



PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

On August 15, 2013, the Judicial Conference's Advisory Committee on Civil Rules ("Advisory Committee") proposed amendments to the Federal Rules of Civil Procedure ("FRCP").¹ The amendments included changes to several of the Rules,² with the most significant changes to Rules 26 and 37.³ These changes, which the Advisory Committee first explored at a May 2010 conference at the Duke University School of Law ("Duke Conference"),⁴ are arguably the most significant modifications to discovery since the 1993 amendments requiring initial disclosures. From May 2010 to April 2013, the Advisory Committee developed the proposed changes, which are designed to reach the goal of the FRCP—"securing] the just, speedy, and inexpensive determination of every action and proceeding."⁵ These amendments realize this goal by expediting the initial stages of each matter, ensuring that discovery is proportional and limited to the claims and defenses at issue in the litigation, and providing that parties are not subjected to unnecessary costs related to an overly broad scope of discovery or document preservation obligations.

The amendments were open to public comment from August 15, 2013 to February 18, 2014.⁶ The more than 2,300 comments submitted run the gamut from enthusiastically welcoming the changes as essential to sharply criticizing them as unnecessary and unfair. Commenters on both sides suggested further changes. Several bodies must now consider the rules and these related comments. This *White Paper* describes the proposed changes, provides an overview of the comments submitted, and outlines the next steps in the process.⁷

PROPOSED AMENDMENTS

The proposed amendments focus on three issues: early case management, proportionality, and preservation. The early case management changes expedite the earliest stages of litigation, while the proportionality proposals reconcile discovery's scale and scope to the matter's specific needs in an effort to cabin related costs. Finally, the preservation changes encourage litigants to preserve discoverable information while resolving the substantial jurisdictional differences of overpreservation-related sanctions. In so doing, the changes reduce unnecessary costs and burdens associated with overpreservation or spoliation that is not willful or in bad faith.

EARLY CASE MANAGEMENT

Scheduling

Many of the proposed scheduling changes aim to reduce the delay at the beginning of litigation. Proposed Rule 4(m) decreases the time period for serving a defendant from

120 days to 60 days. If service has not occurred at that point, the judge may dismiss the action.

After service, at the subsequent scheduling conference, proposed Rule 16(b)(1) would require "direct simultaneous communication"⁸ between parties, whether in person, by telephone, or other sophisticated electronic means. The Advisory Committee believes these methods will create a more effective scheduling conference because they do not involve the inherent time delays of the mail and other means.⁹ Proposed Rule 16(b)(2) requires the judge to issue the scheduling order 90 days after any defendant has been served or 60 days after any defendant has appeared, whichever is earlier. This is reduced from the current 120 and 90 days, respectively.¹⁰ Proposed Rule 16(b)(3)(B)(v) also states that the scheduling order may require a discovery conference with the court before a party may move for a discovery order. The Advisory Committee Notes ("Notes") indicate that judges who have held such conferences often find them to be an efficient way to speedily and efficiently resolve discovery disputes.¹¹

Proposed Rule 26(d)(1) clarifies the occasions on which parties may seek discovery prior to the Rule 26(f) conference by specifying that Rule 26(d)(2) is among the exceptions generally authorized by the rules. Rather than allowing parties to file a motion to modify the sequence of discovery, as the original Rule 26(d)(2) permits, the newly renumbered Rule 26(d)(3) allows parties to stipulate to case-specific sequences of discovery.

Privilege and Preservation

Given that the Rule 26(f) conference "kicks off" discovery, the proposed changes allow parties to identify issues in advance and to address them more substantively at the conference. Rule 16(b)(3)(B)(iii) and Rule 26(f)(3)(C) discuss document preservation. Proposed Rule 16 states that a scheduling order *may* also address the preservation of electronically stored information ("ESI"). Proposed Rule 26 states that the discovery plan *must* include the parties' views and proposals on the preservation of ESI. These changes are made with the recognition "that a duty to preserve discoverable information may arise before an action is filed."¹²

Additional changes to Rule 16(b)(3)(B)(iv) and Rule 26(f)(3)(D) address privilege. Proposed Rule 16 states that a scheduling order *may* include agreements reached under Federal Rule of Evidence ("FRE") 502,¹³ and proposed Rule 26 states that the discovery plan *must* state the parties' views and proposals on claims of privilege, including whether to ask the court to include an order under FRE 502.

Document Productions

Proposed Rule 26(c)(1)(B) explicitly recognizes the court's power to enter a protective order allocating the expenses of discovery. Although judges have this authority under the current rules, the goal of the change is to prevent parties from contesting that authority.¹⁴

Proposed Rule 26(d)(2) permits a party to serve Rule 34 document requests prior to a Rule 26(f) conference, but no earlier than 21 days after the receiving party was served in the litigation. The requests will be deemed served as of the Rule 26(f) conference, with the response deadline still running from that conference date. This is in contrast to the current rule, which forbids serving any requests for production prior to the Rule 26(f) conference. This change is among the changes intended to encourage the parties to have a more informed, focused conversation at the conference.¹⁵

A party's response to requests for production, under proposed Rule 34(b)(2)(B) and (C), must state the grounds for the objection with specificity, must indicate if documents will be withheld on the basis of the stated objections, and must include a reasonable date for production (otherwise production must occur on the timeline of the requesting party).¹⁶ The Notes recognize that some cases require a rolling production; those responses should specify the start and end dates of production.¹⁷ Lastly, Rule 37(a)(3)(B)(iv)'s amendment permits a party to move for an order to compel production if another party fails to produce documents, which takes into account the common practice to produce copies of documents rather than make documents available for inspection.

PROPORTIONALITY

In an effort to limit the ever-increasing costs of litigation to those costs that are necessary for the "just, speedy, and inexpensive determination of every action and proceeding," the Advisory Committee proposes many changes to narrow the scope of discovery. These changes, often referred to as the "proportionality changes," begin with Rule 1. The proposed Rule 1 change amends the second sentence as shown in red below.

Rule 1 – Scope and Purpose

RULE 1—SCOPE AND PURPOSE

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, **and administered, and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

This amendment recognizes that while some adversarial behavior is essential for the litigation process, parties must balance the adversarial nature with notions of cooperation. "Effective advocacy," the Notes state, "is consistent with — and indeed depends upon — cooperative and proportional use of procedure."¹⁸ Cooperation is not mandatory here. Although the Advisory Committee considered making cooperation mandatory, it was concerned that such a mandate would spark additional litigation on whether the parties were being appropriately cooperative.¹⁹

The Committee proposes a wholesale change to Rule 26(b)(1). The proposal limits the scope of discovery to that which is "proportional to the needs of the case," and it provides five illustrative factors for courts to consider. This language completely replaces the current, and often quoted, "reasonably calculated to lead to the discovery of admissible evidence" language, which the Advisory Committee believes courts often interpret too broadly.²⁰ The rule also narrows relevant matter to "any party's claim or defense" rather than the "subject matter involved in the action." These changes will alter the rule as shown below.

Rule 26(b)(1)—Scope of Discovery (emphasis added)

Current Rule 26(b)(1)

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense**—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears **reasonably calculated to lead to the discovery of admissible evidence**. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Proposed Rule 26(b)(1)

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.**

Proposed Rule 26(b)(2) provides largely logistical updates, adding requests for admission to the list of requests that Rule 30 may limit. It eliminates the option for a court to use Rule 36 to limit requests by order or local rule in subsection A, simplifies when a court is required to limit the frequency or extent of discovery in subsection C, and encourages the court to use the revised Rule 26(b)(1) to make that discovery determination (rather than benefit/burden analysis) in subsection C(iii). Rule 34(b)(2)(A) similarly concerns logistics, requiring a party to respond to a request for production delivered under Rule 26(d)(2) within 30 days after the first Rule 26(f) conference.

Amendments to Rules 30, 31, 33, and 36 provide new, specific limits on discovery tools based on empirical research by the Federal Judicial Center.²¹

PROPOSED LIMITS FOR DISCOVERY TOOLS			
Discovery Tool	Current Limit	Proposed Limit	Additional requests with permission of the court?
Depositions (R. 30 and 31)	10 depositions per party	5 depositions per party	yes
	7 hours each	6 hours each	yes
Interrogatories (R. 33)	25	15	yes
Requests for Admission (R.36) (other than authenticity)	None	25	yes

The court may grant additional requests for these discovery rules to the extent Rules 26(b)(1)–(2) require. While the proposed limitations are more conservative than the current limits, they merely represent a starting point for negotiations with the court. Collectively, the proposed amendments also encourage litigants to think both offensively and defensively about using discovery tools. For instance, a party should consider that listing boilerplate affirmative defenses may provide another party with sound reason to argue for a higher number of discovery requests.

PRESERVATION

The final category is the changes designed to address preservation of documents and other information. These changes, which overlap with the new focus on proportionality and include the revisions to Rule 26 discussed above, are otherwise within proposed Rule 37. Proposed Rule 37(e)(1) rewrites the current rule completely. The Notes explicitly state that this was, in part, to address disparate expectations across the federal circuit courts and the fact that “[e]xtremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.”²²

Rule 37(E)(1)—Failure to Preserve Discoverable Information (emphasis added)

Current Rule 37(e)

Failure to Provide Electronically Stored Information.

Absent **exceptional circumstances**, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Proposed Rule 37(e)(1)

Failure to Preserve Discoverable Information. (1) **Curative measures; sanctions.** If a party failed to preserve discoverable information that should have been

preserved in the anticipation or conduct of litigation, the court may:

- (A) **permit additional discovery, order curative measures, or order the party to pay the reasonable expenses**, including attorney’s fees, caused by the failure; and
- (B) **impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction**, but only if the court finds that the party’s actions:
 - (i) caused **substantial prejudice** in the litigation **and** were **willful or in bad faith**; or
 - (ii) **irreparably deprived a party of any meaningful opportunity** to present or defend against the claims in the litigation.

Proposed Rule 37(e)(1) provides “curative measures” and “sanctions” should a party fail to preserve discoverable information in anticipation of litigation. In so doing, the proposed rule limits “sanctions” to destruction (versus loss) of discoverable information. The curative measures listed in Rule 37(e)(1)(A) are available where the harm of loss can be substantially undone or a party took reasonable steps to preserve. In contrast, the sanctions listed in Rule 37(e)(1)(B) require “substantial prejudice” *and* “willfulness or bad faith” or that a party

was “irreparably deprived” of “any meaningful opportunity” to present or defend against claims in the litigation. Accordingly, these changes remove the stigma associated with sanctions and remove the routine threat of sanctions where conduct does not warrant them.

While the newly proposed Rule 37(e)(2) allows the court to consider “all relevant factors” to assess a party’s conduct, it provides five factors to guide a court’s analysis. A court should examine (i) the extent to which a party was on notice that litigation would likely occur and that the information would be discoverable, (ii) the reasonableness of the party’s effort to preserve the information, (iii) whether the party received a reasonable, clear request to preserve information (as well as whether the parties consulted in good faith about the scope of preservation for the request), (iv) the proportionality of the preservation efforts to any anticipated or ongoing litigation, and (v) whether the party timely sought the court’s guidance on any unresolved disputes about preserving discoverable information. Using these factors, a court can determine if a situation warrants curative measures, sanctions, or no remedy at all for a loss of discoverable information.

The first of these Rule 37(e)(2) factors (a party being on notice about litigation) mirrors the common law standard, that the duty to preserve arises when a party knew or reasonably should have known about litigation. Any loss occurring before that triggering moment does not warrant sanctions or other curative measures. These factors should help parties comply with the common law standard, allow the court to determine when the duty to preserve arose, and decide what information warranted preservation. Finally, because this list is not exhaustive, a party’s failure to meet any one factor does not mean his actions were willful or in bad faith. As the Notes state, “[Rule 37(e)] does not provide ‘bright line’ preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific.”²³

OVERVIEW OF PUBLIC COMMENTS

Attorneys, judges, professors, corporations, law firms, and public interest and professional organizations submitted more than 2,300 comments on the proposed rules during the six-month public comment period.²⁴ The comments generally expressed either support or opposition to the rules and often recommended additional changes.

Comments that Generally Supported the Proposed Amendments

The commenters in support of the proposed amendments included *Fortune* 500 corporations, large law firms, the Duke Law Center for Judicial Studies, and the Sedona Conference.

Former Senator Jon Kyl (R–AZ), who served as a member of the Senate Judiciary Committee, also submitted a comment.

These commenters typically celebrated the Advisory Committee’s effort to integrate a proportionality consideration into discovery and to encourage efficiency and fairness. The Sedona Conference supported the deletion of “reasonably calculated to lead to the discovery of admissible evidence” from Rule 26(b)(1) as a means to “help cabin excessive discovery.”²⁵ Another commenter suggested adding language to this rule that would encourage technology-assisted review as means of complying with proportionality requirements.²⁶ Senator Kyl and Professor Donald Elliott coauthored a comment noting the upward trend in litigation costs and the use of discovery as a “bludgeon for settlement” rather than a search for truth. They argued that the proportionality standard was not new, but its prominent placement in Rule 26(b)(1) would require parties to take it more seriously.²⁷

These commenters similarly championed the proposals’ efforts to deter overpreservation and promote a uniform standard for spoliation in Rule 37(e). Many argue that the standard for sanctions under Rule 37 should be limited to circumstances involving willfulness *and* bad faith. The New York State Bar Association seemingly suggests that the rules should take something of a middle ground between the current rule and the proposed change. It suggests that Rule 37(e) (1) should impose a rebuttable presumption of substantial prejudice against a party who acts willfully or in bad faith; the rules define “willfulness” as unreasonable conduct, either intentional or reckless, that will likely create harm; and that “[a]ctions” should include an omission in action.²⁸ The Sedona Conference also recommended a more unified approach to curative measures and sanctions as well as a “good faith” standard instead of a “bad faith” standard.²⁹ The U.S. Department of Justice made a more cautious endorsement of the proposed rules, particularly the proportionality standard. It expressed reservations about the proposed acceleration of the scheduling order as well as the numerical limits on discovery tools.³⁰

Comments that Generally Opposed the Proposed Amendments

The majority of the comments expressed general opposition to the proposed amendments. These commenters included individual plaintiffs’ attorneys, related trade associations, and various affiliates of the American Association for Justice. The Honorable Shira Scheindlin of the Southern District of New York, a notable electronic discovery expert, also submitted comments narrowly on the changes she opposed.

These commenters were deeply concerned about the proposed amendments to Rules 30, 31, 33, and 36, regarding limits to various discovery requests. They regarded the

requests as essential to litigation's natural fact-finding process and maintained that parties can reasonably manage this process themselves.³¹ These comments also raised three primary objections to Rule 26(b)(1)'s proposed proportionality standard. First, they considered the change to be unnecessary since the current process fairly apportions the costs and benefits of discovery, disproportionate discovery is empirically uncommon, and current practice excuses a party from production where the burden outweighs the benefit.³² Second, they argued that the proportionality standard and its five enumerated factors will result in excessive motion practice as parties litigate the meaning of these terms in the context of their case.³³ Lastly, these commenters expressed concern that this new standard would treat plaintiffs unfairly by imposing an additional hurdle (beyond the burden of proof) on them.³⁴ Informational asymmetries require robust discovery, they also argued.³⁵ Judge Scheindlin similarly argued the proportionality standard was unnecessary, since parties usually amicably agree to what information is relevant, and the standard did not state which party bears the burden to demonstrate proportionality.³⁶

Many amendments to Rule 37(e) troubled these commenters. They complained that the new sanctions standard would allow defendants to escape accountability since "willfulness or bad faith" imposes a higher threshold for destruction than the current good faith standard.³⁷ Another commenter questioned if the proposals violated the Rules Enabling Act, since the addition of a willfulness finding and proportionality standard to the Rule might alter the substantive right to sanctions and violate established case law.³⁸ The preservation rules, these commenters concluded, would only create more problems than they solved.

NEXT STEPS

The proposed amendments represent the culmination of years of hard work, yet many months of work remain. The Advisory Committee is presently reviewing the comments and hearing testimony. It will likely spend two to four months deciding if and how to further revise the rules before communicating proposed changes to the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Committee"). At the earliest, the Standing Committee would consider the changes during its June 2014 meeting. The Standing Committee may then recommend the rule changes to the Judicial Conference, the policymaking body of the federal courts. The Judicial Conference is scheduled to meet in September 2014, where it could recommend changes to the U.S. Supreme Court, which has the authority to promulgate the FRCP under the Rules Enabling Act of 1934. The Supreme Court could then consider and promulgate any revised rules

on or before May 1, 2015. Any such rules would take effect on December 1, 2015, unless Congress enacts legislation to reject, modify, or defer them. As a result, the earliest any changes could take effect is December 1, 2015.

CONCLUSION

The parties supporting or opposing the proposed rule changes are exactly the ones you would have predicted based on the goals set out at the Duke Conference. Plaintiffs' attorneys and trade organizations largely oppose the changes, perceiving them as unnecessary and as stifling discovery's fact-finding mission. Larger corporations and the law firms that often represent them favor the amendments, applauding them as a critical step in controlling the ever-increasing cost of discovery. Such a juxtaposition indicates that the rules and the rule amendments are doing precisely what they were intended to do, which is rein in discovery costs and return the focus of litigation to the parties' claims and defenses. As a result, while we expect comments to result in some changes to the proposed rules, wholesale changes seem unlikely.

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APPENDIX A: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule	Category	Proposed Amendment
1	Proportionality	Instructs courts and parties to use rules to secure just, speedy, inexpensive litigation
4(m)	ECM – Scheduling	Reduces time limit for service to sixty days after complaint is filed
16(b)(1)	ECM – Scheduling	Requires direct, simultaneous communication at the scheduling conference
16(b)(2)	ECM – Scheduling	Reduces time period to issue scheduling order
16(b)(3)(B)(iii)	ECM – Privilege & Preservation	Permits scheduling order to address preservation of ESI
16(b)(3)(B)(iv)	ECM – Privilege & Preservation	Permits scheduling order to include agreements reached under FRE 502
16(b)(3)(B)(v)	ECM – Scheduling	Permits scheduling order to require conference before discovery order
26(b)(1)	Proportionality	Requires discovery to be proportional to needs of the case
26(b)(2)(A)	Proportionality	Adds requests for admission to list of discovery tools that may be limited; eliminates option for court to use R. 36 to limit requests by order or local rule
26(b)(2)(C)	Proportionality	Simplifies when a court is required to limit frequency of discovery
26(b)(2)(C)(iii)	Proportionality	Encourages court to use R. 26(b)(1) to define discovery's scope
26(c)(1)(B)	ECM – Documents	Permits courts to enter protective order allocating discovery expenses
26(d)(1)	ECM – Scheduling	Adds R. 26(d)(2) as exception to a party seeking discovery prior to R. 26(f) conference
26(d)(2)	ECM – Documents	Permits R. 34 request to be sent prior to R. 26(f) conference; deemed served at that conference
26(d)(3)	ECM – Scheduling	Permits parties to stipulate to sequence of discovery
26(f)(3)(C)	ECM – Privilege & Preservation	Requires discovery plan to state parties' views on ESI preservation
26(f)(3)(D)	ECM – Privilege & Preservation	Requires discovery plan to state parties' views on claims of privilege and whether to ask court to include agreement in FRE 502 order
30(a)(2)(A)(i)	Proportionality	Requires court permission for >5 oral depositions per party
30(d)(1)	Proportionality	Requires court permission for deposition >6 hours
31(a)(2)(A)(i)	Proportionality	Requires court permission for >5 written depositions per party
33(a)(1)	Proportionality	Requires court permission for >15 interrogatories per party
34(b)(2)(A)	Proportionality	Requires party to respond to request for production delivered per R. 26(d)(2) within 30 days after first R. 26(f) conference
34(b)(2)(B)	ECM – Documents	Requires parties to state objections with specificity; permits parties to state that will produce rather than permit inspection; requires parties to include reasonable date for production (or produce on timeline of requesting party)
34(b)(2)(C)	ECM – Documents	Requires parties to indicate if document will be withheld based on objections
36(a)(2)	Proportionality	Requires court permission for >25 requests for admission per party
37(a)(3)(B)(iv)	ECM – Documents	Permits motion to compel if party fails to produce documents
37(e)(1)	Preservation	Permits curative measures and sanctions for failure to preserve discoverable information
37(e)(2)	Preservation	Provides nonexhaustive factors to determine if there was a failure to preserve, and if it was willful or in bad faith

Endnotes

- 1 Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure — Request for Comment* (2013) [hereinafter *Committee Report on Proposed Amendments*], available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.
- 2 Namel, Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, and 84.
- 3 This *White Paper* does not analyze proposed changes to the Federal Rules of Bankruptcy Procedure or the Federal Rules of Civil Procedure's Appendix of Forms (Rule 84), the latter of which the Advisory Committee recommended abrogating. Proposed modifications to Rule 6(d) (Additional Time After Kinds of Service) and Rule 55 (Setting Aside a Default or a Default Judgment) are less germane to electronic discovery and therefore excluded.
- 4 The conference sought to explore the current costs of civil litigation, with particular emphasis on brainstorming solutions to manage discovery costs. Relying on empirical research done by the Federal Judicial Center, the Conference determined how satisfied litigants were with the present system. It combined that empirical research with suggestions from lawyers to determine how the FRCP could more closely align with their stated goal.
- 5 Fed. R. Civ. P. 1.
- 6 This end date was an extension from the original February 15, 2014 deadline.
- 7 Appendix A provides a one-page summary of all proposed changes discussed in this *White Paper*.
- 8 *Committee Report on Proposed Amendments*, *supra* note 1, at 287.
- 9 *Committee Report on Proposed Amendments*, *supra* note 1, at 262.
- 10 Should a judge find good cause for delay, he or she has discretion to extend these deadlines.
- 11 *Committee Report on Proposed Amendments*, *supra* note 1, at 288.
- 12 *Committee Report on Proposed Amendments*, *supra* note 1, at 287.
- 13 Both changes reference FRE 502 because that rule considers the inadvertent disclosure of privileged information or attorney work product.
- 14 *Committee Report on Proposed Amendments*, *supra* note 1, at 298.
- 15 See *Committee Report on Proposed Amendments*, *supra* note 1, at 298.
- 16 Proposed Rule 34 permits the responding party to state that it will produce copies of documents instead of permitting inspection in recognition of the fact that this is the common practice. See *Committee Report on Proposed Amendments*, *supra* note 1, at 308–09.
- 17 *Committee Report on Proposed Amendments*, *supra* note 1, at 309.
- 18 *Committee Report on Proposed Amendments*, *supra* note 1, at 281.
- 19 *Committee Report on Proposed Amendments*, *supra* note 1, at 270.
- 20 *Committee Report on Proposed Amendments*, *supra* note 1, at 266.
- 21 Although the Advisory Committee considered adding a presumptive limit to RFPs, it ultimately decided not to do so. *Committee Report on Proposed Amendments*, *supra* note 1, at 267.
- 22 *Committee Report on Proposed Amendments*, *supra* note 1, at 318.
- 23 *Committee Report on Proposed Amendments*, *supra* note 1, at 318.
- 24 The Advisory Committee also held three hearings on the proposed changes. They occurred in Washington, D.C. (November 7, 2013), Phoenix, Arizona (January 9, 2014), and Dallas, Texas (February 7, 2014).
- 25 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of The Sedona Conference, at 5 (Nov. 26, 2013) [hereinafter Cmt. of The Sedona Conference].
- 26 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of Duke Law Center for Judicial Studies, at 1 (Oct. 17, 2013).
- 27 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. by Hon. Jon Kyl and Prof. E. Donald Elliot, at 1–2, 3–4.
- 28 See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of N.Y. State Bar Ass'n, at 2 (Oct. 2, 2013).
- 29 See generally Cmt. of The Sedona Conference, *supra* note 25, at 8–20.
- 30 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of U.S. Dep't of Justice, at 2 (Jan. 28, 2014).
- 31 See, e.g., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of Elfvin & Besser (Feb. 13, 2013); Cmt. of Highman, Highman & Ball (Feb. 21, 2013); Cmt. of The Goldblatt Law Firm (Feb. 27, 2013).
- 32 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of Public Justice, at 6 (Mar. 1, 2013); Cmt. of Center for Constitutional Litigation, at 3–6 (Mar. 1, 2013).
- 33 See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of Bay Area Employment Law Office, at 3 (Feb. 28, 2013).
- 34 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of Am. Ass'n for Justice, at 24 (Dec. 19, 2013) [hereinafter Cmt. of Am. Ass'n for Justice].
- 35 *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. of Andrus Anderson LLP, at 3–5 (Dec. 23, 2013).
- 36 See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. by Judge Shira A. Scheindlin, at 2–4 (Jan. 13, 2014).
- 37 See Cmt. of Am. Ass'n for Justice, *supra* note 34, at 21–23.
- 38 See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-RULES-CV-2013-0002, Cmt. by Ronald J. Hedges, at 2–6 (Aug. 20, 2013).

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