had their documents collected in anticipation of possible discovery requests, and only 10% - 85 – had their documents produced to the other side. As the case has progressed, the all-in cost of discovery has grown tremendously. When one adds the costs of continued preservation and data hosting, collection from 415 custodians, and review and production of the documents belonging to 85, the total cost to date for the discovery process in this matter exceeds $22 million.

Example 3. In the third example we presented in 2011, GE had incurred discovery costs of nearly $6 million to produce more than 700,000 documents, representing an estimated 15 million pages of paper and ESI. To date, the cost to the company to complete discovery in that matter has exceeded $11 million and counting, including hosting fees, technical vendor fees, substantive document review, privilege logging, and law firm fees. Apart from the mounting cost, the remarkable thing about this example is the relationship between those costs and the actual value of the case. GE estimates the fair settlement value of the case at less than $4 million, $7 million less than GE has already spent on discovery alone. Yet we face inflexible plaintiffs making what we consider to be exorbitant and unjustified settlement demands well above $11 million. Because the court refuses to shift any of the costs of discovery to plaintiffs, the company has been forced to spend far more on just the document production component of discovery than we believe the entire case is worth. And the plaintiffs are never forced to think critically about the discovery costs in relation to the value of the case; indeed, because they are spending someone else's money, they may well be pleased to the extent they perceive the disparity. In this situation, we would be better off economically if we could pay an unjust

[1] Pace, Nicholas M. and Laura Zakaras. Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery. Santa Monica, CA: RAND Corporation, 2012, at xvi. http://www.rand.org/pubs/monographs/MG1208. Also available in print form.

nuisance value settlement more than double the fair value of the case, a dramatic illustration of the way in which cost can distort or destroy just outcomes.

Some have suggested that advances in technology and litigation management techniques are decreasing the costs of discovery, such that the Committee should not be overly concerned. It is certainly true that technology is getting better, as are our tools and methods of managing the discovery process. But in our experience, even when one can find ways to reduce the unit cost of discovery, that does not always translate into a reduction in the aggregate cost.

Looking more broadly across our portfolio of litigation, we have not noticed a meaningful reduction in the aggregate dollars we are spending on discovery. And the volume of data within the company continues to grow. As anyone who has purchased a computer in the past several years knows, the memory size of computer hard drives continues to expand. At GE, the amount of storage on the hard drives of employee laptops has increased by a magnitude of between 2 and 4 times in the past 3 years alone. To accommodate increasing file sizes and overall data volumes, GE has also been obliged to increase the mailbox size restrictions for the hundreds of thousands of employee email accounts in the company. The size restriction on an employee's ability to receive email has recently increased by more than 4 times and the size restriction on an employee's ability to send email has increased by 10 times. As storage and volume increases exponentially, so do the associated costs and challenges of discovery.

More importantly, even if aggregate costs were declining, they would still be high, both in absolute terms and compared to the costs of other systems of adjudication, which we will address more fully below. And they would still be wasteful: the millions of dollars spent to preserve documents in anticipation of litigation in Example 1 would otherwise be spent creating technology, products, and jobs, or else they would be returned to the owners of the company for them to spend, save, or invest as they wish. It is easy to be dismissive even of large dollar figures associated with discovery, especially for a company the size of GE, but these costs have real consequences.

Comparison With Other Countries' Litigation Systems

A significant percentage of GE's litigation is pending in the court systems of other countries, including roughly 40% of GE's significant cases. GE thus has extensive experience with the court systems of other countries. These countries are not limited to those of Western Europe, or the developed world more generally. GE currently has significant cases in the court systems of South America, in Asia, in the Middle East, in Africa – almost everywhere on the globe.

Although GE has not attempted to make a detailed, data-driven comparative analysis of the cost or burdens of litigation across various countries, GE's experience largely mirrors the conclusions of some of the recent reports and studies conducted by academic institutions and others suggesting that the cost of the U.S. system far outstrips that of systems of equivalent quality elsewhere.[2] GE considers the quality of justice very high in the U.S. federal courts, and has great confidence in the transparency, fairness, and integrity of U.S. judicial proceedings. Yet in GE's experience, the quality of justice is equivalently high in many other court systems, despite the fact that the costs and burdens of litigating cases here are proportionally much higher.

[2] Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies, App. 1 at 15 fig. 9 (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survev%20of%20Major%20Companies.pdf; D.L. McKnight and P.J. Hinton, International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States, NERA (June 2013)

There are undoubtedly many reasons why U.S. litigation costs so dramatically exceed non-U.S. litigation costs, even in advanced industrial democracies with excellent court systems. But one key factor, in GE's experience, is our civil discovery system. No other country has anything remotely like it. Other countries are as interested as we are in providing good quality justice in their courts, but none considers it necessary to require essentially boundless, indiscriminate gathering up and production of every conceivable kind of document and data. In the U.S., discovery costs typically account for 50% or more of the total costs in a case,[3] whereas in many other countries, that figure is much lower. And of course the denominator is much higher in the U.S., as the overall cost of a case here is much higher than in most other countries.

The U.S. is an enormous market with many built-in advantages, and companies and investors need to be here. But the disproportionate cost of U.S. litigation is a competitive disadvantage for global companies based in the United States. It also means that where participants in the global litigation market have the choice to opt out of the U.S. system, they often do. In GE's Oil & Gas business, for example, our preferred contracts typically provide for arbitration in Geneva or Paris, rather than litigation in the U.S. federal courts. A 2008 survey of 180 corporate counsel in Europe conducted by the Lovells law firm (now Hogan Lovells) found that, despite the admirable features of our court system, it was the system about which those counsel had the greatest concern, far outstripping the two runners-up, Russia and China.[4] The discovery regime, with all its attendant costs and burdens, is only one reason, of course – civil juries, punitive damages, and elected judges are others – but it is a major one.

To see why, consider GE's own tale of two cities. GE recently litigated two roughly comparable cases in its Oil & Gas business to judgment, one in federal court in Houston and one in Paris. GE won both cases, but the costs of victory were very different.

In the first case, GE was sued for $55 million in federal court in Houston, based on a claim that certain GE products used in a Floating Production, Storage and Offloading ship did not perform adequately. The case ended with a defense verdict after a month-long trial. Shortly after the verdict, GE and the plaintiff reached a resolution that avoided appeals. GE hired an efficient local litigation boutique for this case but still spent over $7 million in legal fees to achieve this result.

In the second case, a French company sued GE in a French court, claiming more than $130 million in damages due to a joint development project in four Commonwealth of Independent States (CIS) countries that turned out not to be as profitable as hoped. The litigation was complex, and documents and witnesses were spread across Italy, France, Germany and the United Kingdom, as well as the CIS region. The case was heard by the Paris Commercial Court, which rejected almost all of the French company's claims. The judgment was affirmed on appeal at the intermediate level and ultimately by the court of final appeal in France, the *Cour de Cassation.* GE paid a top-flight international law firm total fees of approximately €492,000 (about $671, 500) through final appeal.

The absence of U.S.-style discovery in French litigation accounts for a large part of this dramatic difference in cost. More than half of the total fees GE paid to its outside counsel in the Houston case were spent on discovery, including the litigation of a late-filed spoliation claim against GE that the court ultimately rejected, but only after allowing additional depositions for witnesses and experts. In

[3] John H. Beisner, Discovering A Better Way: The Need For Effective Civil Litigation Reform, 60 Duke L.J. 547, 549 & n.5 (2010).

[4] Lovells, LLP. "The Shrinking World" Research Report: How European In-house Counsel Are Managing Multinational Disputes (Spring, 2008).

fact, litigating that spoliation claim cost nearly the same amount in outside counsel fees as the entire case in France, including appeals to France's highest court.

Distortion and Dysfunction: The Perverse Effects of the Current System

As the above examples reflect, our experience under the current discovery rules has been one of waste and needless burden and cost. The result has been anything but "speedy and inexpensive." But is at least the first goal of the Rules being served? Is the system just? The great irony is that, in many ways, the same features of the Rules that produce the waste, burden, and cost also produce opportunities for substantive injustice. Herein lies the opportunity before the Committee: changes to the Rules that reduce some of the costs and burdens should also reduce some of the incentives that distort litigation behavior and, in the worst-case scenarios, litigation outcomes.

As the prior discussion makes clear, the waste comes from over-preservation, over-production, and tangential litigation over meritless spoliation claims. Consider again the matter in federal court that is the subject of Example 2 above. Of course the ultimate point of all the effort and expense described in that example was to produce evidence to put before the trier of fact. By definition, this is the evidence the parties considered necessary to arrive at an accurate verdict. When one considers the case from that perspective, the picture of waste becomes even more dramatic. GE produced approximately 340,000 unique documents (in pages, more than 6 million) to plaintiffs in that case. At trial, a total of 194 documents were marked as exhibits by both sides. Thus, less than 0.1% of the documents produced (and a far, far smaller percentage of the documents preserved or collected) were actually used at trial.

We recently saw the same pattern in an intellectual property dispute that culminated in a $170 million judgment for GE in federal court in Dallas. For that case (and directly related litigation against the same party), GE collected and preserved 2.4 terabytes of data or roughly 180,000,000 pages. To provide a tangible comparison, that is about 72,000 banker's boxes of documents. We produced only 7% of that in discovery. The total volume of exhibits eventually admitted in evidence fit into two binders, a total of 165 documents.

As these examples suggest, over-preservation and over-production are both very costly. These costs are a function of how the Rules currently work. Rule 26, as currently interpreted by many courts, requires production that is far broader than could ever be necessary to fully and properly present the claims and defenses in a case, which is amply borne out by the huge discrepancy between documents produced and documents actually used at trial. Entitling a litigant to demand and obtain not only the evidence relevant to the claims and defenses in the case but also to anything that might "lead to the discovery of admissible evidence" generates significant additional cost and burden. And when one combines the breadth of Rule 26 with the threat of sanctions under the current version of Rule 37, that leads many litigants, including GE, to over-preserve out of fear of otherwise triggering sideshow litigation over claimed spoliation – litigation that can be damaging both substantively, in its effects on a case, and reputationally, to the company and its lawyers.

Rule 37 drives over-preservation in several distinct ways. To begin with, the trigger for preservation obligations is reasonable anticipation of litigation, but the moment one finds oneself asking the question, even a good faith "no" answer creates risk under the current sanctions regime. Thus, with no objective criteria to use in assessing whether litigation is reasonably anticipated, companies often face strong pressure to assume that situations of conflict or controversy could ripen into litigation. Moreover, even when litigation is anticipated, one cannot easily anticipate its precise contours or issues. Issues that did not seem salient at the outset often become so as theories of recovery and defense morph in a long and complex case. And the party with the duty of preservation knows that

under the current regime, without clear protection for good faith efforts, sanctions are an ever-present threat. Any party seeking sanctions has every incentive to attribute the worst motivations to the party with the duty of preservation, and will naturally claim that whatever is missing is especially important to their case – a claim that is impossible to meaningfully contradict in many cases because, of course, the evidence in question is gone.

After a case has been filed, the problem often becomes worse. That is because in many cases the burdens of document production are seriously asymmetrical. It thus is tactically advantageous for the party with less burden to drive up the other side's costs by demanding the broadest possible scope of discovery consistent with the Rules. The breadth of current Rule 26 can make that tactic quite a powerful one.

This is where the current rules drive not just inefficiencies but injustice in particular cases. The breadth of discovery and lack of clarity and safe harbors in the sanctions rules allow litigants to engage in gamesmanship, setting and springing discovery traps, and playing various forms of "gotcha" based on spoliation claims, all designed to secure tactical or strategic advantage. The incentives to do so are strong: this kind of litigation behavior drives up costs for the other side, exposes them to reputational harm and embarrassment, creates divisions between lawyer and client, and can result in adverse inferences or other jury instructions that substantively further the alleger's case. Worse still, the weaker the case is on the merits, the stronger the incentives are to shift the focus to discovery and spoliation issues. The asymmetrical nature of discovery burdens, amplified by the scope of current Rule 26 and the uncertainties posed by current Rule 37, all too often turn litigation into a form of guerrilla warfare, where one side uses discovery to exact a toll on the other side rather than to find the truth.

The ultimate injustice in such situations manifests itself in two forms. The first is nuisance value settlements. In today's world of electronic discovery, the nuisance value of a case can be quite high, with fees and discovery costs running to many millions of dollars, as the above examples reflect. By definition, a nuisance value settlement represents a substantive injustice, at least most of the time. Money is being paid to a claimant not because anyone has adjudicated the claim and found it valid (or settled a claim for which the party was fairly at risk of being found liable), but because the defendants have concluded it is cheaper to pay the claim than to litigate it. And where the cost of litigation exceeds the value of the dispute – a circumstance increasingly common in the era of ESI – then it becomes economically rational, at least within the context of the particular case, to settle rather than litigate, regardless of the merits. Make no mistake: plaintiff's lawyers are keenly aware of this dynamic, and many exploit it for everything it's worth. It can be worth a lot. Settlements like this happen every day.

The second form of injustice comes when a party that is under assault for claimed spoliation decides to fight and ends up being sanctioned, despite the absence of bad faith or willful discovery misconduct. Satellite sanctions litigation often is completely divorced from the merits of the case, and the sanction itself can have the effect of pushing towards an incorrect verdict. The classic example is the innocent, good faith loss of data that results in an adverse inference or evidentiary presumption, or even in lesser jury instructions that have the effect of informing the jury of the data loss and the party's responsibility for it. Such inferences, presumptions, or instructions might or might not tend toward an accurate verdict: when evidence has been lost not due to any intentional, bad faith destruction but rather to honest mistake or accident, or to good faith misjudgments as to scope, custodians, and the like, as often as not, the inference or presumption will be substantively unfair and tend toward an unjust verdict. After all, if evidence has been lost innocently, there is no reason to suppose that it would have favored the party seeking sanctions rather than the party

resisting them. In such situations, it serves neither logic nor justice to provide one side with a favorable jury instruction.

The Proposed Amendments: A Modest Corrective

The proposed changes to Rules 26 and 37 should help ameliorate some of the uglier aspects of this dysfunction. Because the problem has its roots in the interaction between the scope of what is discoverable (and thus must be preserved and produced), and the rules regarding sanctions for failure to comply with these obligations, any solution should address both factors.

Rule 26(b)(1) – The Scope of Discovery

GE supports the proposed change to Rule 26(b)(1). Limiting discovery to evidence relevant to the claims or defenses in a case, and requiring that it be proportionate to the needs of the case, is a matter of common sense. In evaluating issues relating to the scope of discovery, it is important to bear in mind, as illustrated above, that the vast majority of evidence preserved is not produced, much of what is produced surely never gets reviewed, and most of what is reviewed is never actually used in trial or motion practice. Even among big cases, it is the rare case indeed that will have more than several hundred exhibits, as the examples discussed above show. By definition, those are the only documents important enough to be presented to the trier of fact, and the only ones the parties themselves deem necessary to arriving at a just verdict. In GE's experience, both parties usually know about most or all of these key documents very early in the case. They can be, and usually are, identified quickly.

In light of this well-known truth among litigators, the exceptionally broad scope of discovery embodied in the current Rule 26 is simply unnecessary. And being unnecessary, it is counterproductive to all the purposes of the Federal Rules for the reasons described above. Many other judicial and dispute resolution systems produce just outcomes without creating anything like the preservation and production obligations of the current Federal Rules.

International arbitration is one such example. Many parties to significant business transactions (including sophisticated litigants like GE Oil & Gas) now choose arbitration in civil law countries as their preferred method for resolving disputes in a variety of circumstances, whether they are plaintiffs or defendants. There are many reasons for this, but no party to a billion-dollar commercial contract would choose arbitration if it felt that its chances of obtaining a just resolution according to the facts and the law were meaningfully lower than in court. And the choice of arbitration is of course made behind the veil of ignorance, not knowing what sort of dispute might arise, which party would be plaintiff or defendant, and which party would have greater need for discovery. This says quite a lot about how sophisticated litigants feel about Rule 26's current scope, regardless of whether they are seeking to press or defend against claims.

The American criminal justice system provides another useful point of comparison. Under Federal Rule of Criminal Procedure 16, a criminal defendant is not entitled to obtain every piece of evidence that might lead to something admissible. Instead, in criminal cases, where the interests at stake typically involve individual liberty, the defendant generally gets documents that are material to the preparation of his defense or that tend to exculpate him. And prosecutors and grand juries don't subpoena every scrap of electronic evidence that might conceivably be relevant to a case; far more typically, the criminal investigative process, like GE's internal investigative process described above, is more focused on the documents and evidence that are truly likely to matter. There are of course many reasons why analogies between the civil and criminal justice systems are imperfect; the point is simply that a narrower scope of discovery has long been accepted in the United States as fair and

just in a context where accurate verdicts matter as much as or more than they do in our civil justice system.

And of course, as noted above, many other countries in the world afford good quality, accurate adjudications without the costs and burdens of U.S.-style discovery.

The desire to ensure the broadest possible discovery of evidence bearing on a dispute is understandable, but long experience with the current rules now suggests that we have gone too far. The slight narrowing of the scope of discovery in the proposed amendment to Rule 26 is a worthwhile corrective.[5]

Rule 37(e) – Sanctions

GE also supports the proposed changes to Rule 37(e), including both a nationally uniform set of standards and a restriction of punitive sanctions to instances of intentional, bad faith destruction of evidence. Indeed, these are, if anything, even more important to reducing some of the gamesmanship and injustice that flows from the current design of the Rules. However, further modifications will better ensure that the amendments serve their intended purpose.

First, the term "willful" should either be defined or else the rule should require that the loss of evidence be "willful *and* in bad faith" before punitive sanctions may be awarded. Either way, the critical point is that if a party conducts itself in good faith and nonetheless loses some evidence that might conceivably be relevant to the case, no punitive sanctions are in order. The Sedona Conference's suggested language – "acting with specific intent to deprive the opposing party of material evidence relevant to the claims or defenses" – accurately captures the critical concept. Sanctions such as evidentiary presumptions might be fair if a court finds that a party acted with an intent to deprive the other party of the evidence lost but not if the loss was inadvertent. In a world where compliance is so complex and difficult, where data can be lost through mere failure to know about or stop automatic data deletion protocols in effect in any one of a variegated group of electronic storage programs and media, and where compliance depends upon so many judgments that are so easily second-guessed after the fact with the benefit of hindsight and full knowledge of how the case progressed, allowing sanctions on a lesser showing simply creates an unfair windfall for the opposing party. The desire to achieve such windfalls leads to unproductive and unjust litigation behavior, especially by parties with weak cases on the merits.

Second, we believe that the amendment would be better off without the exception in subsection (B)(ii), which allows sanctions without any showing of bad faith if a loss of data irreparably deprives a party of any meaningful opportunity present a claim or defend against the claims in the litigation. This exception provides a potential avenue for swallowing much of the principal rule. It is also difficult to understand the logic of requiring bad faith where there has been "substantial prejudice" to a party but not where the prejudice rises to a higher level, even assuming there were analytical integrity to the distinction. Either way, evidence has been lost and a party's chance to make out a claim or defense has been significantly harmed, but if the loss did not occur through ill-intentioned conduct, there is both no reason to suppose the lost evidence would support the party seeking the sanction and no reason to direct moral condemnation and punishment at the other party. In these circumstances, the fair and just approach would be to treat the loss of evidence the same way one would treat evidence lost through an act of God: the evidence is simply unavailable, and the case

[5] We further support the proposal made by other commenters to modify Rule 26(c) to make clear that district courts have the authority to issue protective orders limiting excessive or unduly burdensome preservation demands.

moves forward without it, for better or worse, and with whatever result then occurs under the applicable law and burdens of proof. But if the Committee considers it important to retain the exception in some form, it should provide clear guidance about when and how it is to be used, and it should narrow its scope expressly – for example, to tangible things rather than ESI.

Third, GE has concerns regarding the authorization of "curative measures" in subsection (e)(1)(A) for the failure to preserve discoverable information. As with our concern regarding the proposed subsection (B)(ii) exception, we are concerned that this could become an avenue for preserving the existing sanctions regime under another name, and could undermine the core purpose of requiring bad faith before sanctions may be awarded. Whether denominated "sanctions" or "curative measures," an evidentiary presumption or other jury instruction regarding data loss will still have the same effect on the litigation, and if unwarranted, its effects will be equally unfair. Moreover, the absence of any prejudice requirement in subsection (e)(1)(A) means that the curative measures referenced there could provide a means to evade the substantial prejudice requirement in subsection (e)(1)(B), thus creating, in effect, a no-fault, no-prejudice loophole to almost the entirety of the most meaningful change to Rule 37(e). This would represent a step backwards from the current state of the law in many jurisdictions. In our view, the reference to "curative measures" is unexceptionable if it refers to measures other than those presently associated with sanctions, but the current draft of the Note suggests that may not be the case. If the reference to curative measures is to be retained, its scope should be narrowed and defined so that it excludes the types of relief customarily associated with punitive sanctions. Otherwise, the same requirements of bad faith and substantial prejudice that apply to sanctions should also apply to this identical but differently denominated relief.

* * * *

In conclusion, GE thanks the Committee for the opportunity to submit its views and commends the effort to find ways to fine-tune the current rules governing civil discovery to produce a more just, rational, and efficient system.

Respectfully submitted,

Bradford A. Berenson