JOINT COMMENT ON THE PROPOSED FEDERAL RULE AMENDMENTS

FROM THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS

RULE ONE INITIATIVE

IAALS

January 28, 2014

Submitted electronically via Regulations.gov

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

Dear Committee:

We write to you today jointly as the Chair of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Executive Director of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, to comment on the proposed amendments to the Federal Rules of Civil Procedure.

BACKGROUND

In 2007, IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Justice (ACTL Task Force or Task Force) formed a partnership to study costs and delay in America's civil justice system and, if applicable, to propose solutions. Although the project was originally focused on discovery, the project was expanded to a broader examination of the civil justice system.

The goal of the project was first to determine if a problem really existed in the system and, if so, to define and examine it. As a starting point, IAALS and the Task Force worked with an outside consultant to design and conduct a survey of the Fellows of the ACTL.[1] Several major themes emerged from the survey:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

[1] *See* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT (INCLUDING 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS) 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 1 (2008), http://iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf [hereinafter IAALS/ACTL TASK FORCE SURVEY].

2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. . . .

3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial.[2]

Following the survey and additional in-depth research and analysis, in 2009 IAALS and the ACTL Task Force published a *Final Report* with twenty-nine specific suggestions (in the form of Principles) for changes to the civil procedure rules.[3] The inter-related Principles were "developed to work in tandem with one another and should be evaluated in their entirety."[4] IAALS and the Task Force intended that the Principles be tested and evaluated in pilot projects in courts around the country, and jointly developed a model set of Pilot Project Rules for this purpose.[5] A series of national surveys followed, focused on gaining insights into the challenges facing the civil justice system.[6] In addition, numerous pilot projects have been implemented and rule changes enacted around the country in an effort to improve the civil justice system.[7] Of course, at the federal level, the Judicial Conference Advisory Committee on Civil Rules has also been focused on crafting solutions to identified problems, and the current proposed federal rule amendments arise in that context.

Much of the activity in state courts and in a few federal courts around the country parallels the current proposed amendments, and for this reason, we offer the following summary of pilot projects and rule reform efforts. We have also supplemented this summary with applicable research. Finally, several of the Principles in the *Final Report* are directly relevant to

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[2] AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 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 (rev. ed. 2009), http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf [hereinafter FINAL REPORT].

[3] *Id.*

[4] *Id.* at 3.

[5] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & CIVIL JUSTICE, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES 1 (2009), http://iaals.du.edu/images/wygwam/documents/publications/Pilot_Project_Rules2009.pdf.

[6] *See, e.g.*, Corina Gerety, *Trial Bench Views: IAALS Report on Findings from a National Survey on Civil Procedure*, 32 PACE L. REV. 301 (2012); REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 (2010), http://uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf; ABA SECTION OF LITIGATION, AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (2009), http://americanbar.org/content/dam/aba/migrated/litiation/survey/docs/report_aba_report.authcheckdam.pdf; EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

[7] For a visual depiction, along with project descriptions, of current activity across the United States, visit the IAALS *Rule One Initiative* "Action on the Ground" interactive map at http://iaals.du.edu/initiatives/rule-one-initiative/action-on-the-ground.

the proposed amendments, and it is with the perspective of our report in mind that we offer the following comments.

Reform Efforts around the Country

Numerous pilot projects and rule reform efforts are in various stages of consideration and implementation around the country. In some jurisdictions, task forces have been formed and recommendations are in the process of being implemented, such as in Iowa. In others, pilot projects have been implemented and evaluations are underway, such as in Colorado and Minnesota. In others, such as New Hampshire and Massachusetts, the pilot projects have run their course and the projects have moved on to the next phase. In still other states, such as Utah, statewide rule changes were implemented directly without a pilot project. Thus, the approaches and timing of the different projects are as varied as they are geographically diverse. Nevertheless, some themes emerge from the pilot projects that are informative regarding the current proposed amendments.

Proportionality and Judicial Case Management

While it is too early to draw conclusions from the pilot projects, given their current status, nevertheless we can draw from the common purpose and design of the projects when considering the proposed federal amendments. One clear theme across many of the pilot projects is the express incorporation of proportionality in discovery. This falls directly in line with one of the proposed Principles from the *Final Report*, which states that "[p]roportionality should be the most important principle applied to all discovery."[8] Pilot projects around the country have incorporated the concept of proportionality in numerous ways. A corresponding theme that resonates across many of the projects is that active judicial case management has been closely intertwined with the goal of achieving proportionality in discovery. As with proportionality, this theme is consistent with the *Final Report*, which stressed the importance of active judicial management, including early and productive initial pretrial conferences.[9]

The first pilot project to follow on the heels of the *Final Report* was implemented by the Massachusetts Boston Litigation Session (BLS). The pilot project applied to all new cases, on a voluntary basis, starting on January 4, 2010, as well as to those that had not already held an initial Rule 16 conference by that date.[10] The project ran for an initial one-year period and was extended for an additional year, ending December 2011.[11] The BLS pilot project was a direct outgrowth of the *Final Report*, and the pilot project rules explicitly cite to the report.[12] So as to achieve proportionality in discovery, the BLS Pilot Project provided that:

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[8] FINAL REPORT, *supra* note 2, at 7.
[9] *Id.* at 18-21.
[10] *See* Press Release, Massachusetts Supreme Judicial Court, Superior Court Implements Discovery Pilot Project (Dec. 1, 2009), http://www.mass.gov/courts/press/pr120109.html.
[11] *See* Press Release, Massachusetts Supreme Judicial Court, New Leadership in Superior Court's Business Litigation Session to Begin in January, Pilot Project to Streamline Discovery Extended (Dec. 7, 2010), http://www.mass.gov/courts/press/pr120710b.html.
[12] *See* BUS. LITIG. SESSION, MASS. SUPERIOR COURT, BLS PILOT PROJECT, http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf (last visited Jan. 24, 2014) [hereinafter BLS PILOT PROJECT].

> The court, with the parties, will determine the scope and timing of permitted discovery, generally at the initial Rule 16 Case Management conference. The concept of limited discovery proportionally tied to the magnitude of the claims actually at issue will be the guiding principle. In making a proportionality assessment, the factors to be considered include, but are not limited to, the needs of the case, the amount in controversy, the parties' resources, and the complexity and importance of the issues at stake in the case.[13]

The pilot project also provided that "[d]iscovery in general and document discovery in particular will be limited to documents and information that would enable a party to prove or disprove a claim or defense, or enable a party to impeach a witness."[14] The pilot project included a preference for staged discovery, adopted initial disclosures, and clarified that electronic discovery is likewise limited by proportionality.[15] Beyond this, "the parties will conduct no additional discovery absent agreement or a court order, which will be made only after a showing of good cause and proportionality."[16]

In what has become a continuing theme, the BLS project's focus on proportionality was closely tied to early and active judicial case management. The project provided that the parties were expected to confer "early and often about discovery" and to "make periodic reports of these conferences to the court."[17] In addition, the court played a key role itself in conducting "periodic litigation control conferences concerning discovery, beginning promptly after service of the complaint, either on the request of a party or on the court's initiative."[18]

The Boston project stands out as one of the few projects with some preliminary data.[19] A brief report on the preliminary survey findings noted that "[a] significant majority of respondents concluded that the pilot was 'much better' or 'somewhat better' than other BLS cases with respect to each of the following factors: the timeliness and cost-effectiveness of discovery, the timeliness of case events, access to a judge to resolve discovery issues, absence of unnecessary burdens in producing discovery, and cost-effectiveness of case resolution."[20] As compared to a regular BLS case, 70% of respondents said their experience was "much better" or "somewhat better."[21] When compared to other non-BLS cases in Massachusetts state court, the results were even better, with nearly 80% responding that the "BLS pilot provided a much better or somewhat better overall experience than a regular non-BLS session."[22] A final report on the survey results is expected in the spring of 2014.

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[13] *Id.* princ. A.
[14] *Id.* princ. D.
[15] *Id.* princs. B, C, F.
[16] *Id.* princ. G.
[17] *Id.* princ. H.
[18] *Id.*
[19] MASSACHUSETTS SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT PRELIMINARY SURVEY FINDINGS (Sept. 2012) (included as Attachment A).
[20] *Id.* at 2.
[21] *Id.*
[22] *Id.*

New Hampshire was another early pilot project and outgrowth of the *Final Report*.[23] In August 2009, at the request of then Chief Justice John T. Broderick Jr., a committee was established to determine whether and to what degree the problems with the civil justice system identified at the national level apply to the New Hampshire state system. The committee developed the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project, which was launched in two New Hampshire Superior Courts on October 1, 2010.[24] The rules were later expanded to additional counties, and then implemented statewide effective March 1, 2013.[25] The pilot project rules implemented changes to the Superior Court pleading and discovery rules, with specific focus on replacing notice pleading with fact-based pleading and requiring early initial disclosures after which only limited additional discovery is permitted. Proportionality and case management were not the main focus of the pilot project rules, although proportionality was included in reference to electronically stored information (ESI). PAD Pilot Project Rule 5 required that requests for ESI "be made in proportion to the significance of the issues in dispute."[26] Where such a request is considered to be out of proportion, "at the request of the responding party, the court may determine the responsibility for the reasonable costs of producing such ESI."[27] The National Center for State Courts has conducted an evaluation of the New Hampshire pilot project and a final report is expected shortly.

In contrast to New Hampshire, proportionality and case management are both central features of the Colorado Civil Access Pilot Project (CAPP), which applies generally to business actions, with a few exceptions, in select Colorado judicial districts.[28] The pilot project went into effect on January 1, 2012, in four judicial districts, for a two-year period that has since been extended for one additional year. At the request of the Colorado Supreme Court, IAALS is studying the effect of the pilot, with a preliminary report expected in the spring of 2014 and a final evaluation in the fall of 2014.[29] Pilot Project Rule (PPR) 1 describes the scope of the pilot project, and provides in part:

> At all times, the court and the parties shall address the action in ways designed to assure that the process and 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.

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[23] *See generally* N.H. JUD. BRANCH, SUPERIOR COURT – CIVIL RULES OF PROCEDURE, http://www.courts.state.nh.us/superior/civilrulespp/index.htm (last visited January 24, 2014).

[24] *See* SUPREME COURT OF NEW HAMPSHIRE, ORDER ADOPTING SUPERIOR COURT PAD PILOT RULES (N.H. Apr. 6, 2010), *available at* http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf [hereinafter NEW HAMPSHIRE ORDER].

[25] *See* SUPREME COURT OF NEW HAMPSHIRE, ORDER (N.H. Jan. 9, 2013), *available at* http://www.courts.state.nh.us/supreme/orders/01-09-13-Order-Adopting-Temporary-Amendment-to-Court-Rules.pdf. New Hampshire has since adopted new Rules of Civil Procedure for the New Hampshire Superior Court that incorporate the prior PAD Pilot Project Rules. *See* News Advisory, N.H. Jud. Branch, Supreme Court Adopts New Civil Procedure Rules (May 22, 2013), http://www.courts.state.nh.us/press/2013/newcivilrules.htm.

[26] NEW HAMPSHIRE ORDER, *supra* note 24, PR 5(c).

[27] *Id.*

[28] *See Colorado Civil Rules Pilot Project*, JUD. BRANCH ST. OF COLO., http://www.courts.state.co.us/Courts/Civil_Rules.cfm (last visited Jan. 24, 2014). For example, employment cases and construction defect actions are not included.

[29] *See* CORINA D. GERETY, UPDATE ON THE COLORADO CIVIL ACCESS PILOT PROJECT EVALUATION (Oct. 2013), http://iaals.du.edu/images/wygwam/documents/publications/Update_on_Colorado_CAPP_Evaluation.pdf.

> 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.[30]

This concept of proportionality is woven throughout the rules. PPR 9.1 provides that "[d]iscovery 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 1.3."[31] PPR 9.2 goes on to provide that "[d]iscovery 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."[32] Thus, the incorporation of proportionality is closely tied to increased judicial case management. Unless requested sooner, the judge must hold an initial case management conference no later than 49 days after the answer and responsive pleadings are filed. Lead counsel is required to be in attendance, and the parties must submit a detailed joint report at least seven days prior to the conference. Following the initial case management conference, the judge must issue an initial case management order setting forth the case schedule and permitted discovery. In determining whether to permit or exclude discovery, the court must apply the proportionality factors referenced above.[33] Thereafter, "[d]iscovery 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."[34] The expectation for judicial involvement continues, with provisions providing expressly for "Ongoing Active Case Management."[35]

CAPP includes several additional provisions that impact discovery and the proportionality analysis. The parties must file early and staggered initial disclosures with the court. In addition, a single judge is expected to handle all pretrial and trial matters. Parties are limited to one expert on any given issue, and there are no depositions or other discovery of experts beyond the report, to which the expert is limited on direct examination.[36] These aspects of CAPP are likewise drawn from the Task Forces' Proposed Principles, and offer a reminder of the inter-related nature of the 29 Proposed Principles, which the Task Force recommended as a whole in order to have the most impact.

Minnesota has likewise chosen to implement statewide rule changes, which went into effect in July of 2013. The Minnesota Supreme Court established a Civil Justice Reform Task Force that reviewed civil justice reform initiatives from other jurisdictions and recommended

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[30] CHIEF JUSTICE DIRECTIVE 11-02: ADOPTING PILOT RULES FOR CERTAIN DISTRICT COURT CIVIL CASES, PPR 1.3 (Colo. Oct. 7, 2011), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amendedappendixes12-12-11.pdf [hereinafter Chief Justice Directive 11-02].
[31] *Id.* PPR 9.1.
[32] *Id.* PPR 9.2.
[33] *Id.* PPR 7.2.
[34] *Id.* PPR 9.2.
[35] *Id.* PPR 8.
[36] *See generally id.* PPRs 3, 5, 10.

changes to facilitate the efficient and cost-effective processing of civil cases in Minnesota.[37] The rule changes include incorporation of a proportionality consideration for discovery, the adoption of the federal regime of automatic disclosures, the adoption of an expedited procedure for nondispositive motions, and an expedited litigation track pilot program.[38]

The Minnesota rules incorporate proportionality directly into the scope of discovery along with the proportionality factors from Minnesota's Rule 26.02(b)(3):

> Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Upon a showing of good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.[39]

Thus, Minnesota incorporated proportionality and the factors into the scope of discovery, but in a different order and without deleting the remaining language from the prior rule.

In terms of case management, Minnesota's rules already provided for a discovery conference with the court.[40] The rule amendments added a mandatory discovery conference between the parties, followed by the parties filing the proposed written discovery plan with the court.[41] Minnesota also adopted an expedited, informal non-dispositive motion process, which encourages parties to consider whether non-dispositive motions can be informally resolved through a teleconference with the judge. The parties may, but are not required to, submit short letters prior to the telephone conference.[42] Minnesota is evaluating the results of the amendments, in consultation with the National Center for State Courts.

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[37] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: FINAL REPORT (2011), http://www.mnbar.org/sections/outstate-practice/Final%20civil%20reform%20task%20force%20report.pdf.

[38] ORDER ADOPTING AMENDMENTS TO THE RULES OF CIVIL PROCEDURE AND GENERAL RULES OF PRACTICE RELATING TO THE CIVIL JUSTICE REFORM TASK FORCE (Minn. Feb. 4, 2013), *available at* http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-04%20Order%20Civ%20Proc%20&%20Gen%20Rls%20Amendments.pdf.

[39] MINN. R. CIV. P 26.02(b)(3).

[40] MINN. R. CIV. P. 26.06.

[41] *Id.*

[42] MINN. R. CIV. P. 115.04(d).

As in Minnesota, the Iowa Supreme Court established the Iowa Civil Justice Reform Task Force to develop a blueprint for civil justice reform in Iowa. Following a survey to inform its work, the Task Force issued a final report, which included recommendations for a business court pilot project, adoption of the Federal Rules' initial disclosure scheme, and proposals focused on differentiated case management.[43] Proposed rule amendments have been released for public comment, with the comment period extended through March 17, 2014.[44] Iowa has also incorporated proportionality into the scope of discovery by adding a subsection "b" to the scope of discovery in Rule 1.503(1) that provides that "[a]ll discovery is subject to the limitation of rule 1.503(8)."[45] Rule 1.503(8) mirrors Fed. R. Civ. P. 26(b)(2)(C). With regard to this change, the court's comments note that "[m]oving the provision to the general discovery provisions emphasizes the proportionality principle and imposes an independent obligation upon the court to police the proportionality of discovery."[46]

Utah has taken a different approach to achieving proportionality in discovery. Utah has implemented broad-sweeping, permanent statewide rule changes that mandate proportionality through tiers of discovery based on the amount in controversy.[47] The Utah Supreme Court implemented significant statewide changes to the rules governing disclosure and discovery in order to reverse the default from unlimited discovery to proportional and cost-effective discovery. The rules were the result of considerable work on the part of the Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure, which included extensive outreach by the Committee to bar groups, judges, and other interested organizations to inform them about, and receive comments on, the proposed changes prior to the official notice and comment period. The rules went into effect statewide on November 1, 2011.

In Utah, the scope of discovery in Rule 26(b)(1) was revised to allow discovery of "any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below."[48] Proportionality is further defined in Rule 26(b)(2), which provides that "[D]iscovery and discovery requests are proportional if:

> (A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;
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> (B) the likely benefits of the proposed discovery outweigh the burden or expense;

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[43] IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM (2012), http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf.
[44] ORDER REQUESTING PUBLIC COMMENT REGARDING PROPOSED AMENDMENTS TO IOWA DISCOVERY RULES AND A PROPOSED EXPEDITED CIVIL ACTION RULE (Iowa Nov. 1, 2003), *available at* http://www.iowacourts.gov/wfdata/frame3491-1263/File1.pdf.
[45] IOWA PROPOSED DISCOVERY AMENDMENTS, PROPOSED IOWA R. CIV. P. 1.503(1), http://www.iowacourts.gov/wfdata/frame3491-1263/File2.pdf.
[46] *Id.* PROPOSED RULE 1.503(8)(c), committee advisory note 24.
[47] *See* Joe Stultz, *A Primer to the New Utah Rules of Civil Procedure*, Utah Bar J. (Nov. 7, 2011), *available at* http://webster.utahbar.org/barjournal/2011/11/a_primer_to_the_new_utah_rules.html.
[48] *See* UTAH R. CIV. P. 26(b)(1), http://www.utcourts.gov/resources/rules/urcp/ (last visited Jan. 24, 2014.

(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(D) the discovery is not unreasonably cumulative or duplicative;

(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.[49]

The Utah rules are explicit about the burden in discovery, providing under Rule 26(b)(3) that the "party seeking discovery always has the burden of showing proportionality and relevance."[50]

The Utah rules also adopt an initial disclosure regime,[51] with the intent that discovery costs will be reduced by requiring parties to produce, "at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony."[52] In order to make the initial disclosures meaningful, the penalty for failure to timely disclose is, with some exception, that the evidence may not be used in the party's case-in-chief.[53]

To complement these meaningful early disclosures, Utah's new discovery rules provide for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy. The tiers provide for total fact deposition hours; numerical limits for interrogatories, requests for production, and requests for admission; and days to complete fact discovery.[54] The tiers are divided into 1) actions claiming $50,000 or less in damages, 2) actions claiming more than $50,000 and less than $300,000 in damages, and actions claiming non-monetary relief, and 3) actions claiming $300,000 or more.[55] For "extraordinary discovery" beyond the discovery specified by tier, the parties may stipulate that such discovery is necessary and proportional, or a party may file a motion seeking such discovery after conferring with opposing counsel in good faith.[56] Thus, judges become active in the proportionality analysis to the extent the parties believe discovery is warranted beyond that outlined by the applicable tier, and where the parties are unable to reach a stipulation. The National Center for State Courts is evaluating Utah's rule changes.

Other projects have been implemented with a more narrow focus. The Seventh Circuit Electronic Discovery Pilot Program originated in the U.S. District Court for the Northern District

[49] *Id.* RULE 26(b)(2).
[50] *Id.* RULE 26(b)(3).
[51] *Id.* RULE 26(a).
[52] *Id.* RULE 26, committee advisory note.
[53] *Id.* RULE 26(d)(4).
[54] *Id.* RULE 26(c)(3).
[55] *Id.* RULE 26(c)(3).
[56] *Id.* RULE 26(c)(6); *see also id.* Rule 29.

of Illinois as a response to widespread discussion about the rising burden and cost of electronic discovery.[57] The E-Discovery Committee developed Principles Relating to the Discovery of Electronically Stored Information, which are intended to incentivize early information exchange and meaningful cooperation on commonly encountered issues related to evidence preservation and discovery.[58] These Principles are implemented through standing orders issued by individual judges voluntarily participating in the program. The program has run through several phases, with Phase One running from October 2009 through March 2010, and Phase Two running from May 2010 to May 2012. The pilot project is ongoing and is currently in Phase Three. Principle 1.03 expressly incorporates proportionality, providing that the "proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable."[59]

While multiple pilot projects are still in the evaluation stage, the Seventh Circuit Pilot Project has been evaluated at the end of Phase One and Phase Two, and the evaluations provide useful initial data from the projects. The Phase One and Phase Two survey results reflect that attorney respondents frequently identify the focus on proportionality as one of the most useful aspects of the Pilot Program.[60] The Seventh Circuit concluded from the Phase One survey that "the call for a significant focus on proportionality of discovery is welcome and generally is not seen as impeding the just determination of cases."[61] The responses from judges have been even more supportive, with 63% of judge respondents from the Phase Two survey reporting that the proportionality standards played a significant role in the development of discovery plans, and 48% reporting that application of the Principles decreased or greatly decreased discovery disputes brought before the court.[62]

In contrast, other projects have focused more specifically on case management. In early 2011, the Judicial Improvements Committee (JIC) of the U.S. District Court for the Southern District of New York formed an attorneys' Advisory Group, drawn from many sectors of the bar, to work with the JIC in developing a pilot project focused on judicial pretrial case management of complex cases. The approved Pilot Project Regarding Case Management Techniques for Complex Civil Cases took effect on November 1, 2011, and has been extended to run through September 30, 2014.[63] The pilot project anticipates an early and comprehensive initial pretrial conference, at which parties must provide an overview of the issues in the case and the importance of discovery to those issues so that the court can made a "proportionality assessment" and limit discovery as appropriate. The rules for the pilot refer to the factors in Rule

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[57] *See generally* www.discoverypilot.com (last visited Jan. 24, 2014).
[58] SEVENTH CIRCUIT ELECTRONIC DISCOVERY COMM., PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION (Rev. Aug. 1, 2010), http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf [hereinafter SEVENTH CIRCUIT PRINCIPLES].
[59] *See id.*, princ. 1.03.
[60] SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, FINAL REPORT ON PHASE TWO: MAY 2010–MAY 2012, at 72 (2012), http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf [hereinafter FINAL REPORT ON PHASE TWO].
[61] *Id.*
[62] *Id.* at 73.
[63] *See* JUDICIAL IMPROVEMENTS COMM. OF THE S. DIST. OF N.Y., PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES (2011), http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

26(b)(2)(C)(iii) for the proportionality assessment.[64] The focus of the pilot project is case management, and the pilot provides for multiple avenues to achieve this goal. In terms of pretrial conferences, the rules provide that the "Court shall make its best effort to hold an in-person, initial pretrial conference within 45 days of service on any defendant of the complaint."[65] The parties must provide the court an overview of the case at that time "so that the Court can make a proportionality assessment and limit the scope of discovery as it deems appropriate."[66] The rules also provide for pre-motion conferences, subject to some exceptions, allowing for the resolution of most disputes by letter and hearing rather than full briefing.[67]

As in the Southern District of New York, the District of Kansas has nodded to the concept of proportionality as it already exists in the Federal Rules. The District of Kansas' Rule 1 Task Force developed recommendations for achieving the goals of Rule 1, which have been implemented through revisions to the court's four principle civil case management forms and guidelines, as well as corresponding amendments to the local rules.[68] The Guidelines for Cases Involving Electronically Stored Information provides that "Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines," citing Fed. R. Civ. P. 26(b)(2)(C)(iii) and 26(g)(1)(B)(iii).[69]

Cooperation

Several of the above pilot projects and rule change efforts around the country have also explicitly incorporated the concept of cooperation. The Seventh Circuit Electronic Discovery Pilot Project was an early adopter of cooperation. Principle 1.02 directly incorporates cooperation, providing that "[a]n attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions."[70] The survey following Phase Two of the pilot found that the cooperation principle was not a source of controversy, and that may respondents found it "the most useful aspect of the Principles." Of those respondents who felt the Principles had an effect on their case, the majority viewed the Principles as having a positive effect on the level of cooperation between counsel and on counsel's ability to zealously represent his or her client.[71] The report concluded that this "tends to confirm that there is not a conflict between these two concepts."[72]

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[64] *Id.* Exhibit A.
[65] *Id.* sec. I.B.
[66] *Id.* sec. I.B.3.
[67] *Id.* sec. II.B.
[68] U.S. District Court for the District of Kansas, Rule 1 Task Force Update (Aug. 6, 2013), http://www.ksd.uscourts.gov/rule-1-task-force-update/.
[69] U.S. District Court for the District of Kansas, Guidelines for Cases Involving Electronically Stored Information [ESI], Purpose, http://www.ksd.uscourts.gov/rule-1-task-force-documents/ (last visited Jan. 24, 2014) [hereinafter Kansas Guidelines].
[70] Seventh Circuit Principles, *supra* note 58, princ. 1.02 (Cooperation).
[71] Final Report on Phase Two, *supra* note 60, at 51-52.
[72] *Id.* at 52.

The District of Kansas has explicitly incorporated cooperation in its Guidelines for Cases Involving Electronically Stored Information [ESI]. The guidelines provide that "[a]n attorney's representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions."[73] The Report of the Parties' Planning Conference requires the parties to note which procedures have been agreed to in order to "encourage cooperation, efficiency, and economy in discovery, and also to limit discovery disputes."[74] The court's model Scheduling Order incorporates this same concept.[75]

The Southern District of New York has incorporated the concept not as part of its pilot project, but as part of its local rules. Local Civil Rule 26.4(a) provides that counsel "are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures."[76]

Additional Research

In addition to the pilot project evaluations mentioned above, IAALS and the ACTL have recently conducted research in the area of case management. *Working Smarter, Not Harder: How Excellent Judges Manage Cases* is the culmination of a joint project between IAALS and the ACTL, which involved interviewing nearly 30 state and federal trial court judges, from diverse jurisdictions nationwide, who were identified as being outstanding and efficient case managers.[77] The report documents their recommendations and key practices. In their own words, these judges share their strategies in hopes that their experience can serve as a model for other judges who want to replicate their success, to the benefit of the parties who appear before them. This report offers judges a qualitative look at the successful case management practices that their peers are using to ensure a just, speedy, and inexpensive process.

Interestingly, many of the proposed case management amendments reflect practices that the *Working Smarter* judges are already using in their courtrooms to achieve efficiency. Several of the themes that emerged are right on point:

1. Assess a case and its challenges at the outset. Use active and judicial involvement when warranted to keep the parties and the case on track.

2. Convene an initial case management conference early in the life of a case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.

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[73] KANSAS GUIDELINES, *supra* note 69, at 1.
[74] U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS, RULE 26(F) REPORT OF THE PARTIES' PLANNING CONFERENCE 5, http://www.ksd.uscourts.gov/rule-1-task-force-documents/ (last visited Jan. 24, 2014).
[75] U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS, SCHEDULING ORDER, http://www.ksd.uscourts.gov/rule-1-task-force-documents/ (last visited Jan. 24, 2014).
[76] S.D.N.Y. LOCAL CIVIL RULE 26.4(a).
[77] AM. COLL. OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (2014), http://iaals.du.edu/workingsmarter and www.actl.com – listed on the Home page under "Highlights"[hereinafter WORKING SMARTER] (included as Attachment B).

3. Reduce and streamline motion practice to the extent appropriate and possible. Rule quickly on motions.

4. Create a culture of collegiality and professionalism by being explicit up front with lawyers about the court's expectations, and then holding the participants to them.[78]

There was strong consensus among the judges interviewed that becoming involved at the earliest stage of a case is critical, and some judges even start as early as reviewing the complaint as soon as it is filed. The judges found the initial case management conference to be a key time in the case to get a good understanding of the case and the parties. The judges also found motions practice to be a source of cost and delay. The judges overwhelmingly responded that promptly ruling on such motions can have a significant positive impact on the case. The judges also spoke about the importance of collegiality and professionalism among lawyers, and most made their expectations of civility explicit during their initial discussions with counsel.[79]

Analysis and Comments in Light of the Task Force's Proposed Principles

When IAALS and the Task Force published the *Final Report*, we recognized that there was "much more work to be done."[80] The report was intended to inspire substantive discussion, and action, by all who have a stake in America's civil justice system. We applaud the Committee, and its Subcommittees, for the time and effort that have been spent analyzing and proposing solutions to the current challenges facing our system.

The current case management proposals recognize that the early stages of litigation often take too long, and that early and active involvement by the judge can lead to increased efficiency. This is consistent with the Principles, the research to date, and the efforts of others around the country who have implemented pilot projects and rule changes.

First, we applaud the proposed change to Rule 16(b)(2) as resonating with the spirit of Rule 1. We are generally in favor of anything that will make the system of civil justice more expeditious. In our Report, we observed that "[i]n many jurisdictions, today's system takes too long and costs too much."[81]

Second, we endorse the changes being proposed to Rule 16(b)(1) but we hope that in time, and with some experience, the Committee will see fit to make initial pretrial conferences mandatory as we believe, as we said in our *Final Report*, that "[i]initial pretrial conferences should be held as soon as possible in all cases . . .". We note the Committee's observation that "there are cases in which the judge is confident that a Rule 26(f) report prepared by able lawyers provides a sound basis for a scheduling order without further ado" but we believe that a well-run

[78] *Id.* at 1-2.
[79] *Id.*
[80] FINAL REPORT, *supra* note 2, at 25.
[81] *Id.* at 2.

initial pretrial conference could do more than simply serve as the basis for a scheduling order. In our survey of Fellows of the American College, we found that 67% of our respondents thought that such conferences inform the court about the issues in the case and 53% thought that such conferences identified and, more importantly, narrowed the issues.[82] Moreover, 66% of our respondents reported that early intervention by judges helped to limit discovery and 71% said that "early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client."[83]

Pretrial conferences provide an opportunity for the judges to get involved, learn about the issues, and tailor the case—and particularly discovery—so as to achieve a just, cost-effective, and expeditious resolution of the case. Multiple pilot projects have emphasized the importance of the initial pretrial conference, particularly where proportionality has been incorporated into the scope of discovery. If proportionality is included in the scope of discovery, then it reasonably falls to the judge to make that determination, and early engagement by the judge facilitates a fair and appropriate analysis.

Third, we support the new Rule 16(b)(3)(v), which permits judges to direct that before moving for an order relating to discovery, the movant must request a conference with the court. Several jurisdictions around the country, including Minnesota and the Southern District of New York, have implemented similar procedures designed to get the court involved early and without the expense of written briefing, with very positive results. We also found that this practice was utilized and recommended by many of the judges who were interviewed for *Working Smarter, Not Harder: How Excellent Judges Manage Cases*. The judges found that it provides immediate resolution without holding up the case, while also acting as a deterrent factor.[84]

Fourth, we agree with the proposal to modify Rule 16(b)(3) and Rule 26(f) to permit a scheduling order and discovery plan to address preservation and Rule 502 agreements. This is entirely consistent with our *Final Report*, where we recommended that "[p]romptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation." We went on to recommend that, where the parties cannot agree, the court should enter an order specifying which electronic information should be preserved.[85] We do raise one issue for the Committee. The current proposal incorporates the concept of preservation into discovery plans and scheduling orders only in relation to electronic discovery. While the *Final Report* also stresses the importance of preservation discussions between counsel in relation to electronic discovery, we believe it is important that preservation be discussed by the parties and incorporated into scheduling orders in terms of preservation of all evidence, rather than only in the context of electronic discovery.

Like the focus on case management, we applaud the Committee's attempt to bring a proportionality evaluation to document requests by making the proportionality exercise that is now found in Rule 26(b)(2)(c)(iii) a substantive limitation on the type of discovery that may be obtained under Rule 26(b)(1). In our *Final Report*, we recommended that "[p]roportionality should be the most important principle applied to all discovery" and the Committee's proposal is

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[82] *Id.* at 19.
[83] *Id.*
[84] WORKING SMARTER, *supra* note 77, at 23-24.
[85] FINAL REPORT, *supra* note 2, at 12.

very much in line with our recommendation. As the pilot projects and rule reforms around the country reflect, there are many different ways to incorporate this concept into the rules. With specific reference to electronic discovery, we recommended that a proportionality determination should "tak(e) into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens."[86]

How proportionality is incorporated into the analysis, its effect on discovery on the ground, and the role of the court (both how and when the court will engage in the proportionality analysis) are all critical. It might be useful for the Committee to explore the process it envisions – perhaps in a Comment. For example, we assume that the existing procedures that govern resolution of objections to relevance of requested documents would apply similarly to objections based on proportionality. There is, of course, the issue of who has the burden of proof that the proposed Rule does not address. We would recommend that the party making the objection would have the burden.

There is also a proposal to add to Rule 26(c)(1)(B) a recognition of the authority of the court to enter a protective order that allocates the expenses of discovery. The cost of preserving, collecting, and reviewing ESI should generally be borne by the producing party, consistent with the historical approach in America. We do recognize, and agree, however, that "courts should not hesitate to arrive at a different allocation of expenses in appropriate cases."[87] The proposed amendment is consistent with this principle.

Likewise, we agree with the Committee's proposed changes to Rule 34(b)(2)(B) requiring that objections be stated with specificity and Rule 34(b)(2)(c) requiring the objector to state whether any otherwise responsive materials are being withheld on the basis of the stated objection.

Finally, we applaud the change to Rule 1 that makes it clear that the court and the parties share responsibility for carrying out the high aspiration of that Rule and we sincerely hope that it will encourage cooperation. Our one suggestion would be to add "attorneys" so as to make the point that the responsibility falls equally on attorneys.

[86] *Id.* at 14.
[87] *Id.* at 15.

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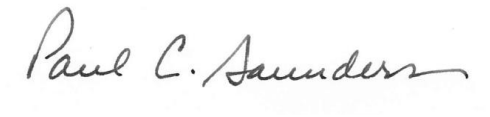
In closing, we appreciate the opportunity to offer these comments to the Committee and we stand ready to answer any questions that the Committee may have.

Sincerely,



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