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March 1, 2013

Via Electronic Mail to rules_comments@ao.uscourts.gov

Honorable David G. Campbell, Chair
Civil Rules Advisory Committee

The Honorable John Koetl, Chair
Duke Subcommittee

Dear Judge Campbell and Judge Koeltl:

At the January meeting of the standing committee you invited comments on pending proposals regarding discovery. I offer these initial comments. I have also asked the American Association of Justice (AAJ), the nation's largest organization of plaintiffs' lawyers, and some of its members to supply further comments relating their experiences in the courts and their thoughts regarding particular details in the proposals.

Here I will focus on two key provisions—the re-definition of the scope of discovery and new presumptive limits on discovery. The proposed re-definition[1] shifts a paradigm. Instead of a requesting party being entitled to information unless the opposing party shows disproportionality, a requesting party now would be entitled to information only upon affirmatively demonstrating proportionality. The presumptive limits are likely to burden

[1] I am working from the text as published to the Standing Committee for its January meeting:

> **(b) Discovery Scope and Limits.**
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> **(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]{sought} need not be admissible in evidence to be discoverable. ~~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).~~ ***

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plaintiffs without yielding commensurate benefit. These changes are inconsonant with the purposes of the civil justice system and predictably will result in practical problems in the courts and in denials of justice. I end with a note about time for service of process.

Please do not construe absence of attention to other proposals as approval or disapproval of them. I hope you find these comments helpful and look forward to seeing you in Oklahoma.

I. Introduction

The current proposals reflect a perceived need to control discovery costs. Yet, as recently as January, the Federal Judicial Center reported, "Discovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases. . . ." Report to the Standing Committee, Presentation by FJC Research Division, Emery G. Lee III (Jan. 2013).

The proposals seek to diminish defendants' burdens in discovery. They seem to assume that current law allows parties to "discover all facts, without limit, unless and until a court says otherwise,"[2] and that disproportionate discovery is common. Neither assumption is correct. The proposals show insufficient regard for the difficulties that workers, consumers and tort plaintiffs—persons who bear burdens of proof—face in obtaining facts in the sole possession of defendants. Despite an opposite intent, the proposals could increase costs and effectively deny access to courts to persons with typically modest claims and are written as if all claims are very large.

Ever since the modern rules were written, drafters have prioritized, through notice pleading accompanied by compelled discovery, the access to the courts that the Constitution guarantees to plaintiffs. Recent constructions of the rules combined with chronic under-resourcing of the courts have rendered the promise of a day in court more remote. Civil case filings are decreasing,[3] and there are fewer trials and fewer jury verdicts. Further retrenchment of the kind described in the current proposals will exacerbate these trends, in part because they will encourage defendants to delay. The proposals travel down this road unnecessarily, as existing tools enable courts to control the small number of instances where discovery requests are overly burdensome or otherwise constitute impermissible fishing expeditions.

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[2] Inst. for the Advancement of the Am. Legal Sys., *21st Century Civil Justice System: A Roadmap for Reform: Civil Caseflow Management Guidelines* 2 (2009) (declaring purpose of rules to end a notion, never actually ensconced in the federal rules, "that parties are entitled to discover all facts, without limit, unless and until a court says otherwise.").

[3] In 2012, "Civil case filings in the U.S. district courts fell four percent to 278,442. Cases involving diversity of citizenship," typically the basis of jurisdiction for federal tort suits, "declined 15 percent, mainly because of a drop in multidistrict litigation filings." Chief Justice Roberts, *2012 Year-End Report on the Federal Judiciary* 13 (2012), *available at* http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf.

II. Rule 26 Already Forbids "Disproportionate" Discovery and Appropriately Allocates the Burden of Establishing Disproportionality

Reducing the scope of discovery by diminishing that which could lead to admissible evidence and thereby requiring plaintiffs to know what the defendant is withholding in advance will significantly burden plaintiffs while at best nominally lowering defendants' expenses.

All stakeholders agree that proportionality principles ought to govern discovery. Proportionality is implemented by information generally being available upon a showing that it "appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1). A party making such a request must certify that it is proportional. Rule 26(g)(1)(B)(iii). A party resisting discovery is excused from producing only upon demonstrating disproportionality.[4]

The burden of showing exception is placed on the resisting party in the text of Rule 26(b)(2)(B) and by case law for Rule 26(b)(2)(C)(iii).[5] The current allocation of responsibility accords with our general understanding of where to place burdens: on the party best able to provide information about the issue in question. *See* 2 *McCormick on Evidence* § 337 (6th ed. 2006); *Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) ("[T]he difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue…").[6]

The current allocation of responsibility accords with the purposes of the Rules. Liberal discovery was considered "one of the most significant innovations of the Federal Rules of Civil Procedure," making it possible that "civil trials in the federal courts no longer need be carried on

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[4] The resister must show, with regard to electronic information, that "the information is not reasonably accessible because of undue burden or cost," Rule 26(b)(2)(B). More generally, the resister can show that "the burden or expense of the proposed discovery outweighs its likely benefit," Rule 26(b)(2)(C)(iii), taking into account proportionality factors echoed in the proposed amendment.

[5] *Prism Tech., LLC v. Adobe Sys., Inc.*, 2011 WL 6303238, *3 (D. Neb. 2011); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511-12 (N.D. Iowa 2000). Defendants have suggested that rules amendments have altered this burden, *see. e.g.*, *David v. Signal Intern., LLC*, 2010 WL 2723180, *5 (E.D. La. 2010); *see also* Advisory Committee Note to 1980, 1993, and 2000 amendments to Rule 26(b)(1), but as a party resisting discovery admitted in *Salamone v. Carter's Retail, Inc.*, 2011 WL 310701, *5 (D. N.J. 2011), the rules are better construed as not changing the burden but merely emphasizing judicial sensitivity to proportionality and the sua sponte power of courts to control discovery. *See* Advisory Committee Notes to 2000 Amendments, citing *Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998).

[6] This allocation fits the same paradigm as our constitutional test for the exercise of personal jurisdiction: a party asserting that jurisdiction exists must show that the exercise is fundamentally fair; a party over whom jurisdiction is sought may still escape jurisdiction upon a showing that particular factors render the exercise unfair. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). The analysis is the basis of the Court's holding in *Asahi Metal Industries, Co. v. Superior Court*, 480 U.S. 102 (1987), and is not displaced by *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (plurality), which considers only the initial inquiry into fairness.

in the dark," enabling parties "to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947). *Hickman* interpreted the 1946 amendments to the Rules, which were crafted purposefully to de-emphasize the importance of close pleading and to assure that relevant evidence became available. Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments (June 1946), p. 33 (text of Rule 26(b)(1)); pp. 34-35 (notes); p. 48 (incorporating standard for interrogatories); p. 52 (incorporating standard for documents), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1946.pdf. *Hickman* construed the initial form of the current language of Rule 26(b)(2), "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," that would be eliminated by the proposed draft.

The meaning and function of that language are well understood. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350-52 (1978). Many collateral consequences of its elimination cannot be foretold but extensive litigation to define the parameters of replacement language is certain as litigants and courts replay analogs of the battles decried by the Committee when it drafted the 1946 amendments. In place of standard boilerplate objections regarding burdensomeness, which have well-defined parameters, *see, e.g., Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir.1982) (the "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection.") (quoting *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan.1997) ("The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request."), we would expect to see boilerplate objections that requests were not proportional, with the burden on a party requesting information to demonstrate proportionality and admissibility.

That is exactly the consequence reported by AAJ members practicing under a pilot project in Colorado. Rules of that project[7] provide, in relevant part:

> Pilot Project Rule 1.3.
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> 1.3. At all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case. The proportionality factors include, for example and without limitation: amount in controversy, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information. This proportionality rule shall shape the process of the case in order to achieve a just, timely, efficient and cost effective determination of all actions.

[7] The rules are available at http://www.courts.state.co.us/Courts/Civil_Rules.cfm.

> Pilot Project Rule 9
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> 9.1. Discovery shall be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and shall comport with the factors of proportionality in PPR
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> 9.2. Discovery shall be limited in accordance with the initial case management order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

These rules have the purpose of eliminating an entitlement to information.[8] The rules apply to a limited number of cases, so experience is not broad. Even so, the rules have engendered confusion and have increased costs of litigation.

At initial conferences judges have been faced with resolving potentially outcome-determinative assertions of disproportionate discovery based simply on the unsubstantiated assertions of each party about the value of a case. For example, in one situation the plaintiff asserted that the value of the case was $5 million and that the case was a matter of public importance; the defendant asserted that the matter was a purely private dispute and had a maximum value of $300,000.

As discovery progresses, plaintiffs' counsel have been faced with naked assertions that discovery is disproportional, even to discovery described as tightly targeted. These counsel report that resolving discovery disputes of this kind has cost more than the production itself. In the analog of a federal Rule 30(b)(6) deposition one defendant would discuss only efforts to retrieve documents, as it asserted that all requests for information were disproportionate. A plaintiff who can't depose a 30(b)(6) deponent is at a loss to bear a burden of demonstrating proportionality.

III. Empirical Evidence Establishes That Disproportionate Discovery Is Uncommon and Does Not Support Re-Allocating the Burden of Demonstrating Disproportionality

The exceptional case of disproportionate costs should not constitute the baseline against which the general rule about scope of discovery is written. Little evidence supports a transsubstantive need to bring down discovery costs. The Committee has considered the result of a RAND report on costs associated with preservation of information, Nicholas M. Pace & Laura Zakaras, RAND Corp., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012), but that report is based on a small sample of highly unrepresentative cases and its authors themselves caution against extrapolation. *Id*. at xiv ("Because the participating companies and cases do not constitute a representative sample of corporations and litigation, we cannot draw generalizations from our findings that apply to all

[8] The rules were developed in accord with the IAALS pilot project, which has the avowed purpose of eliminating entitlement to discovery. *See* note 2, *supra*.

corporate litigants or all discovery productions."). The Federal Judicial Center has found that in the vast majority of cases discovery is limited and proportional. Emery G. Lee, III & Thomas Willging, Federal Judicial Center, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* 2 (Oct. 2009) (hereinafter "*Civil Rules Survey*").[9] Even when discovery is relatively costly it is seldom disproportional.[10] The proposed alteration of the scope of discovery is a transsubstantive response to a problem that occurs in a very small number of cases. It poses a huge risk of rendering costs disproportional in the vast majority of cases where costs are not disproportional now.

Additionally, a defendant corporation's memory cannot be accessed the way that an individual person's memory can be. With a natural person, the right to seek memories of events at issue in the litigation typically can be addressed in a single deposition. That is not true of a corporation. Justice requires a *prima facie* rule that an artificial person's memories be as available as a natural person's memories. The current default, which presumes entitlement to relevant information, fits this mold. Reversing the presumption runs the substantial risk that some entities will be too large to be sued. American justice has prided itself on no one being above the law. The current proposal does not adhere to this foundational premise of our civil justice system.

IV. The Proposal Would Vest Too Much Managerial Authority in Judges, Hampering, Not Aiding, the Administration of Justice

The committee has embraced managerial judging.[11] *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 Duke L.J. 669, 677-88 (2010). Managerial judging has been supported by the plaintiffs' and defense bars, and the bar in general has been satisfied with the existing concept of management. *Id*. at 687 (citing authorities). But the concept has dangers when judges are vested with too much discretion:

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[9] Reporting the preliminary results of a survey of closed federal civil cases, the FJC found that median costs, *including attorney fees*, were $15,000 for plaintiffs and $20,000 for defendants. *See also* Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* § 5.2, at 288 & n.7 (5th ed. 2001) (collecting sources). *See also*, *id.* at 181; Thomas E. Willging & Emery G. Lee, III, Federal Judicial Center, *In Their Words: Attorney Views about Costs and Procedures in Civil Litigation* 21-22 (Mar. 2010) (hereinafter "*In Their Words*") ("three-fourths of the attorneys [surveyed] reached outcomes where discovery costs appeared to be proportional to the stakes").

[10] *Civil Rules Survey*, *supra*. In only five percent of cases do discovery costs reach $300,000 per party, and in those cases the stakes were estimated at $4-5 million. Even in the highest value cases, total costs, including attorney fees, averaged well less than ten percent of what was at stake. *See also In Their Words*, *supra* (noting particularly high costs in intellectual property disputes); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. Rev. 683, 684-85 (1998) (disproportionate discovery is uncommon and tends to happen only in large, uncommon cases).

[11] The concept derives from Judith Resnick, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

> One experiment dramatically demonstrated the very different choices that judges might make in the same case--disturbing but not surprising in a context where decisions are ad hoc and the standard is efficiency. At a conference at Yale Law School in 1985, participating judges were presented with a hypothetical case in which thousands of named plaintiffs, all of whom resided within two miles of a hazardous waste disposal site, sued 152 corporate defendants after an EPA study revealed "the presence of high concentrations of pollutants, including several 'probabl[e] human carcinogens."' Judges' reactions to this case ranged from a judge who recommended establishing a $60 million settlement fund (designed to "curb litigation energy" up front) to a judge who, because she believed the case lacked merit, recommended forcing each individual plaintiff to file a separate complaint, pleading his or her claim with particularity, or to face dismissal. This judge noted that she would "use procedural tools at her disposal to stall the litigation in order to promote settlements."

Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. Rich. L. Rev. 1261, 1270-71 (2010) (footnotes omitted).

The organizer of that conference, Yale law professor E. Donald Elliott noted the absence of an opportunity to argue against a particular managerial approach or to seek appellate review. He added, "It seems beyond serious debate, then, that discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without the procedural safeguards that accompany decisions on the merits." *Id*. at 1271. The current proposal takes the concept of managerial judging a step too far.

Professor Gensler specifically endorsed targeting the middle, rather than either extreme, as the current rules are intended. Gensler, 60 Duke L.J. at 742. The proposed rules are plainly written to manage up than to manage down, and the proposed redefinition of the scope of discovery facilitates managing up. Such an approach, however, does not comport with the constitutional values at stake. A person who brings a lawsuit exercises a fundamental constitutional right. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. '[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'") (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (establishing that right applies to suits between private parties)). The current rules implement that right by establishing an initial entitlement to discover the memories of the opposing party, subject to defenses. In the name of managerial flexibility, the proposed rule would crush that entitlement and make exercise of the right more difficult and more subject to individualized determinations, even whims, of a particular judge. In a contest between managerial flexibility and constitutional values, managerial flexibility should lose.

V. Reduced Presumptive Limits, and Reduced Time to Effect Service of Process, Are neither Necessary nor Desirable

The proposed reductions in presumptive limits in depositions (Rules 30 and 31) assume that costs will be reduced as a result of its adoption. Market forces already drive plaintiffs' lawyers to keep costs low. As the FJC reported, "An experienced defendant attorney who represents insurers described his observations about the economics of law practice: In contingency cases, lawyers learn quickly that they are spending their own money when they do discovery and they learn not to uncover every stone." Willging & Lee, *In Their Words, supra*, at 11. The economics of plaintiffs' practice curtails the number of depositions sought in any case, not only because of expense entailed in taking a deposition but because of the time it takes away from opportunities to pursue other matters. Every plaintiffs' lawyer knows that an economically sound practice requires a healthy inventory of cases pursued simultaneously. Needlessly engaging in activity in any one case takes time away from others.

These market forces already result in proportionate discovery. A 1997 Federal Judicial Center study reported that it was rare that attorneys believed too many depositions were noticed or that depositions took too much time.[12] Moreover, the study found that median number of individuals deposed in any case was four and the mean was six.[13] Another FJC study found that the mean number of depositions taken by plaintiffs is 3.8 and the mean by defendants is 2.8.[14]

Given these numbers, presumptive limits seem to serve little purpose. They are unlikely to be surpassed in the average case. Cases involving greater complexity will surpass the limits and the presumptions will put an awkward barrier in the way of obvious need. Some states accommodate this situation by distinguishing low-value cases from those containing greater complexity in setting their presumptive limits,[15] a solution the committee could consider, we believe, without damaging the principle of transsubstantivity. Such a rule could conserve judicial time. Reduced limits could create satellite litigation, increasing costs in affected cases without effecting cost reductions in typical cases. Similar problems permeate the proposal to limit requests for production (Rules 34 and 36) and limitations similarly should not be imposed through the rules.

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[12] Tom Willging, Memorandum to Discovery Subcommittee: Data on durational limits on depositions 1, 2 (Dec. 22, 1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/0031.pdf/$file/0031.pdf, based on Thomas E, Willging John Shapard, Donna Stienstra, & Dean Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997).

[13] *Id.*

[14] Lee & Willging, *Civil Rules Survey, supra*, at 77 (2009), *available at* http:// www.fjc.gov/ublic/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

[15] *See, e.g.*, Ill. Sup. Ct. R. 222(f)(2)(a)-(b) (providing for limited and simplified discovery in certain cases).

The proposal to require a reduction of the time to serve a defendant or suffer dismissal with prejudice unless good cause is shown (Rules 4 and 16) ignores difficulties plaintiffs sometimes face with service and seems to yield no particular benefit. For example, in admiralty cases, service often must be effected upon a defendant who may be at sea for months at a time, rendering the new shortened time period proposed extremely problematic. It should not become *de rigueur* in those types of cases that a motion for good cause must be filed in almost every case. The proposal moves in the opposite direction this committee took in 1993 when it amended Rule 4 to accord courts greater discretion to enlarge the 120-day period "even if there is no good cause shown." *See* Advisory Committee's Notes on Fed. Rule Civ. Proc. 4, 28 U.S.C. App., p. 663. *See also Henderson v. United States,* 517 U.S. 654, 662 (1996).

VI. Conclusion

These proposals primarily are solutions in search of a problem. They are not warranted by empirical evidence or litigation experience and likely would have adverse impacts on access to justice, which is the core value the rules should implement. I thank you for your attention, and I hope that these perspectives assist you in reaching a just and effective resolution.

Sincerely yours,

John Vail
Vice President and Senior Litigation Counsel