

LOOKING PAST THE DEBATE: PROPOSED  
REVISIONS TO THE FEDERAL RULES OF  
CIVIL PROCEDURE

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The Judicial Conference’s Advisory Committee on Civil Rules recently forwarded to the Standing Committee on Rules of Practice and Procedure several proposed amendments to the Federal Rules of Civil Procedure that would, if adopted, modify the parameters and procedures governing discovery in civil litigation.<sup>2</sup> As discussed more fully below, the proposals address the scope and proportionality of discovery under Rule 26(b)(1); reduce the current presumptive limits for depositions and interrogatories; for the first time set a numerical limit on requests for

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2. See Agenda Book for Advisory Committee on Civil Rules, Norman, Oklahoma, April 11-12, 2013 (hereinafter the “Agenda Book”), <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf>

admission; and establish a framework for the imposition of remedial measures or sanctions where a party fails to comply with their preservation obligations.

Not surprisingly, these proposals already have prompted reactions from the legal community. The Advisory Committee's recommendations have been described as "shift[ing] a paradigm" and adversely impacting "access to justice,"<sup>3</sup> imposing "new extreme limits on discovery" that will prevent litigants from "build[ing] the core evidence needed to prove their claims and to defend against dispositive motions,"<sup>4</sup> and jeopardizing "the effectiveness of discovery in assuring fact-based decision-making in too many cases."<sup>5</sup> One commentator suggests the Advisory Committee's proposals are superfluous for the majority of cases, and unnecessary as "existing tools enable courts to control the small number of instances where discovery requests are overly burdensome or otherwise constitute impermissible fishing expeditions."<sup>6</sup> Others argue, to the contrary, that the Advisory Committee has not shifted far enough to align discovery more closely to the needs of individual cases and has failed to provide a "simple, predictable 'commencement of litigation' trigger for affirmative preservation."<sup>7</sup>

These proposals will likely spark more debate over the coming months. Indeed, the Advisory Committee's recommendations may become a background on which competing philosophical perspectives wage war over the role of civil litigation in today's society. While the intent of this article is not to pick sides, the broader debate should not distract from the more pressing question of how attorneys can or should use the proposed revisions to advance their clients' interests while simultaneously promoting the overarching goal of a just, efficient and cost-effective litigation process. In that regard, the authors will consider the practical ramifications of these proposed revisions and objectively evaluate how they may impact, positively or negatively, a party's ability to pursue a reasonable and

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3. John Vail, CTR. FOR CONSTITUTIONAL LITIG., *CCL's Initial Comments to Federal Civil Rules Advisory Committee* (March 1, 2013), [http://www.cclfirm.com/files/CCL\\_Comments\\_030113\(pdf\)](http://www.cclfirm.com/files/CCL_Comments_030113(pdf)).

4. Carmen Comsti, *Putting the Brakes on New Discovery Restrictions: Advisory Committee Considers Changes to Civil Rules*, NELA EXCH. (January 31, 2013, 8:10 PM), <http://exchange.nela.org/NELA/BlogViewer?BlogKey=44b9ed66-1dbb-4b5a-b7e8-bf321bbeb7e6>.

5. Stuard A. Ollanik & F. Paul Bland, Jr., *Comments of Public Justice, P.C. and The Public Justice Foundation on the Draft Proposals to Amend Discovery Rules*, PUB. JUSTICE (March 1, 2013), <http://publicjustice.net/sites/default/files/downloads/Public-Justice-Comments-to-Advisory-Committee-on-Civil-Rules.pdf>.

6. Vail, *supra* note 3.

7. Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, DRI - The Voice of the Defense Bar, & International Association of Defense Counsel, *Comment to the Civil Rules Advisory Committee, A Meaningful Step Towards Addressing Preservation, Discovery and Costs*, LAWYERS FOR CIVIL JUSTICE (April 1, 2013), <http://www.lfcj.com/articles.cfm?articleid=169>.

effective litigation strategy. Before doing so, however, the authors will provide an overview of the historical development of the Rules and discuss the underlying factors which influence discovery in civil litigation.

#### A HISTORICAL PERSPECTIVE

Debate over the Federal Rules of Civil Procedure and, more specifically, the discovery process is not a recent development. In 1969 and 1970, the Advisory Committee proposed amendments that were the product of “the first comprehensive review of the discovery rules undertaken since 1938,”<sup>8</sup> even though, the “Field Survey of Federal Pretrial Discovery,” conducted in 1965 by Columbia Law School’s Project for Effective Justice, identified no “widespread or profound failings” in the scope or availability of discovery, and concluded that the costs of discovery did not “appear to be oppressive.” Notwithstanding widespread acceptance of discovery as an essential part of litigation, the Advisory Committee acknowledged that “disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist.”<sup>9</sup> The 1969 and 1970 proposed amendments addressed, *inter alia*, the scope of discovery under Rule 26(b)(1), depositions under Rule 30, interrogatories under Rule 33, and requests for production under Rule 34.

Less than ten years after the Advisory Committee’s proposed amendments, the Litigation Section of the American Bar Association proposed further changes to the discovery rules in order to reduce the costs of discovery. The Litigation Section’s proposals included restrictions on the scope of discovery, provisions for a discovery conference at the request of any party, and limitations on the number of interrogatories that might be served on a party without leave of court.<sup>10</sup> Two years later, the ABA’s Litigation Section expressed the view that the 1980 amendments to the Rules were an “insufficient response to a serious problem.”<sup>11</sup> The Second Report of the Special Committee for the Study of Discovery Abuse warned that “abuse of discovery is a major problem and that the recently effective amendments alone are inadequate to reverse the trend toward increasingly expensive, time-consuming, and vexatious use of the discovery rules.”<sup>12</sup> Among the problems cited in the Second Report were “unnecessary use of discovery, the improper withholding of discoverable information, and misuse of discovery procedures.”<sup>13</sup> However, the Litigation Section’s 1982 Second Report included a notable concession:

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8. 48 F.R.D. 487.

9. *Id.* at 489-90.

10. 77 F.R.D. 613, 626.

11. 92 F.R.D. 137.

12. *Id.* at 138.

13. *Id.*

We have taken care to encourage responsible use of the rules and to avoid introduction of provisions that would adversely affect those cases where discovery is working well. . . . We are convinced of the urgent need for further reform of the discovery process. We also recognize that rules alone cannot solve the problem. There is a demonstrable need for lawyers to understand and adhere to, and for judges to enforce, both the letter and spirit of the discovery rules.<sup>14</sup>

Thus, nearly thirty years ago, the ABA acknowledged that efficient and cost-effective discovery was influenced, and potentially impeded, by considerations outside the Rules themselves.<sup>15</sup>

This same point was previously made in 1978 in a frequently quoted passage by then-Professor Wayne Brazil.<sup>16</sup>

The adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution.<sup>17</sup>

Professor Brazil observed that previous efforts at reforming discovery were premised on the unfounded “assumption” that discovery would proceed in an “essentially nonadversarial environment.”<sup>18</sup> Regrettably, Professor Brazil concluded that

[t]he academic and judicial proponents of the modern rules of discovery apparently failed to appreciate how tenaciously litigators would hold to their adversarial ways and the magnitude of the antagonism between the principal purpose of discovery (the ascertainment of truth through disclosure) and the protective and competitive instincts that dominate adversary litigation.<sup>19</sup>

Professor Brazil likely did not foresee the impact of e-discovery when he wrote in 1978 that civil discovery provides “attorneys with new weapons, devices, and incentives for the adversary gamesmanship that discovery was designed to curtail.”<sup>20</sup> In 1983, the Advisory Committee

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14. *Id.* at 139.

15. See also William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 705 (1989) (suggesting that “lawyers trained in and committed to a system governed by the adversary process are not conditioned to function effectively in the pretrial environment envisioned by the Federal Rules”).

16. Professor Brazil was appointed a United States Magistrate Judge for the Northern District of California in 1984.

17. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1987).

18. *Id.* at 1303.

19. *Id.*

20. *Id.* at 1304 and 1310 (Writing in 1978, Professor Brazil noted that his litigation experience involved “cases of moderate size “ and “claims ranging from \$20,000 to \$500,000.” Today, in an e-discovery intensive case, those dollar amounts would not cover the cost of

observed that the discovery process should not be used to “wage a war of attrition or as a device to coerce a party.”<sup>21</sup>

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. As a result . . . the rules have not infrequently been exploited to the disadvantage of justice. These practices impose costs on an already overburdened system and impede the fundamental goal of the just, speedy and inexpensive determination of every action.<sup>22</sup>

These same sentiments have been expressed by members of the judiciary.<sup>21</sup> The effectiveness of discovery procedures in promoting the efficient and cost-effective resolution of litigation depends, to a very great extent, on counsels’ commitment to those same over-arching goals.

The discovery rules in particular were intended to promote the search for truth that is the heart of our judicial system. However, the success with which the rules are applied toward this search for truth greatly depends on the professionalism and integrity of the attorneys involved. Therefore, it is appalling that attorneys . . . routinely twist the discovery rules into some of “the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.” . . . An attorney’s duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. . . . [T]oo many attorneys . . . have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client.<sup>23</sup>

In 1989, Judge Schwarzer described a growing frustration over an apparent disconnect between the adversarial litigation process and the goal of expeditious resolution of civil lawsuits which he attributed in part to “the increasing competitiveness and aggressiveness of the bar and the loosening of professional restraints.”<sup>24</sup> Judge Schwarzer opined that “lawyers trained

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document collection, processing and review).

21. FED. R. CIV. P. 26(b) advisory committee’s note (1983).

22. See, e.g., *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 407 (D.C. Cir. 1984) (noting that “discovery has become a major battleground in litigation,” and recognizing that “[m]assive discovery requests are unfortunately now part of the standard tactical maneuvering of parties immersed in the adversarial process”); *Bonilla v. Trebol Motors Corp.*, 1997 WL 178844, at \*3 (D. P.R. 1997 March 27, 1997) (suggesting that “attorneys must reconcile their adversarial instincts with the spirit of the Federal Rules”); *Bright v. Norshipco and Norfolk Shipbuilding & Drydock Corp.*, 951 F. Supp. 95, 98 (E.D. Va. 1997) (*rev’d in part, vacated in part sub nom.* *Bonilla v. Volvo Car Corp.*, 150 F.3d 88 (1st Cir. 1998) (suggesting that, rather than providing an affordable, expeditious method for resolving disputes, the adversarial process has become “an end in itself rather than simply the means by which parties resolve disputes”).

23. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546-47 (11<sup>th</sup> Cir. 1993).

24. Schwarzer, *supra* note 15 at 704-05.

in and committed to a system governed by the adversary process are not conditioned to function effectively in the pretrial environment envisioned by the Federal Rules.”<sup>25</sup> Presaging many of the positions advanced in the current debate, Judge Schwarzer suggested that the discovery process as practiced often has less to do with advancing the litigation, and instead is employed to exhaust or frustrate the opposing counsel and party. Judge Schwarzer also observed that, “[i]n the context of discovery and pretrial, adversarial techniques are generally counterproductive,”<sup>26</sup> and concluded that “[i]f the promise of the rules is to be realized, it will be necessary to consider how to free the system from the constraints of the adversary process where they are not relevant and to provide workable and acceptable standards of conduct.”<sup>27</sup> To that end, Judge Schwarzer suggested that the then-current discovery rules be amended to require, at the commencement of the litigation, prompt disclosure of all material documents and information by all parties, and thereafter permit supplemental discovery using traditional discovery methods only upon a showing of good cause.<sup>28</sup>

Despite the foregoing criticisms, however, the civil litigation process has worked effectively in the majority of cases. The ABA’s Special Committee for the Study of Discovery Abuse noted in 1980,

[m]uch of this success is due to responsible attitudes and conduct by attorneys and the willingness of the trial judge to devote the time and attention necessary for proper functioning of the discovery process when problems arise. In proposing the present amendments, we have taken care to encourage responsible use of the rules and to avoid introduction of provisions that would adversely affect those cases where discovery is working well.<sup>29</sup>

Without question, the development and growing necessity of e-discovery also has colored the civil litigation debate. In 2001, one commentator, Professor Richard Marcus, suggested that perhaps the challenges posed by e-discovery were analogous to those presented by traditional hard copy discovery.<sup>30</sup> On a positive note, Professor Marcus

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25. *Id.* at 705.

26. *Id.* at 714.

27. *Id.* at 719.

28. *Id.* at 721.

29. 92 F.R.D. at 139. *See also* Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material* 64 LAW & CONTEMP. PROBS. 253, 256 (2001) (“It is debatable whether there was a pressing need for reform [of discovery practices] over the past quarter century.”). In an equally positive vein, a 2010 survey of United States Magistrate Judges suggested that the 2006 amendments to the Federal Rules of Civil Procedure were largely effective in achieving the goals set forth in Rule 1 when those rules were used to full advantage. *See* Emery G. Lee, III & K. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J. 201 (Fall 2010).

30. Marcus, *supra* note 28 at 254-55 and 279 (“The enduring hoopla of the past quarter century about the burdens, intrusiveness, and general undesirability of conventional discovery at

theorized that computers could reduce the burden of searching voluminous materials and thereby serve as a check on the delays and costs associated with discovery under Rule 34.<sup>31</sup> However, he also recognized that e-discovery could present unique spoliation and preservation challenges, and might well increase the need for experts and forensic computer specialists.<sup>32</sup> Professor Marcus closed his 2001 article by suggesting that “sensible behavior by lawyers and judges may well be much more useful” than Rules amendments in addressing the challenges posed by computers and electronically stored information.<sup>33</sup>

Ten years after Professor Marcus’ article, the Advisory Committee on Civil Rules found itself again attempting to identify litigation problems and “the most promising opportunities” to improve the civil litigation process.<sup>34</sup> The Advisory Committee’s Report conceded that, notwithstanding recent Rule changes, “complaints about costs, delays, and burdens in civil litigation have persisted,” in part as a result of the advent and wide use of electronic discovery.<sup>35</sup> The Committee acknowledged that in many cases filed in the federal courts, discovery was viewed by the participating attorneys “as reasonably proportional to the needs of the case” and that the “cases raising concerns are a relatively small percentage of those filed in the federal courts.”<sup>36</sup> “Another area of consensus was that making changes to the Federal Rules of Civil Procedure is not sufficient to make meaningful improvements . . . [and] that there is a limit to what rule changes alone can accomplish.”<sup>37</sup>

But the Duke Conference in 2010, and the empirical studies commissioned in conjunction with that Conference, demonstrate that within the civil litigation community, there remain broadly divergent views on

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least raises questions about whether the ‘new’ discovery is significantly different.”).

31. *Id.* at 261-62 (Professor Marcus envisioned that word searches “can make it much easier to locate pertinent documents in electronically stored materials compared to a search of similar hard copy records by hand.”); *but see, e.g., Nat’l Day Laborer Org. Network v. U.S. Immigration*, 877 F. Supp. 2d 87, 108-09 (S.D.N.Y. 2012) (“Simple keyword searching is often not enough: ‘Even in the simplest case requiring a search of on-line e-mail, there is no guarantee that using keywords will always prove sufficient.’ There is increasingly strong evidence that ‘keyword search[ing] is not nearly as effective at identifying relevant information as many lawyers would like to believe.’”).

32. *Cf. Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 n.10 (D. Md. 2008) (suggesting that resolution of e-discovery issues frequently “involves scientific, technical or specialized information” and warning that “it is risky for a trial court to attempt to resolve issues involving technical areas without the aid of expert assistance”).

33. Marcus, *supra* note 28 at 281.

34. Judicial Conference Advisory Committee on Civil Rules & Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation*, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf> (hereinafter *Report to the Chief Justice*).

35. *Id.* at 1.

36. *Id.* at 3.

37. *Id.* at 4.

how the civil justice system plays out in reality. There is a continuing chorus of complaints about the costs and burdens of civil litigation. Critics suggest, with some justification, that the civil justice system, if not broken, is in serious need of repair and that maintaining the status quo will only serve to restrict public access to the courts and the adjudicative process.<sup>38</sup> Further, some have argued that fundamental problems with the civil justice system require a new approach and significant revisions to the Federal Rules of Civil Procedure.<sup>39</sup> According to this view, “[m]ajor and systemic reform is required to attain the goals stated in Rule 1” and cannot be achieved simply by “tinkering at the edges of the Rules of Civil Procedure.”<sup>40</sup> Not surprisingly, the opposing view holds that “the existing Rules provide all the necessary tools to achieve the changes in practice that have eluded us for decades,” and that “[w]ithout behavioral change in the key participants in the civil justice system . . . even sweeping modifications to the Rules will not foster achievement of the desired goal.”<sup>41</sup>

Discovery abuse frequently is cited as a principle cause for escalating litigation costs and the concomitant delay in resolving lawsuits. Lawyers, clients, and jurists know that all too frequently one discovery dispute leads to another as each side in the litigation employs tactics they perceive as promoting short-term advantage. The burdens and expense of discovery have increased as a reflection of the ubiquitous role of electronically stored information (ESI) in today’s society.<sup>42</sup> Although ESI may not play a pivotal role in every civil lawsuit, its potential impact on the pretrial process

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38. See Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 2 (2009), <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053>.

39. Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, *White Paper: Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century*, FDCC (May 2, 2010), [http://www.thefederation.org/documents/V60N3\\_WhitePaper.pdf](http://www.thefederation.org/documents/V60N3_WhitePaper.pdf).

40. *Id.* at ix.

41. Paul W. Grimm, *The State Of Discovery Practice In Civil Cases: Must The Rules Be Changed To Reduce Costs And Burden, Or Can Significant Improvements Be Achieved Within The Existing Rules?*, 12 SEDONA CONF. J. 47, 49 (2011). See also Millberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lies Not In Our Rules . . .*, 4 FED. CTS. L. REV. 1, 5 (2011) (arguing against drastic changes in the civil justice system and suggesting “there are less drastic alternatives to address the purported concerns of those who histrionically claim discovery is going to break the back of our justice system”).

42. See Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By The Numbers* 60 DUKE L.J. 789, 791 (2010) (noting that “[t]he liberal scope of discovery in federal courts, when coupled with ESI’s defining characteristics – its high volume, broad dispersal, and dynamic nature – also confounds efforts to conduct discovery effectively and economically”). See also *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985) (“[F]rom the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development. . . . [B]ecause we live in a society which emphasizes both computer technology and litigation, the mix of computers and lawsuits is ever increasing.”).

cannot be understated. E-discovery may well distort the civil justice system if meritorious cases are abandoned or unwarranted settlements are extracted because of extra legal considerations. Plaintiffs and defendants accuse each other of exploiting the “e-discovery card” while simultaneously accusing judicial officers of failing to play an active role in managing the discovery process.

The court is not a disinterested observer to these discovery practices. As the Sedona Conference’s Cooperation Proclamation notes, “courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.”<sup>43</sup>

#### FACTORS INFLUENCING CIVIL DISCOVERY

The debate over the effectiveness of the Federal Rules of Civil Procedure plays out against the backdrop of external influences that directly impact the discovery process. Civil litigation historically has been shaped by several distinct, and potentially conflicting, mandates. Building on the doctrine of notice pleading, the discovery process has long reflected the notion that disclosure of all relevant information ensures that the parties’ dispute will be resolved (either through motion, settlement, or trial) based upon on a full and accurate understanding of all relevant facts.<sup>44</sup> This expansive view of discovery presumes that the “open and forthright sharing of information by all parties” will actually promote the goals of Rule 1 by expediting the litigation and providing the parties with the information necessary to make informed decisions about the merits of the litigation and the potential for settlement.<sup>45</sup> In the wake of *Bell Atlantic Corp. v. Twombly*<sup>46</sup> and *Ashcroft v. Iqbal*,<sup>47</sup> the concept of notice pleading may be a thing of the past as plaintiffs now must “frame ‘a complaint with enough factual matter (taken as true) to suggest’ that he or she is entitled to relief.”<sup>48</sup> Certainly, the Supreme Court has clearly enunciated its view that “[t]hreadbare recitals of the elements of a cause of action, supported by

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43. The Sedona Conference®, *Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp).

44. See, e.g., *Bear Stearns Funding, Inc. v. Interface Grp.-Nev., Inc.*, 2007 WL 4051179 (S.D.N.Y. 2007). See also *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (suggesting that mutual knowledge of all relevant facts gathered by both parties was “essential to proper litigation”).

45. See, e.g., *Bd. of Regents of Univ. of Neb. v. BASF Corp.*, 2007 WL 3342423, at \*5 (D. Neb. Nov. 5, 2007).

46. 550 U.S. 544 (2007).

47. 556 U.S. 662 (2009).

48. *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 555 U.S. at 556).

mere conclusory statements” will “not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”<sup>49</sup>

While data suggests that post-*Twombly* and *Iqbal* plaintiffs are twice as likely to face motions to dismiss that are being granted with increased frequency, the interpretation of that data is open to question.<sup>50</sup> One author has argued that the Supreme Court’s decisions “ignore the problem of information asymmetry,” and may, in many instances, require a litigant to plead what he or she does not know and cannot access.<sup>51</sup> The full effect of the Supreme Court’s pleading standards on the discovery process remains to be seen.<sup>52</sup>

In their original design, the Federal Rules of Civil Procedure were predicated on the assumption that discovery would be lawyer-directed with minimal judicial involvement.<sup>53</sup> Indeed, Rule 29 was revised in 1993 to give litigants even “greater opportunity” to modify by stipulation the procedures governing or limiting discovery.<sup>54</sup> Writing as recently as 2000, the Advisory Committee reiterated its hope that “reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.” However, the Advisory Committee has acknowledged that “[i]f primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obligated to act responsibly and avoid abuse.”<sup>55</sup>

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49. *Ashcroft*, 556 U.S. at 678-79. The Supreme Court also seems to have a rather cynical view of the trial bench’s ability to manage the pretrial process, given the Court’s apparent belief “that the success of judicial supervision in checking discovery abuse has been on the modest side.” *Id.* at 685 (quoting *Twombly*, 550 U.S. at 559).

50. See Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motion to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUDICIAL CTR. (Nov. 2011), available at <http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/%24file/motioniqbal.pdf> (finding, with the exception of one case category, no “statistically significant” increase in the likelihood a motion to dismiss would be granted after *Iqbal*). But see Lonny Hoffman *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. (2011) (suggesting that the Federal Judicial Center’s study may provide an incomplete picture of actual Rule 12(b)(6) motion practice post-*Iqbal*).

51. Arthur R. Miller, *Simplified Pleadings, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 340 (2013) (suggesting that “the prevalence of the motion to dismiss and concomitant deferral of discovery seemingly mandated by *Iqbal* inevitably delay those cases that survive the motion to dismiss from progressing toward a resolution on the merits, potentially cloaking wrongdoing with a de facto litigation immunity”).

52. See *Report to the Chief Justice*, *supra* note 33 at 5-7.

53. See, e.g., *Sempier v. Johnson & Higgins*, 45 F.3d 724, 734 (3d Cir. 1995) (“Since 1938, civil discovery has been an attorney-initiated, attorney-focused procedure. The vast majority of federal discovery tools operate, when used properly, almost entirely without the court’s involvement.”); *Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 20 (D. Colo. 1977), *aff’d sub nom.*, *Ohio v. Arthur Anderson & Co.*, 570 F.2d 1370 (10th Cir. 1978).

54. *Cf. Lee v. Cent. Gulf Towing, LLC*, 2004 WL 2988478, at \*2 (E.D. La. 2004) (noting that the “self-evident purpose” of Rule 29 “is to encourage agreed-upon, lawyer-managed discovery and to eliminate the cost, effort and expense involved in court intervention in discovery through motion practice”).

55. FED. R. CIV. P. 26(g) advisory committee’s note (1983). But see *Harlem River*

Lawyers who pursue discovery predicated on a “business as usual” approach, particularly in a case in which electronically stored information figures prominently, can hardly complain at the resulting expense, delays, and inefficiencies.

But lawyer-directed discovery does not operate in a vacuum. Litigation remains an adversarial process in which counsel traditionally has been expected to “zealously assert[] the client’s position.”<sup>56</sup> While the American Bar Association’s Model Rules of Professional Conduct presume that a lawyer’s obligations to the client are “usually harmonious” with counsel’s role as an officer of the court, they also suggest that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”<sup>57</sup> Indeed, commentators posit that “[t]he ethic of zeal is . . . pervasive in lawyers’ professional responsibilities because it informs all of the lawyer’s other ethical obligations with ‘entire devotion to the interest of the client.’” As the number of cases going to trial continues to decline, discovery becomes the context within which this “zealous advocacy” plays out.

Economic incentives that influence lawyers on both sides of the litigation divide also affect civil discovery. It would be naive to dispute that members of the plaintiff’s bar have, on occasion, used discovery (and particularly e-discovery) as a vehicle to gain advantage in future settlement discussions. Similarly, the defense bar (with its billable-hour business model) is not immune to the financial benefits that may be derived from the discovery process. In a survey conducted by the Federal Judicial Center in October 2009, responding attorneys tended to agree that “economic models in many law firms result in more discovery and thus more expense that is necessary.”<sup>58</sup> The authors of the resulting Report suggested that “this question gets at another sense of the term ‘discovery abuse,’ namely, lawyers may pursue or resist discovery ‘because it increases the number of billable hours.’”<sup>59</sup> If this assessment is correct, the explosion of e-discovery may only exacerbate this economic driver. A recent case-study conducted

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Consumers Co-Op, Inc. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551, 553 (S.D.N.Y. 1972) (“The federal rules envision that discovery will be conducted by skilled gentlemen of the bar, without wrangling and without the intervention of the court. The vision is an unreal dream. Regrettably, hostility and bitterness are more the rule than the exception in unsupervised discovery proceedings.”).

56. ABA MODEL RULES OF PROF’L CONDUCT PREAMBLE (2000).

57. *Id.*

58. Emery G. Lee III & Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure* (March 2010), at 8, available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv.2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv.2.pdf/$file/costciv2.pdf).

59. *Id.* See also Miller, *supra* note 50 at 354 (expressing the author’s perception during the period he served as an Advisory Committee Reporter that “[d]iscovery’s costs seemed to be rising (which at least in part appeared to be a product of it having become a ‘profit-center’ for many law firms working on an hourly basis)”).

by the Rand Institute for Civil Justice examined the costs associated with different phases of e-discovery production and concluded that the review of documents for relevance, responsiveness and privilege (tasks largely within the domain of outside counsel) typically comprised 73 percent of the total costs of ESI production.<sup>60</sup> The authors of the Rand Institute study suggested that widespread use of computer-assisted review technology as a means for reducing the cost of document review may be constrained, in part “by outside counsel who would stand to lose a historical revenue stream.”<sup>61</sup> That said, the economic pressures on outside counsel are likely to increase as computer-assisted review technology is addressed in more judicial opinions and scheduling orders, as more outside vendors compete for work traditionally performed by attorneys, and as organizations take this pretrial work inside their own law departments.<sup>62</sup>

On balance, some changes to the Federal Rules of Civil Procedure are inevitable. The debate surrounding those changes, however, should not be driven by hyperbole or measured from a zero-sum perspective. In the final analysis, the effectiveness of the current Rules and the impact of any future changes will be determined by the ability of parties, their counsel, and the courts to apply those Rules in a common-sense manner consistent with the goals reflected in Rule 1. A lawyer that can litigate in a thoughtful, strategic way will not be constrained by the proposed revisions recently introduced by the Advisory Committee.

#### THE ADVISORY COMMITTEE’S PROPOSALS

##### *I. The Scope and Proportionality of Discovery under Rule 26(b)(1)*

In its present form, Rule 26(b)(1) includes within the scope of discovery (1) any non-privileged matter that is relevant to any party’s claim or defense, and (2) with the court’s approval, upon a showing of good cause, any matter relevant to the subject matter involved in the action. Rule 26(b)(1) further acknowledges that “relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

The Advisory Committee’s proposed changes eliminate the court’s ability to extend discovery to the subject matter of the action, “confining all

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60. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND (2012), at Summary xiv, [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

61. *Id.* at Summary, xix.

62. See David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 MINN. J. L. SCI. & TECH. 151 (2011) (examining the variables of ESI discovery and how those variables may impact e-discovery cost calculations).

discovery to what is relevant to the claims or defenses of the parties.”<sup>63</sup>

In addition, the sentence allowing discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence is shortened, so as to provide only that information need not be admissible in evidence to be discoverable. This change reflects experience . . . that in operation many lawyers and judges read the “reasonably calculated” phrase to obliterate all limits on the scope of discovery[.]<sup>64</sup>

The Advisory Committee’s proposal also explicitly incorporates “the cost-benefit calculus now required by Rule 26(b)(2)(C)(iii).<sup>65</sup> Under the proposed version of Rule 26(b)(1), a party would be permitted to obtain discovery that is relevant and proportional to the needs of the case, considering “the amount in controversy, the importance of the issues at stake in the action, 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.”

Initial criticisms of the proposed revisions to Rule 26(b)(1) assert that the changes will curtail a litigant’s “entitlement to information” and ultimately restrict access to the courts. Some critics suggest that “without robust and wide-ranging discovery, plaintiffs are simply not able to gather enough evidence to prevail in their cases before the triers of facts.”<sup>66</sup> This view seems to presume that the current version of Rule 26(b)(1) gives litigants a “right” to seek broad, unfettered discovery. In contrast, comments from representatives of the defense bar suggest that the Advisory Committee’s proposals do not go far enough. Proponents of this view contend that “expansive perceptions of relevance are unlikely to be altered by this rule change alone and will persist in fostering disproportional discovery unless a materiality standard is added to proposed Rule 26(b)(1).”<sup>67</sup>

Discovery in the civil litigation context, and certainly under the current version of Rule 26(b)(1), is not an unfettered right.<sup>68</sup> Civil discovery, “like all matters of procedure, has ultimate and necessary boundaries.”<sup>69</sup> It is generally accepted, for example, that litigants should

63. Agenda Book, *supra* note 2 at Tab 1A, 35.

64. *Id.* at Tab 1A, 35-36.

65. *Id.*

66. See Caffarelli & Siegel, Ltd., <http://www.cslaw.com>.

67. Lawyers for Civil Justice, *supra* note 7 at 10 (suggesting that Rule 26(b)(1) should explicitly state that discovery is limited to nonprivileged matter “that is relevant [**and material**] to any party’s claim or defense . . .”) (emphasis in original).

68. See, e.g., *Hilt v. SFC Inc.*, 170 F.R.D. 182, 187 (D. Kan. 1997) (holding that “[t]he discovery rules provide no absolute, unharnessed right to find out every conceivable, relevant fact that opposing litigants know”). Cf. *E.E.O.C. v. Woodmen of World Life Ins. Soc.*, 2007 WL 649298, at \*3 (D. Neb. Feb. 1, 2007) (holding that “an ‘emotional distress claim does not . . . give Defendants an unfettered right to pursue discovery into [the plaintiff’s] entire medical history”).

69. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

not be permitted to engage in a “fishing expedition.”<sup>70</sup> As the Supreme Court noted in *Hickman v. Taylor*,<sup>71</sup> the “broad and liberal” treatment accorded the “deposition-discovery rules” is designed to facilitate “mutual knowledge of all the relevant facts gathered by both parties” and permit inquiry “into the facts underlying [the] opponent’s case.” The Supreme Court has acknowledged, however, the need to firmly apply “the requirement of Rule 26(b)(1) that the material sought in discovery be ‘relevant’” and cautioned that courts “should not neglect their power to restrict discovery” under the balancing test set forth in Rule 26(c).<sup>72</sup> A “broad and liberal” application of the discovery rules must be reconciled with the goals articulated in Rule 1.<sup>73</sup> Nothing in the proposed revision to Rule 26(b)(1) departs from these fundamental tenets.

The current version of Rule 26(b)(1) distinguishes between “party-controlled” discovery and “court-permitted” discovery. The 2000 Amendments to Rule 26(b)(1) “implemented a two-tiered discovery process.”<sup>74</sup>

[T]he first tier being attorney-managed discovery of information relevant to any claim or defense of a party, and the second being court-managed discovery that can include information relevant to the subject matter of the action. Accordingly, when a party objects that discovery goes beyond that relevant to the claims or defenses, “the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action.” . . . When the district court does intervene in discovery, it has discretion in determining what the scope of discovery should be. “[T]he actual scope of discovery should be determined according to the reasonable needs of the action.”<sup>75</sup>

The “attorney-managed” discovery currently available under Rule 26(b)(1) would not change under the proposed revision. Parties may continue to discover matters relevant to the claims and defenses in the litigation.

The revised Rule 26(b)(1) would, however, eliminate the court’s

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70. See, e.g., *Woodward v. Emulex Corp.*, 714 F.3d 632, 636 (1<sup>st</sup> Cir. 2013) (holding that the trial court did not abuse its discretion by limiting discovery to specifically named employees and thereby preventing “a fishing expedition into possibly barren waters”); *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1163 (10<sup>th</sup> Cir. 2010) (noting that “Rule 26(b), although broad, has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition”); *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (“[A]lthough the standard of relevance in the context of discovery may be broader than in the context of admissibility, ‘this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery.’”).

71. 329 U.S. 495, 507 (1947).

72. *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

73. *Id.*

74. *In re Cooper Tier & Rubber Co.*, 568 F.3d 1180, 1188 (10<sup>th</sup> Cir. 2009).

75. *Id.* at 1188-89 (internal citations omitted).

ability, on a showing of good cause, to extend discovery to any information or material “relevant to the subject matter involved in the action.” As a practical matter, eliminating “court-managed” discovery under Rule 26(b)(1) may have little effect on a party’s ability to pursue reasonable discovery. The current version of Rule 26(b)(1), and the accompanying Advisory Committee Notes, make clear that discoverable information, whether obtained at the initiative of a party or with the permission of the court, must be relevant. Even the “reasonably calculated” component of Rule 26(b)(1) is qualified by the relevance requirement.

It is well-established that relevance, in the context of discovery, should be broadly construed.<sup>76</sup> In the past, courts have held that “relevancy” under Rule 26(b)(1) “encompass[es] ‘any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’”<sup>77</sup> A “request for discovery should be allowed ‘unless it is clear that the information sought can have no possible bearing’ on the claim or defense of a party.”<sup>78</sup> While a litigant’s right to pursue discovery is not confined to the precise facts alleged in the pleadings, the information sought should be “germane to a specific claim or defense asserted in the pleadings.”<sup>79</sup> A party seeking discovery cannot satisfy the relevance standard simply by relying on speculation or suspicion.<sup>80</sup> The relevance standard under Rule 26(b)(1) does not “allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.”<sup>81</sup>

However, the Advisory Committee’s Note to the 2006 Amendment to

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76. See, e.g., *Food Lion, Inc. v. United Food & Commercial Workers Int’l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012 (D.C. Cir. 1997). See also *Barton v. RCI, LLC*, 2013 WL 1338235, at \*3 (D.N.J. April 1, 2013) (“The precise boundaries of the Rule 26 relevance standard depend upon the context of particular action, and the determination of relevance is within the discretion of the District Court.”).

77. *Heller v. HRB Tax Group, Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (“[R]elevant evidence includes ‘any matter that could bear on, or that could reasonably lead to other matter that could bear on’ the claims or defenses of any party.”) (quoting *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 3240, 351 (1978); *Joyce v. North Metro Task Force*, 2011 WL 1884618, at \*3 (D. Colo. May 18, 2011) (holding that discovery is relevant “if it has ‘the mere tendency’ of making any material fact more or less probable”) (quoting *Fed. Deposit Ins. Corp. v. Wise*, 139 F.R.D. 168, 170 (D. Colo. 1991)).

78. *U.S. Auto. Ass’n v. Mitek Sys., Inc.*, 2013 WL 652419, at \*2 (W.D. Tex. Feb. 15, 2013) (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 689-90 (D. Kan. 2001). See also *A.H. v. Knowledge Learning Corp.*, 2010 WL 4117508, at \*4 (D. Kan. Oct. 19, 2010) (“[A] request for discovery should be considered relevant if there is ‘any possibility’ that the information sought may be relevant to the claim or defense of any party.”).

79. *Estate of David Rubinstein v. United States*, 96 Fed. Cl. 640, 646 (Fed. Cl. 2011).

80. See, e.g., *Christensen v. Quinn*, 2013 WL 1702040, at \*5 (D.S.D. Apr. 18, 2013); *Invensas Corp. v. Renesas Elecs. Corp.*, 287 F.R.D. 273, 278 (D. Del. 2012).

81. *In re Fontaine*, 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975) (quoting *Broadway & Ninety-Sixth St. Realty Co. v. Loew’s Inc.*, 21 F.R.D. 347, 352 (S.D.N.Y. 1958).

Rule 26(b)(1) readily concedes that

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. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims and defenses raised in a given action.<sup>82</sup> . . . In each instance, the determination whether such information is discoverable because it is relevant to the claims and defenses depends upon the circumstances of the pending action.<sup>83</sup>

The 2000 Amendments were intended to signal “to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”<sup>84</sup> Nothing in the Advisory Committee’s recent recommendations suggest that a revised version of Rule 26(b)(1) would apply a narrower or different standard for measuring relevance.<sup>85</sup>

Moreover, limiting a party’s discovery efforts under Rule 26(b)(1) to information relevant to the claims and defenses is consistent with the general tenor of Rule 26. For example, Rule 26(a)(1) requires a party to identify those individuals, documents, and electronically stored information that they “may use to support their claims and defenses.”<sup>86</sup> Rule 26(f)(2) requires the parties to confer as soon as practicable to “consider the nature and basis of their claims and defenses,” and develop a discovery plan predicated on those claims and defenses.<sup>87</sup> Rule 16(c)(2) also suggests that

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82. The Advisory Committee suggested that such information could include “other incidents of the same type or involving the same product” or “information that could be used to impeach a likely witness.” *Cf.* *West v. Bell Helicopter Textron, Inc.*, 2011 WL 6371791, at \*2 (D.N.H. Dec. 20, 2011) (noting that “[c]ourts routinely permit discovery of similar, if not identical models in products liability litigation, provided they share with the accident-causing model at least some characteristics pertinent to the legal issues in the litigation,” as well as “[i]nformation regarding whether other purchasers or users experienced similar problems with the product”).

83. FED. R. CIV. P. 26(b)(1) advisory committee’s note (2000).

84. *See id.*

85. *Cf.* *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1192 (10<sup>th</sup> Cir. 2009) (noting that the 2000 Amendments to Rule 26(b)(1) “changed only the answer to the question of ‘relevant to what’ . . . [and] did not change the definition of the word ‘relevance’ itself for purposes of discovery”).

86. The Advisory Committee Notes to the 2000 Amendment explain that “[t]he disclosure obligation applies to ‘claims and defenses,’ and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4) which authorizes denials ‘warranted on the evidence,’ and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.”

87. For example, the discovery plan should address “the subjects on which discovery may be needed” and “what changes should be made in the limitations on discovery imposed under these rules . . . and what other limitations should be imposed.” *See* FED. R. CIV. P. 26(f)(3)(B) and (E). The court in *SEC v. Collin & Aikman Corp.*, 256 F.R.D. 403, 414-15 (S.D.N.Y. 2009), after being confronted with a series of discovery disputes, observed that “with few exceptions, Rule 26(f) requires the parties to hold a conference and prepare a discovery plan . . . Had this been accomplished, the Court might not now be required to intervene in this particular dispute.”

a scheduling conference involving the parties and the court may consider and take appropriate action to “formulat[e] and simplify[ ] the issues, and eliminat[e] frivolous claims or defenses,”<sup>88</sup> as well as “control[] and schedul[e] discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37.”<sup>89</sup>

The Advisory Committee’s proposal to incorporate within Rule 26(b)(1) the proportionality factors from Rule 26(b)(2)(C)(iii) does not affect any substantive change to the scope of discovery. The current version of Rule 26(b)(1) expressly states that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” Since 1983, trial courts have been required, “on motion or on [their] own,”<sup>90</sup> to limit the frequency or extent of discovery otherwise permitted under the Federal Rules of Civil Procedure if the court determines, after consideration of various factors, that “the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>91</sup> More importantly, parties seeking discovery must certify, pursuant to Rule 26(g)(1)(B)(iii) that their discovery requests are “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”<sup>92</sup> Explicitly incorporating proportionality factors in Rule 26(b)(1) will not materially change obligations already imposed upon litigants, their counsel, and the court.<sup>93</sup>

While the proposed revisions to Rule 26(b)(1) likely will have little substantive impact on the scope of discovery, the procedural and tactical implications may be more significant. How lawyers draft and respond to discovery requests will almost certainly need to change, which would not be an undesirable consequence. All too often, written discovery takes the form of recycled or “pattern” interrogatories and requests for production.<sup>94</sup>

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88. FED. R. CIV. P. 16(c)(2)(A).

89. FED. R. CIV. P. 16(c)(2)(F).

90. FED. R. CIV. P. 26(b)(2)(C).

91. FED. R. CIV. P. 26(b)(2)(C)(iii).

92. It should be noted that Rule 26(g)(1)(B)(ii) also applies the certification requirement to discovery responses and objections, and the responding party or attorney must certify, “to the best of [his or her] knowledge, information, and belief formed after a reasonable inquiry,” that the responses and objections are “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”

93. The obligation to conduct discovery in a proportionate manner does not always translate into compliance with that mandate. Data compiled by the Federal Judicial Center in 2010 suggested that “Rule 26(g) is an underutilized provision in the Rules.” More than half of the federal magistrate judges responding to the FJC survey indicated that parties “‘never’ invoke Rule 26(g) with respect to responses to requests for production, while 67.5% of the respondents “indicated that they never invoke the rule *sua sponte*.” See Lee, *supra* note 28 at 209.

94. *Cf. Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 56 (D.N.J. 1985) (criticizing “plaintiff’s use of multiple sets of pattern interrogatories, presumably derived from other discrimination cases;” warning that “the use of multiple pattern interrogatories in more complex litigation can lead to . . . confusion and duplication, . . . especially when the propounding counsel has made little effort to tailor the interrogatories to the facts and circumstances of this case”);

Expansive discovery requests become even more problematic when combined with definitions and instructions that are themselves ambiguous or overreaching.<sup>95</sup> Rather than drafting requests with precision, counsel fall into the habit of propounding interrogatories and requests for production that are so expansive or so imprecise as to invite objection.<sup>96</sup> Attorneys frequently draft and serve patently overbroad discovery requests as an opening gambit or as a prelude to negotiating more reasonable requests with opposing counsel.<sup>97</sup> In the past, this approach to discovery might have been rationalized or excused, and Rule 26(g) sanctions avoided, under the guise of seeking information or matters “relevant to the subject matter involved in the action.”<sup>98</sup> The revised version of Rule 26(b)(1), if adopted, would eliminate that safety net.

It is likely that in the wake of a revised Rule 26(b)(1), objections to discovery requests on proportionality grounds will become more prevalent. It does not necessarily follow that proportionality objections will be sustained with any greater frequency than other objections, particularly in response to carefully-drafted interrogatories or requests for production.<sup>99</sup>

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Blank v. Ronson Corp., 97 F.R.D. 744, 745 (S.D.N.Y. 1983) (noting that “there is, in this vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers...[i]t is, on the contrary, obvious that they have all been produced by some word-processing machine’s memory of prior litigation”); Crown Ctr. Redevelopment Corp. v. Westinghouse Elec. Corp., 82 F.R.D. 108, 110 (W.D. Mo. 1979) (expressing concern over the emerging practice of using “lengthy and detailed sets of standard forms of interrogatories;” and suggesting that these “standard” interrogatories were simply generating “predictably launched counter attacks in the form of objections and motions for protective orders”).

95. In re Urethane Antitrust Litig., 2008 WL 110896, at \*1 (D. Kan. Jan. 8, 2008) (holding that a discovery request is overly broad and unduly burdensome on its face if it uses an omnibus term such as “relating to,” “pertaining to,” or “concerning” to modify a general category or broad range of documents or information; “such broad language ‘make[s] arduous the task of deciding which of numerous documents may conceivably fall within its scope;” such a request “requires the respondent either to guess or move through mental gymnastics . . . to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request”).

96. See Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008) (noting that Rule 26(g) “aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk requests served without consideration of cost or burden to the responding party. . . . the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement or trial”).

97. Cf. Cummings v. Gen. Motors Corp., 365 F.3d 944, 953 (10th Cir. 2004) (noting that the litigation had been characterized by numerous miscommunications and unnecessary disputes caused by plaintiff’s failure to frame precise discovery requests). Counsel should remember that it is not the court’s responsibility to redefine or redraft discovery requests that are obviously overbroad. Cf. Dombach v. Allstate Ins. Co., 1998 WL 695998, at \*7 (E.D. Pa. Oct. 7, 1998).

98. FED. R. CIV. P. 26(b)(1).

99. More than 60% of the federal magistrate judges responding to a 2010 survey by the Federal Judicial Center reported that the proportionality provisions in Rules 26(b)(2)(C) and 26(c) were being invoked and, when raised, were effective in limiting the cost and burden of discovery. However, 18.2% of respondents answered that Rule 26(b)(2)(C) was “rarely” or “never” effective

Under the current version of Rule 26(b)(1),

Once the requesting party has made a threshold showing of relevance, the burden shifts to the party resisting discovery to show specific facts demonstrating that the discovery is not relevant, or how it is overly broad, burdensome, or oppressive. The articulation of mere conclusory objections that something is “overly broad, burdensome, or oppressive,” is insufficient to carry the resisting party’s burden – that party must make a specific showing of reasons *why* the relevant discovery should not be had.<sup>100</sup>

Like other objections to discovery, the responding party would be required to come forward with sufficient facts (rather than boilerplate or conclusory assertions) to show that the requested discovery violates the proportionality test.<sup>101</sup>

A proportionality analysis is necessarily case-specific and will hinge on several different factors. As commentators have recognized,

[t]he ‘metrics’ set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties’ resources.<sup>102</sup>

While it may be unwise to generalize about any aspect of the litigation process, it seems reasonable to assume that a well-drafted interrogatory or request for production seeking facially relevant information is far more likely to withstand a proportionality challenge.<sup>103</sup> In some cases, a court may have a difficult time making a proportionality assessment “since ‘it may be impossible to review the content of the requested information until

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in limiting the cost and burden of e-discovery, and nearly 20% of respondents had no opinion on the subject. *See Lee supra* note 28, at 202 and 205.

100. *Christensen v. Quinn*, 2013 WL 1702040, at \*6 (D.S.D. April 18, 2013). *See also Barton v. RCI, LLC*, 2013 WL 1338235, at \*3 (D.N.J. April 1, 2013) (“[T]he party resisting discovery has the burden of clarifying and explaining its objections to provide support therefor.”); *Duenez v. City of Manteca*, 2013 WL 684654, at \*3 (E.D. Cal. Feb. 22, 2013) (“The party seeking to compel discovery has the burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)(1). The party opposing discovery then has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections.”).

101. *See, e.g., United States v. DISH Network, LLC*, 2010 WL 5463101, at \*4 (C.D. Ill. Dec. 29, 2010) and cases cited therein.

102. *The Sedona Conference® Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (Fall 2010) (noting that while Rule 26(b)(2)(C)(iii) references a number of monetary considerations, “courts may likewise analyze whether nonmonetary concerns, such as the societal benefit of the case or the nonmonetary burden on the producing party weigh in favor of limiting discovery”).

103. However, in allowing the requested discovery, the court could consider shifting the costs of that production as a meaning of ameliorating the burden on the producing party. *See, e.g., Adair v. EQT Prod. Co.*, 2012 WL 1965880, at \*4 (W.D. Va. May 31, 2012) (suggesting that if the court is “inclined to limit discovery based on the burden or cost of the review, . . . the court could shift the costs of that review, either in whole or in part, to the requesting party”).

it is produced.”<sup>104</sup> In such cases, a court inclined to err on the side of caution may fall back on the Supreme Court’s observations in *Hickman* and *Lando*.<sup>105</sup>

II. *Reducing Presumptive Limits for Depositions and Interrogatories under Rules 30 and 33 and Setting a First-Time Numerical Limit on Requests for Admission under Rule 36*

The Advisory Committee has proposed changes that would reduce the presumptive limit on depositions under Rule 30(a)(2)(A)(i) from ten to five per party, and the presumptive length of an oral deposition under Rule 30(d)(1) from seven to six hours.<sup>106</sup> The presumptive limit on interrogatories in Rule 33(a)(1) would change from twenty-five to fifteen per party.<sup>107</sup> The Advisory Committee also recommends including, for the first time, a numerical limit in Rule 36(a)(2). Under the proposed revision, a party could serve on any other party twenty-five requests to admit, but the numerical limit would exempt requests to admit the authenticity of documents.<sup>108</sup> In proposing these new limits, the Advisory Committee acknowledged that additional discovery might be necessary or appropriate in some cases, but concluded that it would be easier to reduce the presumptive limits and then “manage up” in those cases.<sup>109</sup>

Much like the proposed changes to the scope of discovery under Rule 26(b)(1), commentators have expressed concern that the proposed numerical limits in Rules 30, 33, and 36 will compromise the effectiveness of the discovery process as a means for achieving a full and fair, fact-based resolution of litigation. It has been suggested that the recommended numerical limits do not properly reflect the difficulties facing plaintiffs in cases involving asymmetrical discovery and will likely “burden plaintiffs

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104. Theodore C. Hirt, *The Quest for “Proportionality” in Electronic Discovery—Moving from Theory to Reality in Civil Litigation*, 5 FED. CTS. L. REV. 171, 192 (2011). See also Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889 (March 2009) (suggesting that proportionality rules are impossible to apply effectively and require impossible comparisons between discovery value and cost before parties gather the evidence).

105. See Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J. L. & TECH. 49, 95 (2007) (suggesting that “[t]ime and experience have shown that judges’ discretion is guided by the historical policy of liberal discovery, which has overwhelmed the language and structure of the discovery amendments as well as standard canons of construction”).

106. See Agenda Book, *supra* note 2 at Tab 2A, page 85 of 322.

107. *Id.* at Tab 2A, 86.

108. *Id.* at Tab 2A, 87.

109. *Id.* at Tab 2A, 120. The Advisory Committee proposes to leave unchanged the ability of the parties, by stipulation or by court order, to extend the length of a deposition “if needed to fairly examine the deponent or if the deponent, another person, or any other circumstances impedes or delays the examination.” See FED. R. CIV. P. 30(d)(1).

without yielding commensurate benefits.”<sup>110</sup> Others argue that “artificially low numerical limits will harm the fact-finding function of discovery and create inefficiencies.”<sup>111</sup>

First, it should be noted that *any* numerical limit on depositions, interrogatories, or requests for admission has a degree of artificiality or subjectivity. There is nothing sacrosanct in the number “25.”<sup>112</sup> Numerical limits on requests for production or requests for admission have been established by local rules in various federal district courts.<sup>113</sup> For example, in the District of Colorado, the standard Rule 16 scheduling order advises the parties that they “are expected to engage in pretrial discovery in a responsible manner consistent with the spirit and purposes of Fed. R. Civ. P. 1 and 26 through 37,”<sup>114</sup> and are further expected to “propose discovery limits” that are consistent with the proportionality mandates in Rules 26(b)(2)(c) and 26(g)(1)(B)(iii). The standard scheduling order also instructs that “[i]f the parties propose more than twenty-five (25) requests for production and/or requests for admission, at the scheduling conference, they should be prepared to support that proposal by reference to the factors identified in Fed. R. Civ. P. 26(b)(2)(c).”<sup>115</sup> These presumptive limits have been in effect in the District of Colorado for the past three years and have been generally well-received by Colorado practitioners.

More importantly, the current and proposed versions of Rule 26(b)(2) acknowledge the court’s ability to modify or alter any limits on discovery permitted under the Rules.<sup>116</sup> Given the court’s discretion under Rule 26(b)(2), there is an obvious inconsistency in the arguments raised by the Advisory Committee’s critics. The same commentators who are willing to trust the court’s discretion under the “good cause” standard in Rule 26(b)(1) seem uncomfortable in relying on the court to use its judgment to appropriately modify numerical limits in a particular case.

If the numerical limits proposed by the Advisory Committee are not cast in stone, as Rule 26(b)(2) clearly acknowledges, the real question is

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110. Vail, *supra* note 3 at 1-2.

111. Ollanik, *supra* note 5 at 11.

112. See *Power & Tel. Supply Co., Inc. v. Suntrust Banks, Inc.*, 2004 WL 784533, at \*1 (W.D. Tenn. Mar. 15, 2004) (noting that the purpose of numerical limits is not to prevent discovery, but to prevent potentially excessive use of a particular discovery device).

113. See, e.g., N.D.OKLA. Ct. R. 36.1 (“Without leave of Court or written stipulation of the parties, the number of requests for admissions for each party is limited to twenty-five (25).”); see also W.D.TEX. C.P.R. 36 (“Requests for admissions made pursuant to Federal Rule of Civil Procedure 36 are limited to 30 requests. The court may permit further requests upon a showing of good cause.”).

114. The U.S. Dist. Ct. for the Dist. of Colo., Civil Case Scheduling Order (2013), available at <http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/Forms.aspx>; See COLO. R. CIV. P. 16(f)(2)(A).

115. See D.COLO. P.R. 16.2 and Instructions for Preparation of Scheduling Order, available at <http://www.cod.uscourts.gov/Forms.aspx>.

116. See Agenda Book, *supra* note 2 at Tab 2A, 100.

what factors might the court consider in determining whether a party should be given leave to take additional depositions or serve additional interrogatories or requests for admission. For example, initial disclosures are designed to accelerate the exchange of basic information and “help focus the discovery that is needed, and facilitate preparation for trial or settlement.”<sup>117</sup> Consistent with those objectives, it may be unreasonable to restrict a litigant to five depositions if the opposing party identifies under Rule 26(a)(1)(A)(i) substantially more than five potential witnesses with information that the disclosing party may use to support their claims or defenses. Similarly, more than five depositions may be appropriate in a case involving several expert witnesses. As currently drafted, Rule 30(a)(2)(A)(i) does not distinguish between fact and expert depositions, but rather simply states that a party must obtain leave of court if “the deposition would result in more than ten depositions being taken under this rule or Rule 31.”<sup>118</sup> It could be reasonably argued in an expert-intensive case, that additional depositions are required or that expert witnesses should not count against the numerical limit.<sup>119</sup> Rule 30(a)(2)(A)(i) also does not address how the numerical limit on depositions might apply in a case where witnesses necessary for trial are beyond the subpoena power of the court, thus making preservation depositions essential. Counsel can argue that *de bene esse* depositions should not count against the numerical limit, particularly since those depositions would not be necessary unless and until the need for a trial becomes certain.<sup>120</sup> Plaintiff may suggest that additional discovery is required to respond properly to defendant’s affirmative defenses. Court decisions differ on whether the *Twombly* and *Iqbal* pleadings standard applies to affirmative defenses.<sup>121</sup> While it seems self-

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117. *Sender v. Mann*, 225 F.R.D. 645, 650 (D. Colo. 2004).

118. FED. R. CIV. P. 30(a)(1)(A)(i).

119. The parties could agree that, absent a showing of good cause, no experts would be deposed until after a ruling on motions for summary judgment when the claims going to trial are identified with certainty. See *S.E.C. v. Nacchio*, 2008 WL 4587240 (D. Colo. Oct. 15, 2008) (discussing the requirements for an expert report under Fed. R. Civ. P. 26(a)(2)(B), and noting the Advisory Committee’s suggestion that a comprehensive expert report may result in an abbreviated expert deposition “and in many cases ... may eliminate the need for a deposition”).

120. See *Rayco Mfg., Inc. v. Deutz Corp.*, 2010 WL 183866, at \*3 (N. D. Ohio Jan. 14, 2010) (noting that “[t]rial depositions (also known as ‘preservation depositions’ or ‘*de bene esse* depositions’) are not treated as part of the discovery process to which the Rule 30(a)(2)(A)(i) ten-per-side deposition limit applies”) (collecting cases).

121. See, e.g., *Polo v. Shwiff*, 2013 WL 1797671, at \*5 (N.D. Cal. April 29, 2013) (endorsing the view that “applying the standards enunciated in *Twombly* and *Iqbal* will ‘serve to weed out the boilerplate list of affirmative defenses which is commonplace in most defendants’ pleadings where the claims are irrelevant to the claims asserted”); *Smith v. Mustang, Indep. Sch. Dist. No. 1-69*, 2012 WL 10848, at \*1 (W.D. Okl. Jan. 3, 2012) (concluding that *Twombly* and *Iqbal* apply to affirmative defenses); *Gessele v. Jack in the Box, Inc.*, 2011 WL 3881039, at \*2 (D. Or. Sept. 2, 2011) (suggesting that “the majority of district courts across the country have extended *Twombly*’s plausibility standard to affirmative defenses). But compare *Unicredit Bank AG v. Bucheli*, 2011 WL 4036466, at \*6 (D. Kan. Sept. 12, 2011) (declining to apply the

evident that “boilerplate defenses clutter dockets and expand discovery,”<sup>122</sup> there may be a reasonable basis to exceed numerical limits if plaintiffs are required to wade through a laundry list of affirmative defenses that have only marginal relevance (at best) to the claims asserted in the case.

In seeking relief under Rule 26(b)(2), counsel also should consider the interplay between depositions and interrogatories. Rule 33(a)(1) now states that leave to exceed the current numerical limit of 25 interrogatories, including all discrete subparts, may be granted “to the extent consistent with Rule 26(b)(2).”<sup>123</sup> The purpose of this provision is to provide judicial scrutiny before parties engage in potentially excessive discovery.<sup>124</sup> For example, Rule 26(b)(2)(C)(i) states that the court must limit the frequency or extent of discovery if the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source with less burden, cost, or inconvenience. No one reasonably would dispute that interrogatories are a less-expensive method for obtaining discovery. However, cost-saving does not always equate to efficiency. A party seeking leave to serve additional interrogatories should be prepared to show that discovery under Rule 33 provides a more cost-effective alternative, given the subjects to be explored or the particular information sought.<sup>125</sup> But counsel should remember that interrogatories seek information from a named party that may be admissible under Federal Rules of Evidence 801(d) and, in that respect, duplicate depositions under Rule 30(b)(6). A party intent on taking a Rule 30(b)(6) deposition may find it difficult to justify the need for additional interrogatories directed to the same corporate party.<sup>126</sup>

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*Twombly/Iqbal* standard to affirmative defenses) and *Burget v. Capital West Sec., Inc.*, 2009 WL 4807619, at \*2 (W. D. Okl. Dec. 8, 2009) (“An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery.”).

122. *Safeco Ins. Co. of America v. O’Hara Corp.*, 2008 WL 2558015, at \*1 (E.D. Mich. June 25, 2008) (“Boilerplate defenses clutter the docket and, further create unnecessary work. Opposing counsel generally must respond to such defenses with interrogatories or other discovery aimed as ascertaining which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution.”).

123. FED. R. CIV. P. 33(a)(1).

124. *Cf. Grynberg v. Total, S.A.*, 2006 WL 1186836, at \*6 (D. Colo. May 3, 2006) (“[W]hatever may be said for the virtues of discovery and the liberality of the federal rules, . . . there comes at some point a reasonable limit against indiscriminately hurling interrogatories at every conceivable detail and fact which may relate to a case.”).

125. *See, e.g., Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 2002 WL 534459, at \*4 (W.D. Va. Mar. 18, 2002) (noting, in deciding a motion for additional interrogatories, that the court should consider whether “the requesting party has adequately shown that the benefits of additional interrogatories outweigh the burden to the opposing party”).

126. *See e.g., United States ex rel. Fago v. M & T. Mort. Corp.*, 235 F.R.D. 11, 25 (D.D.C. 2006) (noting that Rule 30(b)(6) does not obligate a deponent to acquire the kind of detailed information that would be more appropriately sought through an interrogatory or document request; and concluding there was “no added benefit to compelling the same information through a Rule 30(b)(6) deposition because, like Rule 30(b)(6) deposition testimony,

Rule 26(b)(2)(C)(ii) requires the court to limit the frequency or extent of discovery where the party seeking discovery has had “ample opportunity to obtain the information by discovery in the action.”<sup>127</sup> The corollary to this provision seems obvious. A lawyer seeking leave to exceed numerical limits might have justification to argue that a responding party’s patently deficient discovery responses or obfuscation in the face of proper discovery requests has denied the requesting party any “reasonable opportunity” to obtain the requested relevant information.<sup>128</sup> Assuming the court finds that the responding party has violated their certification requirement, the requesting party would then cite Rule 26(g)(3), which permits the court to impose “an appropriate sanction.” Arguably, leave to take additional depositions might constitute an appropriate sanction in a particular case. All of these potential arguments are predicated, of course, on the requesting party’s willingness and ability to draft focused interrogatories. Boilerplate discovery requests would have the unintended effect to undermining any request to exceed numerical limits.

The proposed numerical limit on requests for admission under Rule 36 also raises tactical considerations. Requests for admission are viewed not as a “discovery tool” but rather as means to identify issues or facts that will not be contested.<sup>129</sup> In that respect, requests for admission duplicate the framework governing motions for summary judgment under Rule 56(c).<sup>130</sup>

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an interrogatory can be served on and answered by a corporation via its officers and agents”); *Banks v. Office of Senate Sergeant-At-Arms*, 222 F.R.D. 7, 19 (D.D.C. 2004) (emphasizing the court’s expectation that “the parties [will] find topics that will insure that the 30(b)(6) depositions are meaningful exercises in ascertaining information that has not been previously discovered or are necessary to ascertain the positions [defendant] took or takes as to factual and legal issues that have arisen”); *Smithkline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082, at \*9 (N.D. Ill. Jan. 24, 2000) (finding the defendants’ 30(b)(6) notice sought a witness to testify regarding “plaintiff’s responses to defendant’s interrogatories and requests for production, along with the subjects identified therein;” and noting that the liberal discovery available under the Rules does not permit a party to wield the discovery process as a club by propounding requests that compel the recipient to assume an excessive burden).

127. FED. R. CIV. P. 26(b)(2)(C)(ii).

128. *Cf. Meadows v. Home Depot USA, Inc.*, 2002 WL 31374956, at \*1 (D. Kan. Aug. 29, 2002) (holding that plaintiff had demonstrated good cause for exceeding 25 interrogatories, after concluding that additional interrogatories provided a cost-effective method of conducting discovery, and that plaintiff had been disadvantaged by defense counsel’s failure to promptly respond to plaintiff’s inquiry as to whether defendant would voluntarily stipulate to a greater number).

129. *See, e.g., RLA Mktg., Inc. v. WHAM-O, Inc.*, 2007 WL 766351, at \*5 (D. N.J. Mar. 7, 2007) (noting that several district courts have ruled that requests for admissions “are not, strictly speaking, discovery tools as they are devices to establish facts without the necessity of formal proof through testimony or documents presented at trial”); *Hart v. Dow Chemical*, 1998 WL 151815, at \*3 (N.D. Ill. Mar. 27, 1998) (“Strictly speaking, requests for admissions . . . are not discovery tools because the requests are not used to ascertain whether information exists. To the contrary, requests for admissions eliminate issues from contention at trial and expedite the litigation process.”).

130. Rule 36 requests also provide a useful method for authenticating documents or other materials and, to that end, additional requests may be necessary in a document or ESI-intensive

That Rule provides that a party “asserting that a fact cannot be or is genuinely disputed” must support that assertion by citing to specific materials in the record. The non-moving party then has the burden to demonstrate a genuine dispute as to a material fact which precludes judgment as a matter of law. Motion practice under Rule 56 provides, in practical application, an alternative means for obtaining admissions. A strategic lawyer would raise the issue of authentication in advance of the Rule 16 scheduling conference (most logically, at the Rule 26(f) conference<sup>131</sup>), knowing that the trial court “may consider and take appropriate action” to “obtain[ ] admissions and stipulations about facts and documents to avoid unnecessary proof.”<sup>132</sup> Having made that effort and been rebuffed by the opposing party, counsel is in a stronger position to request leave to serve more than the presumptive 25 requests for admission.

*III. Establishing a Framework for the Imposition of Remedial Measures or Sanctions for Failure to Comply with Preservation Obligations Under New Rule 37(e)*

Finally, the Advisory Committee proposes to revise Rule 37(e) to establish a framework for imposing remedial measures or sanctions if a party fails to comply with their preservation obligations. The current version of Rule 37(e), which addresses ESI “lost as a result of the routine, good-faith operation of an electronic information system,” would be wholly re-written.<sup>133</sup> The proposed revision provides that a court could impose “any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction” only if the court determines that the party’s failure to preserve caused substantial prejudice in the litigation and was willful or in bad faith, or if the court finds that the failure to preserve “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action and was negligent or grossly negligent.”<sup>134</sup> The proposed Rule 37(e) also identifies various factors the court should consider in assessing whether the spoliator’s actions were willful or taken in bad faith or whether the nonmoving party was negligent or grossly negligent. The Advisory Committee’s proposal would eliminate the perceived necessity to “over-

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case. The Advisory Committee’s proposed numerical limit would not include requests for admission directed to authenticity issues. *Cf.* *Estate of Manship v. United States*, 232 F.R.D. 552, 560 (M.D. La. 2005) (allowing plaintiffs to serve additional requests for admission directed to the authentication of certain documents; and holding that “[t]his task is not overly burdensome and is designed to resolve technical evidentiary issues prior to trial”).

131. *See* FED. R. CIV. P. 26(f)(3)(B), (F) (providing that counsel should submit a discovery plan that addresses, *inter alia*, “the subjects on which discovery may be needed” and “any other orders that the court should issue under . . . Rule 16(b) and (c)”).

132. *See* FED. R. CIV. P. 16(c)(2)(C), (D).

133. FED. R. CIV. P. 37(e).

134. Agenda Book, *supra* note 2 at Tab 3B, 178.

preserve” potentially discoverable files and thereby reduce the cost of maintaining those materials. The new Rule also would move toward a more uniform treatment of document preservation for the federal court system.<sup>135</sup>

The Advisory Committee’s proposed Rule 37(e) is the product of a lengthy deliberative process<sup>136</sup> and is certain to generate significant comment from academics and the legal community. While the ensuing discussion will likely reflect different philosophical positions, in reality, the Advisory Committee’s proposal has practical benefits for both plaintiffs and defendants.

First, preservation and spoliation are not matters of concern unique to the defense bar and their clients. In the past, particularly in an asymmetrical case (such as a single employee discrimination action brought under Title VII ), plaintiff’s counsel might have paid only fleeting attention to his or her client’s preservation obligation since it was presumed that the defendant employer had possession, custody or control of all the relevant ESI. That confidence may be misplaced, however, with the advent of social media. As one court recently observed, there is “no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms.”<sup>137</sup> A party is presumed to have control over their social networking accounts and relevant information on those sites is discoverable.<sup>138</sup> The preservation obligation is triggered when litigation is pending or is reasonably foreseeable,<sup>139</sup> and encompasses what the party “knows, or reasonably should know is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the

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135. See Agenda Book, *supra* note 2, at Tab 1A, 26.

136. See, e.g., Thomas Y. Allman *Preservation Uncertainty Revisited: Addressing Spoliation by Rulemaking* 56 THE ADVOC. (TEX.) 25 (2011).

137. *Robinson v. Jones Lang LaSalle Ams., Inc.*, 2012 WL 3763545, at \*1 (D. Or. Aug. 29, 2012). See also *EEOC v. Original Honeybaked Ham Co. of Ga.*, 2012 WL 5430974, at \*2 (D. Colo. Nov. 7, 2012) (“There is a strong argument that storing [personal] information on Facebook and making it accessible to others presents an even stronger case for production, at least as it concerns any privacy objection. It was the claimants (or at least some of them) who, by their own volition, created relevant communications and shared them with others.”).

138. See, e.g., *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, 2008 WL 4513696, at \*5 (D.N.J. Oct. 1, 2008) (finding no reason to treat websites differently than any other electronic file; and noting that an intermediary was involved in the act of posting website content did not diminish defendants’ ultimate authority to add, delete or modify the website’s content); *Flagg v. City of Detroit*, 252 F.R.D. 346, 353-56 (E.D. Mich. 2008) (holding, in applying Rule 34(a)(1), that the defendant city had “control” over text messages preserved by a third-party mobile telephone provider pursuant to a contractual relationship with the defendant).

139. See, e.g., *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). See also *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process* (2010) (stating “a duty to preserve is triggered *only* when a party concludes (or should have concluded) based on credible facts and circumstances, that litigation or a government inquiry is probable,” and “whether litigation can be reasonably anticipated should be based on a good faith and reasonable evaluation of the facts and circumstances as they are known at the time”).

subject of a pending discovery request.”<sup>140</sup> Since the plaintiff controls when litigation commences, as well as the nature and scope of any claims asserted, a plaintiff’s attorney who does not take early and affirmative steps to preserve social media content risks spoliation sanctions.<sup>141</sup>

Also, the plaintiff and defense bars likely share similar misperceptions about the risks and benefits associated with spoliation motions. Organizations are inclined to reflexively over-preserve out of fear that they may become the next Qualcomm, Inc.<sup>142</sup> Litigants may file spoliation motions late in the pretrial process as a way of gaining an unwarranted tactical advantage, either by reopening discovery, rearguing a substantive issue already decided by the court, or extracting some advantage in settlement discussions.<sup>143</sup> Data shows that spoliation motions are being filed more frequently.<sup>144</sup> However, the practical benefits of those motions may be misperceived or overstated.

In 2010, the Federal Judicial Center conducted a study of sanctions motions based on an allegation that the nonmoving party had destroyed evidence, particularly electronically stored information.<sup>145</sup> Researchers examined electronic docket records for civil cases filed in 19 different federal districts in 2007-2008. Data revealed that spoliation motions were presented in only 0.15% of the civil cases filed in those districts during the subject period. For those sanctions motions resolved by court order, motions were granted 28% of the time and denied 72% of the time. The most common type of sanction granted was an adverse inference instruction, which was imposed in 44% of all cases in which a sanction was granted. A terminating sanction, either dismissal or default judgment, was imposed in only one of the studied cases. More importantly, the Federal

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140. *Wm T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984). *But see* *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003) (“[T]he obligation to preserve relevant evidence cannot be defined with precision.”).

141. *See, e.g., Gatto v. United Air Lines, Inc.*, 2013 WL 1285285, at \*3-4 (D.N.J. Mar. 25, 2013) (holding that defendant was entitled to an adverse inference instruction based on plaintiff’s failure to preserve his Facebook account and his intentional destruction of evidence). *See also* *Cajamarca v. Regal Entertainment Group*, 2012 WL 3782437, at \*1-3 (E.D.N.Y. Aug. 31, 2012) (imposing a monetary sanction on plaintiff’s counsel based on his failure to advise the plaintiff to preserve data on her hard drive, including Facebook communications with friends); *Katiroll Co., Inc. v. Kati Roll and Platters, Inc.*, 2011 WL 3583408, at \*3-5 (D.N.J. Aug. 3, 2011) (addressing plaintiff’s request for spoliation sanctions based on defendant’s failure to preserve his Facebook pages in their original state and his actions in changing his profile picture on Facebook).

142. *See* *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan 7, 1008), *vacated in part on other grounds*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

143. *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 508 (D. Md. 2009).

144. Willoughby, *supra* note 41 at 790-91 (finding that the failure to preserve ESI was the most common misconduct for which sanctions were imposed in 401 cases involving motions for sanctions related to the discovery of electronically stored information).

145. Emery G. Lee III *Motions for Sanctions Based On Spoliation of Evidence in Civil Cases*, FED. JUDICIAL CTR. (2011), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf\\_Empirical\\_Data/Federal%20Judicial%20Center.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf).

Judicial Center's study highlighted the practical effect of spoliation motions.

First, spoliation usually becomes an issue relatively late in a case – indeed, spoliation motions tend to occur after the typical case would have already ended. Part of the explanation for this is that spoliation cases have much longer processing times than civil cases in general. The average disposition time was about 1.8 years (649 days) for the 152 spoliation cases that had terminated at the time of data collection. The average disposition time for civil cases, in general, was about 0.7 years (253 days). . . . Second, the spoliation cases terminated at trial 16.5% of the time, compared to just 0.6% of civil cases in general. Given that the spoliation trial cases are included in the civil cases in general, the frequency of trial in the spoliation cases is even more remarkable. These two differences indicate that the spoliation cases can be accurately described as ones in which the parties found it extremely difficult to reach a settlement. These are often cases in which there is “bad blood” between the parties.<sup>146</sup>

These findings suggest that any practical advantage from a spoliation motion may be illusory. The Advisory Committee's proposal has the salutary effect of re-focusing attention on the “remedial” aspects of a spoliation motion.<sup>147</sup> An approach to the preservation issue that reduces expensive and time-consuming motion practice and facilitates an efficient disposition of the action should be perceived by both sides as a salutary proposal. Finally, some version of the proposed Rule 37(e) may provide relief from the balkanized approach to the spoliation issue that now characterizes the litigation landscape, thereby bringing some predictability to this area of the law.<sup>148</sup>

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146. *Id.* at 5.

147. *Cf.* *Allstate Ins. Co. v. Gonyo*, 2009 WL 1924769, at \*3 (N.D.N.Y. 2009) (“When pursuing sanctions [for spoliation], our primary task . . . is to restore the innocent party to the same position he would have had if the evidence had not been destroyed.”); *Asher Assocs., LLC v. Baker Hughes Oilfield Operations, Inc.*, 2008 WL 1328483, at \*11 (D. Colo. May 12, 2009) (“[I]f spoliation sanctions are intended to ameliorate prejudice, the court must acknowledge the extent to which the parties currently enjoy a level playing field.”); *Strong v. U-Haul Co. of Massachusetts*, 2006 WL 164822, at \*5 (S.D. Ohio. Dec. 28, 2006) (holding, in selecting an appropriate sanction for spoliation, that the court must seek the least severe sanction that is “proportionate to the seriousness of the infraction, and the goal of the remedy must be to place the parties on a level playing field”).

148. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 516 (D. Md. 2010) (referring to “concern through the country among lawyers and institutional clients regarding the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that FED. R. CIV. P. 26(b)(2)(A) applies to all discovery in civil cases”). Judge Grimm, the author of *Victor Stanley*, appended to his decision a chart that contains citations to cases discussing preservation and spoliation in each of the circuits. That chart should be copied and saved by any lawyer who has occasion to litigate in more than one federal jurisdiction.

In sum, any debate concerning the proposed Rule 37(e) should not over-shadow the practical reality that preservation issues are best addressed by the parties as early as possible and from a reasonable, good faith perspective. This point is addressed at length in *the Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel*.<sup>149</sup> Counsel should resist sending a *pro forma* preservation letter that equates to an ultimatum or a blanket demand to save everything.<sup>150</sup> Such a demand is not supported by case law,<sup>151</sup> and would almost certainly draw an objection if framed as a request for production under Rule 34.<sup>152</sup> Similarly, the recipient of a preservation demand should view the request as an opportunity to open a dialogue on the scope of any preservation obligation, rather than an affront to be ignored. Conferring with opposing counsel does not place the responding party at a tactical disadvantage, particularly if the recipient has already concluded that the preservation demand letter was sufficient to trigger a litigation hold.

#### CONCLUSION

Whether, or to what extent, the Federal Rules of Civil Procedure should be amended will be the subject of ongoing debate for the foreseeable future. That debate will be driven by philosophical differences and parochial perspectives that will likely linger long after any revisions have

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149. Available at <http://thesedonaconference.org/download-pub/465>.

150. Cf. *Millennium TGA, Inc. v. Comcast Cable Commc'ns*, 286 F.R.D. 8, 15 (D.D.C. 2012) (observing, in a case where counsel sent a very expansive “document hold” letter, that “[t]he potential burden of such a data preservation demand takes greater significance when the record in this case indicates that the lawyers representing Plaintiff in this case commonly bring these BitTorrent copyright actions, seek identifying information, keep the case pending for several months and then never prosecut[e] the lawsuit,” and characterizing these preservation demands as “intimidating” and “oppressive”); *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 n.10 (D. Colo. 2007) (criticizing a preservation demand letter couched in terms of “any documents, notes, materials, electronic files, or other evidence that may be evidence or may lead to discoverable evidence, actual or potential, relative to any use, decisions, discussions, or involvement whatsoever in the above referenced cases,” and identifying 48 separate categories of materials or information that defendant would be expected to preserve, including “data files,” “data stored by electronic means,” and “back-up tapes”).

151. See, e.g., *Zubulake v. WBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (organizations need not preserve “every shred of paper, every e-mail or electronic document, and every backup tape”); *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at \*4 (N.D. Ill. 2003) (stating “[a] party does not have to go to ‘extraordinary measures’ to preserve all potential evidence . . . [i]t does not have to preserve every single scrap of paper in its business”).

152. Cf. *Twigg v. Pilgram’s Pride Corp.*, 2007 WL 676208, at \*9 (N.D. W.Va. Mar. 1, 2007) (holding that a request for production that included “all other related documents” failed to comply with the “reasonable particularity” requirement of Rule 34; and observing that such a formulation would require the responding party to “engage in guessing games”); *Banks v. Office of Senate Sergeant-At-Arms*, 2005 WL 1074329, at\*6 (D.D.C. May 5, 2005) (holding that failure to draft requests for production to comply with the “reasonable particularity” requirement of Rule 34 should count against the requesting party, not the responding party); *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992) (“[B]road and undirected requests for all documents which relate in any way to the complaint are regularly stricken as too ambiguous.”).

been enacted by the Judicial Conference. In the end, the effectiveness of the Federal Rules of Civil Procedure will be determined by how those provisions are applied by practitioners and judges. A lawyer inclined to approach the Federal Rules from a strategic and practical perspective will not find their clients disadvantaged by the Advisory Committee's proposed revisions. Trial judges who thoughtfully perform their case management responsibilities will not be constrained in their efforts to meet the objectives set forth in Rule 1. For everyone else, there is simply the observation provided by Pogo in the long-running American comic strip: "we have met the enemy and he is us."