COMMENTS NEEDED ON PROPOSED CHANGES TO THE FEDERAL RULES

The Judicial Conference of the United States is proposing to change drastically the Federal Rules of Civil Procedure to limit discovery significantly. On August 15, 2013, a six-month public comment period opened on the proposed rule changes. The Judicial Conference needs to hear from those who oppose these proposed amendments to the Rules throughout the comment period and at each of the hearings. The proposed Rules changes will have an impact on your practice and we need you to tell the Judicial Conference how.

The outline below addresses some issues you might consider when drafting your comments. We encourage you to include personal stories from your own cases in your comments. You may submit comments on one or several of the proposed changes. There is no need to include all the topics and talking points; they are designed to allow you to pick and choose from a range of topics so that your comments will be uniquely yours. A chart showing a redline of the proposed changes and the Advisory Committee's rationale is attached.

Introduction

1. Overview of your practice or practice area.

2. Importance of access to justice for your clients and importance of the Federal Rules in ensuring that access.

Impact of the Changes to the Federal Rules on Your Practice or Practice Area

Some of the proposed changes are likely to benefit your practice. At some point in your comments, it would be a good idea to mention some or all of these. The proposed changes include allowing service of discovery requests before the Rule 26(f) conference, requiring an informal conference with the court before discovery motions are filed, and reducing the time between service and a Rule 16 conference. You may also wish to include reference to the pilot project of Initial Protocols for Employment Discrimination Cases Alleging Adverse Action (published in late 2011) as a step taken at the mutual suggestion of the employees and management bars that can improve the handling of cases significantly.

Among the proposed rules that raise issues for our practice, and on which you might want to comment, are:

1. Rule 26(b): New "proportionality" standard for discovery

- Describe how the proposed "proportionality" standard, and in particular the specific consideration of "whether the burden or expense of the proposed discovery outweighs its likely benefit" will have an impact your ability to represent your clients.
- Using specific examples from your practice, discuss how this fundamental change in standard will harm your clients. Consider including examples of situations where the defendant argued that it was too burdensome or expensive to produce discovery that later proved fundamental to your case.

2. Rule 30 and Rule 31: Limitations on the Number of and Amount of Time for Depositions
    - Describe the important role depositions play in the discovery process and the array of people you depose in a typical case (i.e. individual defendants, decision-makers, current employee witnesses, human-resource representatives, experts, etc.). Discuss how these deponents and/or the information they provide are necessary to the case. Make clear that you are almost certain to face a summary-judgment motion in every case, and explain how a a reduction in the number of depositions by more than half, and limiting the time for questioning witnesses would cripple your ability to get your case to trial, and how the reduction would prejudice the ultimate trial.
    - Discuss examples from your cases where you needed to take more than five depositions. Consider using specific examples where a large number of depositions were necessary to support your client's claims or where a key piece of discovery was found in later depositions.

3. Rule 33 (Interrogatories) and Rule 36 (Requests for Admissions): Limitations on the number of each, including all discrete subparts.
    - Discuss the important role that interrogatories and requests for admission play in your cases. How will decreasing the number of these tools lead to less information, increase aggressive motion practice, and increase collateral litigation over the number and form of interrogatories and requests for admissions? If you had any experience with the collateral litigation associated with mandatory Rule 11 sanctions from 1983-1993, please include it in this section.
    - Describe specific examples from your cases where interrogatories and requests for admission were critical to your case. Specifically consider whether that information would be available under these new limitations.

4. Rule 4: Limiting the Time for Service from 120 days to 60 days.
    - Discuss the importance of having adequate time for service; the difficulty of locating individual defendants is something you may be able to discuss.

- Describe examples from your cases where more than 60 days was needed for service.

5. Rule 37(e): Sanctions for Failure to Cooperate in Discovery
    - Discuss how defendants will abuse the removal of the "safe harbor" provision for preservation of electronically stored information and the new presumptive standard for when a court may cure or sanction failure to preserve any evidence, not just electronically stored information.
    - Describe any experiences you have had with Rule 37(e) sanctions in the courts and consider how this proposed change would have impacted your ability to get sanctions under Rule 37(e).

<u>General Policy Points and Themes for You to Consider in your Comments</u>

- Discuss the importance of Rule 1's statement that the Civil Rules are intended to assure the just and speedy determinations; perhaps suggest that the proposed changes place too much emphasis on limiting the expenses involved in litigation, and/or that they will not achieve that result and may even have the opposite effect.
- Discuss how the cumulative impact of these proposed changes to the Rules will have a serious adverse impact your practice.
- Discuss how the closing of the courthouse doors through procedural changes like these proposed Rules will affect your ability to hold wrongdoers accountable. Consider how the proposed Rules will make it easier for defendants to hide relevant information.
- Consider the importance of discovery in ensuring justice for your clients. Discuss how limited discovery harms a plaintiff's ability to recover from those who harmed her. In particular, mention how these changes will most harm those cases where the claims are fact-intensive, like civil rights and employment cases. Include any other categories of plaintiff in this discussion based on your practice and expertise. Consider other kinds of cases that will also be unduly affected (i.e. complex commercial disputes, intellectual property matters, whistleblowers, antitrust claims, products liability, etc.).
- Discuss tactics you have seen defendants use to avoid producing discovery.
- Although these changes are intended to be presumptive, they will eventually become a narrow standard with which every plaintiff must comply. Consider how the presumptive effect of these proposed Rules will have a negative impact on discovery. If you can point out examples of presumptive rules that have become, in effect, mandatory, cite them.
- Reflect on how these proposed Rules shift the burden of production to plaintiffs. "Disproportionate " will become the new "burdensome," but with a cruel twist: the burden of proof now will be on the plaintiff, despite the truth that defendants control the greatest part of the information related to the proportionality inquiry, and, indeed, to the subject of the case itself.
- Discuss how the proposed Rules will increase costs for you and your clients.

How To Submit Comments

Comments are due no later than February 15, 2014. We encourage you to submit your comments **by October 1, 2013**, one month prior to the first public hearing.

The procedure for submitting public comments has changed from previous experience. Please note the new procedures. Comments may be submitted electronically by following the instructions at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx. Hard copy submissions may be mailed to the following address:

> Committee on Rules of Practice and Procedure
> Administrative Office of the United States Courts
> One Columbus Circle, NE
> Suite 7-240
> Washington, DC 20544

All comments are made part of the official record and are available to the public. Comments submitted to the Advisory Committee in advance of their April 2013 meeting will receive a docket number and appear in the public record. Please check the Regulations.gov site after August 21, 2013 to find those comments.

Testifying At Public Hearings

The Advisory Committee on the Civil Rules will hold hearings on the proposed amendments on the following dates:

- Washington, D.C., on November 7, 2013,
- Phoenix, Arizona, on January 9, 2014, and
- Dallas, Texas, on February 7, 2014.

Members who wish to present oral testimony should coordinate with NELA Staff about appearing at public hearings on these proposals.

If you have any questions about this template, the proposed amendments, the process for submitting comments, or participating in the public hearings, please contact Rebecca Hamburg Cappy (rcappy@nelahq.org; (415) 296-7629) or Julie M. Strandlie (jstrandlie@nelahq.org; (202) 898-2880).

National Employment Lawyers Association

SUMMARY OF PROPOSED DISCOVERY RULE CHANGES[1]
ADVISORY COMMITTEE ON CIVIL RULES
(Updated August 16, 2013)

Table 1 contains the proposed changes that NELA recommends its members prioritize in their comments to the Advisory Committee. Table 2 enumerates the additional changes being considered by the Advisory Committee, some of which may be beneficial. Following the tables are proposals that were abandoned by the Advisory Committee prior to publication.

TABLE 1. PRIORITY PROPOSED RULES TO CHALLENGE

RULE	PROPOSED CHANGES[2]	ADVISORY COMMITTEE RATIONALE[3]
Rule 4: Time Limit for Service	**(m) Time Limit for Service.** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *	* Shortens time for service from 120 to 60 days. * The Advisory Committee hopes that "This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation."

[1] The complete package of proposals and Advisory Committee comments is available at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.
[2] This column contains the redlined version of the proposed changes to the current Federal Rules of Civil Procedure.
[3] This column is based on a review of the Advisory Committee Report to the Standing Committee for the Standing Committee's January 2013 meeting. Standing Committee on Civil Rules Agenda Book, "Advisory Committee Report," 229 (January 2013), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

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RULE	PROPOSED CHANGES[2]	ADVISORY COMMITTEE RATIONALE[3]
Rule 30: Oral Depositions	**(a) When a Deposition May Be Taken. * * *** **(2) *With Leave*.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * **(d) Duration; Sanction; Motion to Terminate or Limit.** **(1) *Duration*.** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of ~~7~~ 6 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.	* This rule reduces the number of presumptive depositions from 10 to 5. * The Advisory Committee recognized that some cases legitimately need more than 5 depositions and allows that parties may stipulate to a greater number. Where parties can't agree, the courts are instructed to be "guided by the scope of discovery defined in Rule 26(b)(1) and the limiting principles stated in Rule 26(b)(2)." * The Advisory Committee asserted that limits on depositions had been studied by the Federal Judicial Center. The FJC's materials, however, did not support the specific limitations made in the proposals and did not specifically identify depositions as a problem in discovery. * The Advisory Committee stated that further studies would be "carried forward" to further test the strong doubts that have been expressed about lowering deposition limits. They should be encouraged to do so.
Rule 31: Written Depositions	**(a) When a Deposition May Be Taken. * * *** **(2) *With Leave*.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *	* This change reduces the presumptive number of written depositions from 10 to 5. * The Advisory Committee's analysis of this rule change mirrors the analysis of Rule 30 limitations on oral depositions.
Rule 33: Interrogatories	**(a) In General.** **(1) *Number*.** Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.	* The Advisory Committee stated that there has been little controversy over a reduction of presumptive interrogatories. * The Advisory Committee is discussing the creation of a separate limit for multi-party cases. No sketch has been drafted on this suggestion. * Despite discussion of the problems attendant with counting parts and subparts, the Advisory Committee is nonetheless considering this reduction.

RULE	PROPOSED CHANGES[2]	ADVISORY COMMITTEE RATIONALE[3]
Rule 36: Requests for Admissions	**(a) Scope and Procedure.** **(1) *Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described document. **(2) *Number.*** Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts. * * *	* The Advisory Committee stated that there has been little controversy over limiting requests for admissions. * At one point in the discussions, the Advisory Committee was considering eliminating requests for admissions all together.

TABLE 2. ADDITIONAL PROPOSALS UNDER CONSIDERATION

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 1: Cooperation	**Rule 1. Scope and Purpose.** * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding.	* No specific language about cooperation was added, but the Committee did add language indicating that both parties and the court have certain duties during litigation. * The Advisory Committee could not agree upon a broad definition of cooperation, particularly in light of the adversary principles. * The Advisory Committee abandoned attempts to make cooperation a mandatory duty so as not to encourage tactical motions regarding failure to cooperate and to avoid complicating the professional ethics rules. * A cooperation rule would have a broader reach than discovery and would aim to curb other "tactics in a war of attrition," such as excessive dispositive motion practice.[4] * The Advisory Committee concluded that a cooperation rule may only be aspirational.

[4] *Id*. at 237.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 16(b)(1) & 16(b)(2): Scheduling Orders	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: **(A)** after receiving the parties' report under Rule 26(f); or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~. **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order: within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.	* Reduces the amount of time given to issue a scheduling order to 90 days from 120 after service of defendant or to 60 days from 90 days after defendant appears. * Adds permission to delay for good cause. * The Advisory Committee also discussed requiring that parties have a scheduling conference with the court in order to promote "effective management." The Advisory Committee has not yet added such a conference to the proposed rule. ***** The Advisory Committee dismissed concerns about Rule 16(b) changes raised by the U.S. Department of Justice (DOJ), stating that the proposed changes will be adequate in the vast majority of cases brought against the U.S. government.
Rule 16(b)(3): Informal Conference Before Discovery Motions	**(3)** ***Contents of the Order.*** **(B)** *Permitted Contents*. The scheduling order may: **(iii)** provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; **(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence; **(v)** direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court; [present (v) and (vi) would be renumbered] * * *	* The Advisory Committee wants to encourage judges to take an active interest in managing discovery disputes by promoting informal pre-motion conferences. * The Advisory Committee cites to a survey, which found that 1/3 of local rules already require an informal conference between parties before filing a discovery motion. * The Advisory Committee had considered mandating a pre-motion conference but declined to pursue such a mandatory conference for fear of resistance among the judiciary.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 26: Proportionality and Scope of Discovery	**(b) Discovery Scope and Limits.** **(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).~~ * * *	* The change to Rule 26(b)(1) is meant to explicitly define proportionality in the rules. When deciding whether proportionality is adequate, the court would consider five factors: (1) Amount in controversy; (2) Importance of the issue at stake in the action; (3) The parties' resources; (4) Importance of discovery to resolve the issue; and (5) Expense versus benefit analysis. * This sketch follows many other discarded versions. It transfers the balancing factors of 26(b)(2)(C)(iii) into 26(b)(1)'s definition of the scope of discovery. * The Advisory Committee noted that a high percentage of all cases work well within the existing scope of discovery, but also noted that "grave problems persist" and the "geometric growth in potentially discoverable information generated by electronic storage adds still more imperative concerns."[5] * Substantial concern was expressed about the difficulty in defining proportionality in the rule text and about using costs as a limiting factor on discovery.

[5] *Id.* at 226.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 26 (cont'd): Proportionality, Scope of Discovery, & Cost-Shifting	**(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~ **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * * **(iii)** the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs 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~~. **(c) Protective Orders.** **(1)** ***In General.*** * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * * **(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *	* The purpose of this change is to explicitly permit courts to issue protective orders that shift discovery costs from one party to another.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 26(d): Early Discovery, Discovery Before Parties' Conference	**(d) Timing and Sequence of Discovery.** **(1) *Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except: **(A)** in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~; **(B)** when authorized by these rules, including Rule 26(d)(2), by stipulation, or by court order. **(2) *Early Rule 34 Requests*.** **(A) *Time to Deliver*.** More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: **(i)** to that party by any other party, and **(ii)** by that party to any plaintiff or to any other party that has been served. **(B) *When Considered Served*.** The request is considered as served at the first Rule 26(f) conference. **(~~2~~3) Sequence.** Unless the parties stipulate or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery. * * *	* This change permits early discovery for Rule 34 (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes) requests following a 21-day waiting period after service on the defendant. * The time to respond to an early discovery request would still be set from the Rule 26(f) conference. * The Advisory Committee considered a broader rule that allowed for early discovery for all types of discovery but saw little gained by allowing other early discovery (*e.g.*, deposition requests or interrogatories).

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 26(f): Preservation and FRE 502	**(f) Conference of the Parties; Planning for Discovery.** **(1) *Conference Timing*.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * * **(3) *Discovery Plan.*** A discovery plan must state the parties' views and proposals on: * * * **(C)** any issues about disclosure~~, or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence; * * *	* This change is meant to ensure that preservation obligations and Evidence Rule 502(e) agreements regarding attorney-client privilege and work product are not overlooked in party conferences, discovery plans, and scheduling orders. * The Advisory Committee was specifically concerned with electronically stored information when creating these sketches. * See also changes to Rule 16(b)(3) above on preservation-related issues.
Rule 34(b)(2): Discovery Requests – Response &Timing	**(b) Procedure. * * *** **(2) *Responses and Objections.*** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection to the request~~ the grounds for objecting with specificity, including the reasons. The responding party may state that it will produce copies of documents or electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.	* The additional language in Rule 34(b)(2)(A) is meant to cross-reference the new pre-conference discovery request. * This change to Rule 34(b)(2)(B) requires that objections to a discovery request be stated with "specificity", without removing the general objections of vague, burdensome and the like. * An addition to Rule 34(b)(2)(B) clarifies the difference between production and inspection of electronically-stored information.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 34(b)(2) (cont'd): Discovery Requests – Objection	**(C)** *Objections.* An objection must state whether any responsive materials are being withheld on the basis of the objection. An objection to part of a request must specify the part and permit inspection of the rest.	* This change would add a requirement that a party making a discovery objection state whether anything is being withheld on the basis of the objection.
Rule 37(a): Failure to Produce (*See also* Rule 34(b)(2)(B) changes)	**(a) Motion for an Order Compelling Disclosure or Discovery.** *** * *** **(2) *Specific Motions.*** **(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer if designation, production, or inspection. This motion may be made if: * * * **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.	* Reflecting the fact that electronically-stored information is typically produced rather than made available for inspection, the purpose of this rule change is to clarify that a party can be compelled to produce electronically-stored information. * The Advisory Committee clarified that this rule change was meant to allow for rolling production. It is unclear whether the Advisory Committee will write this clarification in a comment. * See also Rule 34(b)(2)(B) changes above.
Rule 37(e): Failure to Make Disclosures or to Cooperate in Discovery; Sanctions	~~**(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.~~ **(e) 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	* This Rule change completely replaces the "safe harbor" provision for preservation of electronically stored information with a set of standards for when a court may cure or sanction failure to preserve any evidence, not just electronically stored information. * Adverse-inference jury instructions are not available as curative measures.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 37(e) (cont'd): Failure to Make Disclosures or to Cooperate in Discovery; Sanctions	**(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. **(2) *Factors to be considered in assessing a party's conduct.*** The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include: **(A)** the extent to which the party was on notice that litigation was likely and that the information would be discoverable; **(B)** the reasonableness of the party's efforts to preserve the information; **(C)** whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; **(D)** the proportionality of the preservation efforts to any anticipated or ongoing litigation; and **(E)** whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.	* Generally, sanctions require bad faith *and* profound effect on the ability to prove something.

DISCARDED CHANGES

- The Advisory Committee decided not to change Initial Disclosure requirements.
- The Advisory Committee abandoned a proposal that would have added a presumptive limit on Rule 34 requests to produce.
- The Advisory Committee tabled the creation of rules requiring or permitting cost shifting in discovery. It believes that more studies and development is required before seriously considering the addition of a cost shifting provision. The Advisory Committee, however, will add "or the allocation of expenses" to the Rule 26(c)(1)(B) list of reasons for issuing a protective order to permit cost shifting orders explicitly. *See above.*
- No changes to contention discovery rules.
- No changes to Rule 45.
- The Advisory Committee was considering adding "not evasive" to Rule 26(g)(1) certifications but will not pursue this or any changes to the rule.
- The Advisory Committee has deferred the creation of Uniform Exemptions under Rules 16(b), 26(a)(1)(B), 26(d), and 26(f) in order to research current exemptions in local rules.