Civil Procedure
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Professor Lonny Hoffman

Section 7
(CM Pages 494-599)

Discovery
Questions to Discuss
(Note: these questions cover several classes)

1. What are some of the reasons that we permit parties to engage in discovery before trial? (We will talk about at least three primary reasons)

2. How is the scope of permissible discovery defined in the federal rules? (Related question: What are the major changes to the scope of discovery under the version of Rule 26 that went into effect in December 2015?)

3. What do we mean by nonprivileged matter?

4. What is the "American" rule with regarding to discovery?

5. What are parties' mandatory initial disclosure obligations under the federal rules?

6. What other mandatory disclosure obligations are there under the federal rules?

7. What is the purpose of Rule 27?

8. Can you explain difference between interrogatories, requests for production, requests for documents, and requests for admissions?

9. When it comes to information generally (including electronically stored information), what are a parties' preservation obligations?

10. Under the new version of Rule 37 that went into effect in December 2015, what are the potential sanctions available if a party failed to take reasonable steps to preserve information that should have been preserved in anticipation or conduct of litigation?

THE STATE COURT LITIGATOR'S GUIDE TO DISCOVERY IN FEDERAL COURT

BY CHRIS POPOV & LIANE NOBLE

FOR THE TRIAL LAWYER WHO PRIMARILY PRACTICES in state court, litigating in federal court can feel like venturing to a foreign land. But at least as far as discovery is concerned, federal courts speak the same basic language of discovery that is spoken in state court. Indeed, the stated goals of discovery in both state and federal court are to allow parties to obtain full knowledge of the facts and contentions, to prevent trial by ambush, and to promote fairness.[1] And under both systems, litigants have the same basic discovery mechanisms at their disposal: requests for disclosures, interrogatories, requests for admission, requests for production, and depositions.

Nevertheless, there are important differences in how discovery is executed in federal court. The failure to recognize these differences can be embarrassing for the infrequent federal practitioner, and can even have implications on the success of a case. Think of the differences between state and federal discovery as different dialects of the same language. This article highlights some of the differences between the two systems and serves as a quick and informal primer for those who are not experienced federal court litigators. Think of this as the state court practitioner's "phrase book" for use in federal court.

Think of the differences between state and federal discovery as different dialects of the same language.

I. The Federal Rules Prohibit Parties from Serving Discovery Until They Have Conducted a Rule 26(f) Conference.

A key distinguishing feature of federal discovery practice is the requirement under Federal Rule 26(f) that parties conduct an initial pretrial conference before discovery can begin. Discovery in a federal suit cannot begin until after the completion of this initial conference.[2] This, of course, contrasts with Texas state court practice, where the discovery period begins at the commencement of a case, and parties are generally advised to begin discovery immediately.[3]

Rule 26(f) requires parties to confer "as soon as practicable,"[4] and a party's failure to do so can lead to *sua sponte* dismissal of the action for failure to prosecute.[5] Because there is no corollary to the initial planning conference requirement under the Texas rules,[6] litigators who find themselves in federal court should familiarize themselves with Rule 26(f) and be prepared for the conference at the outset of the case. During the initial pretrial conference, parties must: (1) consider the nature and basis of their claims and defenses and the possibilities of settlement, (2) make or arrange for the exchange of initial disclosures, (3) discuss preservation of discoverable information, and (4) develop a proposed discovery plan for submission to the court.[7]

The requirement in federal court that the parties themselves develop a discovery plan also marks a significant departure from Texas discovery practices. In Texas state court, "[e]very case must be governed by a discovery control plan,"[8] and the rules provide for different levels of discovery depending on the amount in controversy or the complexity of the case. Level 1 discovery rules apply to expedited actions under Texas's recently amended Rule 169,[9] Level 2 is the default discovery plan,[10] and Level 3 applies when so ordered by the court, either on the parties' motion or the court's initiative.[11] In contrast there are no default discovery plans in federal court; parties practicing in federal court must develop a proposed plan on their own. Indeed, a party's failure to participate in good faith in developing and submitting a discovery plan may lead to the imposition of sanctions.[12] This plan must state the parties' views and proposals regarding the following: (1) changes to disclosure procedures, (2) discovery scope and deadlines, (3) issues related to discovery of electronically stored information ("ESI"), and (4) claims of privilege and protections.[13] Parties must file with the court a written report outlining the discovery plan 14 days after the 26(f) conference. A court may then memorialize the parties' agreements into a scheduling order.[14] Failure to follow an order under Rule 26(f) can result in sanctions.[15]

II. Initial Disclosures Are Mandatory and Automatic Under the Federal Rules.

Another unique feature of the federal discovery rules is the mandatory and automatic nature of initial disclosures. In Texas, a party may serve on another party a request for disclosures pursuant to Rule 194.[16] In contrast, the federal rules *require* that certain information be voluntarily disclosed without a discovery request.[17] The purpose of this rule is to accelerate the exchange of basic information and to eliminate the paperwork involved in requesting such information.[18] Mandatory disclosures in federal court occur in three stages: initial disclosures, expert disclosures, and final pretrial disclosures. Initial disclosures are generally made within 14 days after the Rule 26(f) conference and must include information regarding potential witnesses, documentary evidence, damages and insurance.[19] Expert disclosures must be made by the date set by court order or agreed to by the parties.[20] Final pretrial disclosures must occur at least 30 days before trial and must include information regarding witness identity, deposition witness identity, and document identity.[21]

III. Limitations on Written and Oral Discovery Are Found Throughout the Federal Rules, as Opposed to Being Dictated by a Particular Discovery Level.

A state court litigator should also note that the federal rules impose different limits on the other forms of discovery, and that those limits on discovery are found in different places throughout the federal rules. Unlike the Texas rules, which set forth varying limits on oral and written discovery depending upon which of the three discovery control plans apply, the federal rules apply a more uniform set of limits that are specific to the type of discovery (e.g., requests for admissions, interrogatories, or depositions), as opposed to the type of case or the amount in controversy. With respect to requests for admissions, for instance, the Texas rules impose a limit of 15 requests for Level 1 cases,[22] but do not limit the number of requests in Level 2 or 3 cases. The federal rules do not limit the number of requests for admissions, but a court can impose a limit by order or local rule.[23] With respect to interrogatories, the Texas rules impose a limit of 15 for Level 1 cases and 25 for Level 2 cases.[24] For level 3 cases, absent a court order, interrogatories are subject to the Level 1 or Level 2 limitations depending on the amount of relief requested.[25] In contrast, the federal rules limit the number of interrogatories to 25 in all cases, absent leave or stipulation.[26] Finally, with respect to requests for production, the Texas rules impose a limit of 15 requests for Level 1 cases,[27] but do not limit the number of requests in Level 2 or 3 cases. The federal rules do not limit the number of requests for production for any case.[28]

The federal restrictions on deposition practice are also more uniform than the multi-tiered approach set forth in the Texas rules. In state court, regardless of the discovery control level, no side may examine or cross-examine a witness for more than 6 hours, excluding breaks.[29] Additionally, for Level 1 cases, each party has 6 hours in total to examine and cross-examine all witnesses, but the parties may agree to expand the limit to 10 hours.[30] In Level 2 cases, each side is limited to 50 hours to examine and cross-examine opposing parties, experts designated by those parties, and persons subject to those parties' control.[31] Additional time may be allotted if more than two experts are designated. In contrast, the federal rules simply limit the parties to 10 depositions per side and limit each deposition to one day of 7 hours absent leave or stipulation.[32]

The deadline by which parties must complete discovery is also typically easier to calculate in federal court. In Texas, the discovery period varies based on the discovery level. In a Level 1 case closes 180 days after the first request for discovery of any kind is served.[33] The discovery period for Level 2 cases closes on the earlier of 30 days before trial or nine months after the earlier of the first deposition or the due date of the first response to written discovery.[34] Level 3 discovery periods end in accordance with Level 1 or Level 2 depending on the amount of damages sought and the issues involved. Conversely, the deadline for discovery in federal court is simply determined by court order.

The more uniform nature of the federal limits on discovery has its advantages and disadvantages. On the one hand, the federal rules make it less complicated to calculate deadlines, time limits, and limitations on requests. On the other hand, under the federal rules, individuals litigating a single $76,000 claim will be governed by the same default discovery limits as two multi-national corporations litigating a complex $76 million suit. In other words, the federal rules may impose or permit discovery that is disproportionate to the needs of the case, which highlights the importance of thinking critically about the needs of the case at the outset, and using the 26(f) conference to set a scheduling and discovery control order that makes sense for a given case.

IV. The Federal Rules Make It Easier to Compel Discovery from Out-of-State Non-Party Witnesses.

The federal rules provide some advantages to parties seeking discovery from non-party witnesses who work or reside out of state. Tex. R. Civ. P. 201.1(a) permits parties to take depositions of witnesses located outside of Texas, but the litigant must first determine the requirements of the other state's

courts. This could involve the use of letters rogatory, letters of request, a commission or the filing of an ancillary action. The requirements vary from state to state and sometimes even by county. In contrast, Fed. R. Civ. P. 45(a)(2) authorizes a federal court to issue a subpoena to any witness in the United States, subject to the limitation that the witness can only be compelled to appear for deposition within 100 miles of where the subpoena was served. Furthermore, once served with a federal court subpoena, the witness can be compelled to travel up to 150 miles from her residence or 150 miles from where she was served to answer discovery; in state court a non-party witness can only be compelled to appear for discovery within 100 miles of where she resides.[35]

V. The Federal Rules Require Automatic Disclosure of Expert Witnesses and Expert Reports.

Another important distinction between federal and state discovery procedures involves the discovery of expert opinions. While the federal rules require parties to automatically produce expert reports, there is no such requirement in Texas state court. Rather, a party in state court may request the report of an opposing party's retained testifying expert through its request for disclosure.[36] The responding party may then either produce the report or tender the retained expert for deposition.[37] Additionally, a party may move for a court order requiring production of a retained testifying expert's report.[38]

In contrast, the federal rules require that certain expert discovery be voluntarily disclosed without a discovery request.[39] These mandatory expert disclosures, as briefly described above, must be made by the date ordered by the court, the date stipulated by the parties, or at least 90 days before the trial date.[40] Unless otherwise stipulated or ordered, this mandatory disclosure of any retained testifying expert must also be accompanied by a written report.[41] While parties are not required to produce the reports of non-retained testifying experts, they must provide a disclosure summarizing the facts and opinions to which the non-retained witness is expected to testify.[42] It is also important to note that while drafts of expert reports are discoverable in state court, the federal rules treat draft expert reports as privileged work product.[43]

VI. The Federal Rules Set Forth a Different Mechanism for Asserting Privilege and Challenging Claims of Privilege.

State court litigators should also be aware of three important federal-state distinctions related to the discovery of privileged information. First, the procedure for asserting a privilege is different in federal court. In state court, in order to claim a privilege, a party first withholds the information and serves a withholding statement.[44] Then, the requesting party may request a privilege log.[45] The respondent must then supply a privilege log within 15 days of the request.[46] In contrast, under the federal rules, it is not necessary to request a privilege log when the responding party asserts a privilege.[47] The federal rules place the burden on the respondent to notify the requesting party that it is withholding information and automatically serve a response that includes a privilege log.[48]

Second, state and federal courts handle differently the inadvertent disclosure of privileged information. In Texas, Rule 193 contains a snap-back provision, under which parties who inadvertently disclose privileged information are permitted to amend their withholding statements within 10 days of discovery of the accidental production.[49] Materials must then be promptly returned. Federal Rule 26(b)(5)(B) similarly requires prompt return, sequestration, or destruction of any inadvertently disclosed privileged information, but it goes even further and includes additional protections. Under the federal rule, the recipient of an inadvertently-disclosed privileged document is prohibited from using or disclosing the information until the claim of privilege is resolved. The recipient is also required to take reasonable steps to retrieve the inadvertently-disclosed information if the recipient has disclosed it to a third-party before being notified of the privilege claim. Moreover, the federal rules contemplate enforcement of additional "quick-peek" or "claw-back" arrangements between the parties as a way to avoid the excessive costs of pre-production review.[50] Under a quick-peek agreement, a responding party provides certain materials for initial examination without waiving any claims of privilege, the requesting party reviews the information and designates the documents it wishes to have actually produced, and the responding party conducts its privilege review on only those specified documents.[51] Under claw-back agreements, production without intent to waive privilege or protection is not a waiver so long as the responding party identifies the documents mistakenly produced, and the receiving party's documents are returned.[52]

Finally, the source of substantive privileges law differs between state and federal court. In Texas, many privileges are codified in the Rules of Civil Procedure or Rules of Evidence. The rules contain specific provisions governing work product privilege, attorney client privilege, spousal privilege, trade secret privilege, clergy privilege, physician-patient privilege, and mental health information privilege.[53] Conversely, the Federal Rules of Civil Procedure and Federal Rules of Evidence do not codify privileges in the same way that the Texas rules do. Rather, federal common law governs these concepts in

cases based on federal question jurisdiction.[54] In federal cases premised on diversity jurisdiction, state law privilege rules will govern.

VII. The Federal Rules Apply Different Standards for Obtaining Protective Orders.

Parties in both federal and state court may file a motion for protective order to limit the scope of discovery, but litigants in federal court must be prepared to show good cause. Texas courts will issue a protective order to protect against undue burden, harassment, or the invasion of a protected personal, constitutional or property right.[55] Federal courts require an additional showing of good cause.[56] In determining good cause, many courts apply a balancing test to determine whether the producing party's burden of production and its privacy interests outweigh the right of the opposing party and the public.[57]

Parties may also seek to limit the disclosure of privileged or confidential materials exchanged through a sealing order. Under the stringent sealing requirements of Texas Rule of Civil Procedure 76a, a party must file a written motion specifying the grounds for protection and must post a public notice stating the time and place of the hearing and inviting the public to intervene and be heard.[58] In federal court, records may be sealed without public notice, and a sealing order may often be obtained where the parties agree on confidentiality.[59]

VIII. The Federal Rules Envision a Two-Tiered Approach to E-Discovery.

The federal rules and supporting case law create a more comprehensive scheme for electronic discovery. In Texas, a single e-discovery rule, Rule 196.4, requires responding parties to produce electronic data that is "reasonably available."[60] If the party cannot produce the information requested, it must state an objection. If the court orders the responding party to comply, the court must also order the requesting party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.[61]

Whereas Texas e-discovery is governed by a single rule and a single substantive Supreme Court case, federal e-discovery provisions are integrated throughout the federal rules and there are a plethora of decisions interpreting those rules. The federal e-discovery scheme envisions a formalized two-tier approach with less court intervention. Under the first tier, a "party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost."[62] If there is a dispute, the rules contemplate that the parties will meet and confer before filing discovery motions.[63] If, after a conference, the parties are still in dispute, the second tier of federal e-discovery is initiated. Under the second tier, the responding party must show that the information requested is not reasonably accessible because of undue burden or cost. If that showing is made, then the requesting party must show good cause for the production.[64] Whether practicing in state or federal court, advocates should attempt to address e-discovery issues in the early stages of the litigation.

IX. A Federal Court May Appoint a Magistrate Judge to Set a Scheduling Order and to Rule on Discovery Disputes.

Another facet of federal practice likely to affect the discovery process is codified in 28 U.S.C. § 636 (b)(1)(A), under which a federal judge may "designate a magistrate judge to hear and determine any pretrial matter pending before the court," including the resolution of discovery motions. Indeed, many judges refer all discovery motions to magistrate judges for resolution.[65] Although parties may initially be taken aback when they learn their discovery dispute is being decided by a judicial officer other than the Article III judge to whom the case was assigned, this practice may actually be beneficial to the litigants. Disputes can often be decided more quickly by magistrate judges, who routinely deal with discovery issues and who often have more flexibility on their dockets to for oral hearings.

X. The Federal Court's Local Rules Sometimes Modify the Discovery Rules in Material Ways.

Another essential consideration when conducting discovery in a federal suit is the interaction of the district court's local rules with the Federal Rules of Civil Procedure and Evidence. For instance, the Local Rules in the Northern District of Texas contain filing requirements for discovery materials.[66] The Local Rules in the Western District of Texas contain additional notice requirements for oral depositions, limits on the number of requests for admissions, and pre-approved interrogatories for which objections will not be considered.[67] In the Eastern District of Texas, the court runs a discovery hotline answered by a judge to rule on discovery disputes.[68] While state district courts in Texas promulgate and enforce local rules as well, they typically do not substantively alter discovery limitations in the same way.

XI. Conclusion

To the experienced state court practitioner, discovery in federal court should not be a completely foreign and unfamiliar experience. By and large trial lawyers in state and federal court will have the same discovery tools at their disposal.

There are, however, some nuanced differences, including: the Rule 26(f) conference requirement; mandatory initial, expert, and pre-trial disclosures; different limits on the various forms of discovery (*see Figure 1 below*); more expeditious exchange of expert evidence; different substantive and procedural rules regarding privileges; and a more formalized two-tier approach to e-discovery with less court intervention. This article is not meant to provide an exhaustive list of all relevant distinctions, but rather a preliminary reference point for newcomers to federal discovery practice. The reader is encouraged to consult the Federal Rules of Civil Procedure and Evidence as well as the district's local rules before proceeding with discovery in federal court.

Figure 1.

	Federal	Texas		
		Level 1	*Level 2*	*Level 3*
Discovery Period Begins	After parties complete Rule 26(f) conference. Fed. R. Civ. P. 26(d)(1)	When suit is filed		
Discovery Period Ends	As ordered by the court or agreed by the parties.	180 days after the first request for discovery is served. Tex. R. Civ. P. 190.2(b)(1).	Earlier of (1) 30 days before trial or (2) nine months after the earlier of (a) the first oral deposition or (b) the due date of the first response to written discovery. Tex. R. Civ. P. 190.3(b)(1).	Absent discovery control order, refer to Level 1 or 2 depending on amount of relief sought
Disclosures	Mandatory disclosures in three stages: initial, expert and pre-trial. FED. R. CIV. P. 26 (a)(1).	Not mandatory; must be requested under Tex. R. Civ. P. 194.2		
		May request disclosure of documents, not considered a request for production. Tex. R. Civ. P. 190.2(b)(6)	No other limitation	No other limitation
Requests for Admissions	FED. R. CIV. P. 36 does not set a limit on number, but a court can impose a limit by order or local rule.	No more than 15 written requests for admissions. Tex. R. Civ. P. 190.2(b)(5)	No Limit	No Limit
Interrogatories	Absent leave or stipulation, no more than 25. FED. R. CIV. P. 33(a)(1)	No more than 15. Tex. R. Civ. P. 190.2(b)(3).	No more than 25. Tex. R. Civ. P. 190.3(b)(3).	Absent discovery control order, refer to Level 1 or 2 depending on amount of relief sought
Requests for Production	No Limit. FED. R. CIV. P. 34	No more than 15. Tex. R. Civ. P. 190.2(b)(4).	No Limit	No Limit

<table>
<tr><td>Depositions</td><td>FED. R. CIV. P. 30 sets a limit of 10 depositions per side, but can be increased with leave of court or stipulation. Limited to one day of seven hours, absent leave or stipulation.</td><td colspan="3">No side may examine or cross-examine a witness for more than 6 hours, excluding breaks. Tex. R. Civ. P. 199.5(c).</td></tr>
<tr><td></td><td></td><td>Each party has 6 hours in total to examine and cross-examine all witnesses, may agree to expand to 10 hours, but not more without court order. Tex. R. Civ. P. 190.2 (b)(2).</td><td>Each side has 50 hours to examine and cross opposing parties, experts designated by those parties, and subject to those parties' control. No time limit on deposition of witness not subject to either party's control. If side designates more than 2 experts, other side has 6 hours more for each additional expert. Tex. R. Civ. P. 190.3(b)(2).</td><td>Absent discovery control order, refer to Level 1 or 2 depending on amount of relief sought</td></tr>
<tr><td>Discovery Subpoenas for Third Parties</td><td>Federal court may issue subpoena to any witness in the United States, but a non-party witness can only be compelled to appear for discovery within 100 miles of where he resides. FED. R. CIV. P. 45.</td><td colspan="3">Tex. R. Civ. P. 201.21(a) permits deposition of out of state witness, but the provision is subject to the requirements of the other state, which may involve filing for a commission, letter rogatory, or ancillary action. A witness can only be compelled to appear within 150 miles of her residence or where she was served. Tex. R. Civ. P. 176.</td></tr>
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Chris Popov is a partner with Vinson & Elkins, LLP. He has tried commercial cases in both state and federal courts. Prior to joining the firm, Chris served as a judicial clerk to the Honorable James L. Dennis on the United States Court of Appeals for the Fifth Circuit.

Liane Noble is a litigation associate with Vinson & Elkins, LLP. Prior to joining the firm, Liane served as a judicial clerk to the Honorable Fred Biery on the United States District Court for the Western District of Texas. ★

[1] *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) ("The primary objective of discovery is to ensure that lawsuits are 'decided by what the facts reveal, not by what facts are concealed.'"); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 913-14 (Tex. 1992) (goals of discovery are "to promote responsible assessment of settlement and prevent trial by ambush"); *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989) ("[R]ules regarding discovery . . . were designed to . . . ensure fairness."); *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978) (discovery rules are designed to prevent "trial by ambush" and "that sort of emergency litigation which could degenerate into 'quick-draw hip-shooting'"); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) ("Properly used, [the rules of discovery] prevent prejudicial surprises and conserve precious judicial energies.").

[2] FED. R. CIV. P. 26(d)(1). Exceptions to this rule include discovery conducted before suit by the filing of a verified petition under FED. R. CIV. P. 27, discovery conducted with leave of court after suit is filed but before the Rule 26(f) conference, and discovery conducted in certain proceedings exempt from the Rule 26(f) conference requirement as outlined in FED. R. CIV. P. 26(a)(1)(B) and the 2000 Notes to FED. R. CIV. P. 26, at ¶15.

[3] *Broom v. Arvidson*, No. 04-00-00214-CV, 2001 WL 220058, at *5 (Tex. App—San Antonio 2001, no pet.) (trial court properly denied continuance because plaintiff's delay in serving discovery requests over three months after she filed her original petition indicated a lack of diligence); *see also Patrick v. Howard*, 904 S.W.2d 941, 946 (Tex. App.—Austin 1995, no pet.) (promptness of discovery requests is an indication of diligence).

[4] FED. R. CIV. P. 26(f)(1). The conference must occur at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). Under Rule 26(f)(4), courts may by local rule require an expedited schedule for the conference and written discovery plan report.

[5] *See Spencer v. United States*, No. C-11-122011, WL 1158552, at *3 (S.D. Tex. Mar. 25, 2011) (dismissal for failure to prosecute was

proper where plaintiff failed to confer with defendant as required by Rule 26(f)).

[6] By permitting parties to submit an agreed discovery order in Level 3 cases, Texas Rule 190.4 clearly contemplates, but does not require, a discovery conference. Tex. R. Civ. P. 190.4. Additionally, Texas case law suggests that parties in state court should engage in a discovery conference when electronic information is involved. *See In re Weekely Homes, LP*, 295 S.W.3d 309, 321 (Tex. 2009) (parties should meet and confer regarding protocols for electronic discovery before requesting information).

[7] FED. R. CIV. P. 26(f)(2).

[8] Tex. R. Civ. P. 190.1.

[9] Level 1 discovery plans also apply to divorce suits not involving children in which the marital estate is valued at less than $50,000. Tex. R. Civ. P. 190.2(a)(2). However, the expedited actions process does not apply to suits involving a claim under the Family Code, Property Code, Tax Code or Chapter 74 of the Civil Practice & Remedies Code. Tex. R. Civ. P. 169(a)(2). It does not apply when a party files a petition for injunctive relief. Tex. R. Cvi. P. 190 cmt. 2 (1999).

[10] Tex. R. Civ. P. 190.3.

[11] Tex. R. Civ. P. 190.4.

[12] FED. R. CIV. P. 37(f).

[13] FED. R. CIV. P. 26(f)(3)(A)-(F).

[14] FED. R. CIV. P. 16(b).

[15] FED. R. CIV. P. 37(b)(2).

[16] Tex. R. Civ. P. 194.1. Under the recent amendments to Rule 190.2, a party in a Level 1 case may request disclosure of documents, electronic information, and tangible items in the disclosing party's possession in addition to disclosures under Rule 194.2. Tex. R. Civ. P. 190.2(b)(6). This type of request is not considered a request for production. *Id.*

[17] FED. R. CIV. P. 26(a).

[18] 1993 Advisory Committee's Notes on FED. R. CIV. P. 26, at ¶2.

[19] FED. R. CIV. P. 26(a)(1).

[20] FED. R. CIV. P. 26(a)(2). The specific requirements for expert disclosures are discussed below.

[21] FED. R. CIV. P. 26(a)(3).

[22] Tex. R. Civ. P. 190.2(b)(5).

[23] FED. R. CIV. P. 36.

[24] Tex. R. Civ. P. 190.2(b)(3).

[25] Tex. R. Civ. P. 190.4(b).

[26] FED. R. CIV. P. 33(a)(1).

[27] Tex. R. Civ. P. 190.2(b)(4).

[28] FED. R. CIV. P. 34.

[29] Tex. R. Civ. P. 199.5(c).

[30] Tex. R. Civ. P. 190.2 (b)(2).

[31] Tex. R. Civ. P. 190.3(b)(2).

[32] FED. R. CIV. P. 30.

[33] Tex. R. Civ. P. 190.2(b)(1).

[34] Tex. R. Civ. P. 190.3(b)(1). The Level 2 discovery period for Family Code cases ends 30 days before the trial date. Tex. R. Civ. P. 190.3(b)(1)(A).

[35] Tex. R. Civ. P. 176; FED. R. CIV. P. 45.

[36] Tex. R. Civ. P. 194.2(f)(4)(A).

[37] Tex. R. Civ. P. 195.

[38] Tex. R. Civ. P. 195.5.

[39] FED. R. CIV. P. 26(a)(2).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] FED. R. CIV. P. 26(b)(4)(B).

[44] Tex. R. Civ. P. 193.3.

[45] *Id.*

[46] *Id.*

[47] FED. R. CIV. P. 26(b)(5)(A).

[48] *Id.*

[49] Tex. R. Civ. P. 193.3(d).

[50] 2008 Advisory Committee's Notes on FED. R. EVID. 502, at ¶16.

[51] 2006 Advisory Committee's Notes on FED. R. CIV. P. 26, at ¶27.

[52] *Id.*

[53] Tex. R. Civ. P. 192.5; Tex. R. Evid. 503-510.

[54] FED. R. EVID. 501.

[55] Tex. R. Civ. P. 192.6.

[56] FED. R. CIV. P. 26(c)(1); *In re Terra Int'l*, 134 F.3d 302, 306-07 (5th Cir. 1998).

[57] *Gutierrez v. Benavides*, 292 F.R.D. 401, 403-405 (S.D. Tex. 2013); *Kimberly-Clark Corp. v. Cont'l Cas. Co.*, No. 3:05-CV-0475-D, 2006 WL 3436064, at *4 (N.D. Tex. Nov. 29, 2006).

[58] Tex. R. Civ. P. 97a(3).

[59] FED. R. CIV. P. 5.2(d).

[60] Tex. R. Civ. P. 196.4; *In re Weekly Homes LP*, 295 S.W.3d 309 (Tex. 2009).

[61] *Id.*

[62] FED. R. CIV. P. 26(b)(2)(B).

[63] 2006 Advisory Committee's Notes on FED. R. CIV. P. 26, at ¶7.

[64] FED. R. CIV. P. 26(b)(1).

[65] The most analogous provision in the Texas allows a court to appoint a special master for good cause in exceptional cases involving complex or highly technical discovery matters. Tex. R. Civ. P. 171.

[66] Northern District of Texas LR 5.2.

[67] Western District of Texas CV-30, CV-33, CV-36.

[68] Eastern District of Texas CV 26(e).

LIVING DAILY WITH WEEKLEY HOMES

BY KENNETH J. WITHERS & MONICA WISEMAN LATIN

INTRODUCTION

Texas led the nation in adopting a specific procedural rule addressing the discovery of electronically stored information (ESI). Tex. R. Civ. P 196.4 has been with us since 1999, and although it was a new and novel rule, there have been remarkably few appellate opinions addressing the subject.[1] After ten years, the Texas Supreme Court took the opportunity presented by *In re Weekley Homes*[2] to provide a detailed blueprint for requesting ESI. That blueprint clearly is not from a pattern book. Discovery of ESI requires custom legal carpentry, for good reasons. It takes thought, planning, and communication between opposing counsel to avoid turning discovery of ESI into a money pit. While Rule 196.4 provides a procedural framework for parties who insist on formal motion practice, the cost and delay of litigating ESI discovery issues can be significantly reduced—or eliminated altogether—with some common-sense cooperation between opposing counsel to develop a fair and proportional discovery building plan before breaking ground.

In this article, we discuss why discovery of ESI is different from the discovery of paper to which lawyers were accustomed before the 1999 amendments, and how the Texas Rules of Civil Procedure address these differences in Rule 196.4. Then we review the background facts of *Weekley Homes* and explore the Supreme Court's application of the rule. We also see how *Weekly Homes* has been applied in subsequent appellate court decisions. Finally, we look at the Court's practical advice for litigants seeking or responding to discovery of ESI and the Court's call for planning, communication, and cooperation between opposing parties in litigation.

I. Why discovery of ESI is different

We live in a world of electronic information. Almost everything we read, listen to, watch, write, or communicate to others is generated, stored, or transmitted using computer technology. In business, government, education, entertainment, and almost all other human endeavors, relatively little information is committed to paper in the first instance. Although exact statistics are difficult to come by, experts have long believed that 93 percent of all business documents are created electronically and only 30 percent are ever printed to paper.[3] While paper documents abound, almost all paper documents are printouts information from computer files. Ask yourself when you last saw a typewriter being used routinely in a business, government office, school, or even at home.

Recent statistical research confirms that we are overwhelmingly a "digital" information society. According to the University of California at San Diego's Global Information Industry Center, American consumers receive only about 8.61% of their information in print form, measured in words. Measured in time, the average American spends only 6 hour per day reading printed material. Measured in compressed bytes, print constitutes only .02% of all information media.[4] The researchers note that "[n]ew digital technologies continue to remake the American home."

> Ten years ago 40 percent of U.S. households had a personal computer, and only one-quarter of those had Internet access. Current estimates are that over 70 percent of Americans now own a personal computer with Internet access, and increasingly that access is high-speed via broadband connectivity. Adding iPhones and other 'smart' wireless phones, which are computers in all but name, personal computer ownership increases to more than 80 percent. [...] The average American spends nearly three hours per day on the computer, not including time at work. [5]

The use of computers to generate, manage, and communicate information has significant consequences that go far beyond simply changing the way we write and store information. Some of these are extensions of problems that could occur in the paper document world. Others are unique to the computer world. But these consequences require us to approach the discovery of electronically stored information (ESI) differently than we approached the discovery of paper documents.

A. Volume

The first—and perhaps the most obvious—consequence of our conversion to digital information technology is an explosion in the volume of data that may be subject to discovery, or that needs to be sifted through to locate that which is subject to discovery. Two leading electronic discovery thinkers note that "[i]n a small business, whereas formerly there was usually one four-drawer file cabinet full of paper records, now there is the equivalent of two thousand four-drawer file cabinets full of such records, all contained in a cubic foot or so in the form of electronically stored information."[6]

The increase in volume is due to a number of factors. One is that electronic information systems tend to automatically replicate and store numerous copies of files in a variety of locations. The same file—or slightly different versions—may be found on several active areas of the computer hard drive, or as duplicate files maintained for backup purposes, or on archival and disaster media. A second reason for the proliferation of ESI is that users tend to distribute copies of their work far and wide, because it is so fast and easy to do. Gone are the days when one copy of an office report or memorandum was circulated to 20 or more people, each of whom checked their name off the distribution list and passed it on to the next. Today, a report or memorandum, with a few keystrokes, is replicated in the file directories or on the hard drives of every member of the organization. A third reason for the proliferation of ESI is that many human communications that used to be relatively or purely ephemeral, such as telephone calls and handwritten notes, are now routinely conducted using electronic information systems, leaving a more-or-less permanent record. The sheer volume of email, for instance, is staggering. According to the respected technology research firm Radicati Group, 247 billion email messages were sent per day in 2009, and that number will double by 2013.[7] If the average office worker sends or receives approximately 100 business-related email messages a day (a conservative estimate) and all were saved, 25,000 email messages will accumulate in that office worker's mailbox in the course of a year. In an organization with even a rudimentary electronic information system, that volume would be magnified by the system's automatic replication and backup operations, as well as users' tendency to send email to multiple recipients.

According to the respected technology research firm Radicati Group, 247 billion email messages were sent per day in 2009, and that number will double by 2013.

B. Complexity

A second important feature of ESI that distinguishes it from paper documentation, and that necessitates a different approach to discovery, is that ESI is created, maintained, and stored in complex systems, and often cannot be extracted from these systems without difficulty. Almost anyone can understand the technology of paper records—pen and ink, typewriter and filing cabinet, carbon and photocopier. While the physical file organization might have been complex, no special equipment or expertise beyond literacy in the relevant language was needed to access the information stored on paper documents. ESI, however, is the product of a complex set of relationships between physical equipment (computer drives and storage media), operating systems (providing the essential environment for translating electronic impulses into information) and the ever-growing array of application software that allows the information to be created, managed, and viewed. Without the proper elements of the system in place, ESI is just a vast assembly of positive and negative charges arranged on magnetic media. As Baron and Paul write:

> [Q]uite recently there has been an evolutionary burst in writing technology – a jagged punctuation on a 50 century-long sine wave. A quick succession of advances clustered or synced together, to emerge into a radically new and more powerful writing technology. These include digitization; real time computing; the microprocessor; the personal computer, e-mail; local and wide-area networks leading to the Internet; the evolution of software, which has "locked in" seamless editing as an almost universal function; the World Wide Web; and of course people and their technique. These constituents have swirled into an information complex, now known as the "Information Ecosystem." In such a system, th whole exhibits an emergent behavi that is much more than the sum of the parts. Critically for law, such systems cannot be understood or explained by any one person.[8]

Simply put, lawyers without information management expertise are seldom in a position to either know what they should be asking for in electronic discovery, or provide a response to a request, without an understanding of the systems with which they are dealing. Even when they have the relevant ESI, they are hard pressed to explain here it came from or lay the proper foundation for admission of the ESI as evidence.[9]

C. Preservation

One important element of the complexity of ESI that further distinguishes it from paper documentation is its essentially ephemeral nature. This is not the same as the ephemeral nature of unrecorded spoken words, which are truly gone once they are uttered, but closer to the original meaning of ephemera—information recorded for very short retention. Information systems record information in a variety of ways, almost all intended for short retention or migration to less transitory media. Electronic information systems are constantly taking in new data, moving data to variou temporary storage areas, overwriting stale or duplicate data, and deleting whole files. Most of this activity is occurring at high speed and without any human intervention. Traditional

concepts of "preservation" developed for the paper world simply cannot apply.

This is not to say that "preservation" is impossible. In fact, electronic information systems are capable of storing vast amounts of information for long periods of time, and because of the complexity and replication of data within systems, almost nothing is actually lost. However, locating specific data and locking it down in a form that can be accessed for later use required prompt action, may require specialized expertise, and can be considerably more expensive than simply setting aside a box of paper documents.

D. "Dark Data"

A final factor that distinguishes electronic discovery from discovery of paper documentation is what some information scientists have dubbed "the rise of dark data." This refers to ESI that is created by information systems themselves, and not intentionally by people using the systems. "Dark data" goes beyond the email, word processing, spreadsheets, databases, videos, and other documents that users create and access routinely. The phrase "dark data" was coined recently by researchers at the University of California at San Diego, who hypothesized

> ... that most data is created, used, and thrown away without any person ever being aware of its existence. Just as cosmic dark matter is detected indirectly only through its effect on things that we can see, dark data is not directly visible to people. The family auto (or automobiles) is a more typical example of dark data. Luxury and high-performance cars today carry more than 100 microcontrollers and several hundred sensors, with update rates ranging from one to more than 1,000 readings per second. One estimate is that from 35 to 40 percent of a car's sticker price goes to pay for software and electronics. As microprocessors and sensors 'talk' to each other, their ability to process information becomes critical for auto safety. For example, airbags use accelerometers, which measure the physical motion of a tiny silicon beam. From that motion, the car's acceleration is calculated, and approximately 100 times each second, this data is sent to a microprocessor, which uses the last few seconds of measurements to decide whether and at what intensity to inflate the airbag in the event of a collision. Over the life of an auto, each accelerometer will produce more than one billion measurements. Yet in a crash, only the last few data points are critical.[10]

This ESI is buried in the volume and complexity of electronic information systems, but may be highly relevant to a legal action and is entirely within the potential scope of discovery in the appropriate case. More common forms of "dark data" that have been the subject of discovery in civil litigation are the addresses of people who visit web sites, automatically recorded by web server software,[11] and the structure of complex databases from which a party needs to derive particular data.[12] Perhaps the most common form of "dark data" subject to discovery is metadata, the tracking information that computer applications and systems generate about computer files themselves, such as the date of creation or the date a file was last accessed.[13]

TACKLING E-DISCOVERY ON A BUDGET

BY SHAWN RAYMOND

MANY COMMERCIAL CASES ARE LARGE ENOUGH to justify hiring an outside vendor to take charge of the entire data collection and production process, including hosting an on-line platform for document review. But going this route is not cheap. Indeed, for many clients, particularly individuals and small businesses, it is prohibitively expensive.

Having recently completed several moderately sized electronic document productions in plaintiff-side commercial contingency fee cases for clients who are paying expenses, I am happy to share my still evolving approach to carrying out "do-it-yourself" electronic discovery for cost-conscious clients.

Reach Early Agreement on How to Produce E-Discovery

At the outset of each case, I work to get all parties to agree on the format for how all electronic production, particularly emails, will take place. At Susman Godfrey, we propose the following standard agreement:

> Electronic documents will be produced, to extent possible, in PDF format. If necessary, the parties will exchange application data electronically in the native format kept by the producing party. We will produce a bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged that do not contain electronic documents produced in the PDF format. If such application data is used at trial or in deposition, the party introducing the data will indicate in the footer on the hard-copy version (or on a separate cover sheet) (a) the CD or DVD from whence it came, (b) the directory or subdirectory where the file was located on the CD or DVD, and (c) the name of the file itself including the file extension.

I find that producing electronic documents in PDF format is almost always sufficient and cheaper. The alternative, producing electronic documents in native format, is usually an unnecessarily expensive, cumbersome approach unless special circumstances dictate. The biggest exception that comes to mind involves the production of Excel spreadsheets that contain more than one page of columns – they can be extremely difficult to read as individual PDF print outs and may be meaningless without the ability to see the formulas that create the numbers in the Excel spreadsheets.

Even if it turns out that some amount of native-format production needs to take place, I nonetheless press opposing counsel for an agreement to initially produce all electronic documents in PDF format and then give each side the opportunity to request a supplemental native-format production for particular documents (e.g., documents difficult to read as PDFs, or documents in which the parties want to review the metadata).

If you go the "production as a PDF" route, make sure to specify whether or not the parties will produce responsive electronic documents as searchable PDFs. I prefer producing documents in searchable PDF format because it is easy to upload the them to any number of standard document review tools (e.g., Summation Blaze, CaseMap, Concordance) that do not require you or your client to pay an outside vendor to host the documents on an expensive external platform.

Keep an Eye Out for Certain Types of E-Discovery

Until recently, I viewed the term "E-Discovery" as limited to email and electronic Word or Excel documents. But with ever-expanding forms of electronic communication, I now make it a point in my document requests to ask for two specific types of electronic media that many people overlook: instant messages and electronic recordings of voice mail.

In a number of industries, particularly ones involving oil and gas brokers and traders, instant messaging serves as an important method for internal and external communication. And because people write them in real time, instant messages ("IMs") can be an evidentiary goldmine. People type IMs back and forth so quickly – each IM includes the date, hour, minute, and even second of the communication — reading them makes me feel as if I am reviewing a transcript from a government wire tap. Given the real-time nature of IM conversations, people have a tendency to be careless (some may say more "honest") with what they write. And when witnesses write IMs that touch upon key matters at issue in a case, I am always on the lookout for ways to use them to my advantage on cross examination.

You also may be surprised to find out how far back companies keep archived IMs. Many businesses utilize IMs as a way to record particular trades or transactions. It is therefore not unusual for some of them to store IMs along with back-up email or document server tapes. Because IMs are common,

used today by individuals and corporations, you should consider specifically referencing them as part of your document requests.

Voicemail is another commonly used communication tool. Because of that, I find out whether the parties have access to electronic recordings of voice mail. In recent years, new voice mail features have become available that automatically convert a voice message to a .WAV file and then send the voice message to the phone recipient's email address as an attachment. If users save these .WAV files, your requesting this type of data could lead to a treasure trove of good (or bad) evidence for your case.

Other new voicemail-related products now offered, including GoogleVoice and Phonetag, either use an automated system to transcribe voice messages and send them to the user as an email text, or automatically route voicemails to transcribers who listen to the voice messages, convert them to text, and email the typed message to the recipient. That makes them discoverable.

As these types of voice mail services become more prevalent, I think they can become increasingly important evidentiary tools. You should give some thought to having your document requests specifically cover these types of communications.

Do-It-Yourself Email Review

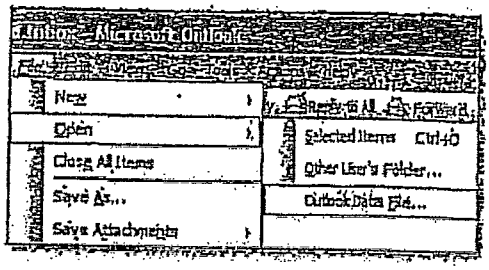
Rather than hiring an outside vendor to host a website so you can review a manageable number of emails – a single gigabyte equals about 100,000 pages of emails without attachments, so my rule of thumb is to try to perform an "in-house" review if my client's email production is less than four gigabytes. I have borrowed the following email review technique that my partner, Trey Peacock, introduced me to some time ago.

I do not pretend to have the technical expertise necessary to search for and capture emails off a client's server, but most small companies have an IT department or an available third-party consultant capable of running word searches or finding emails from particular users without having to consult with (and pay for) an outside litigation vendor. In such cases, I rely on these IT personnel to gather potentially responsive emails.

When it comes to conducting word searches for possible responsive documents, I make every effort to reach an agreed-upon list of search terms with opposing counsel. This puts all parties on notice of what is being searched, and it decreases the likelihood of having to perform subsequent searches, which can be a budget-busting time killer.

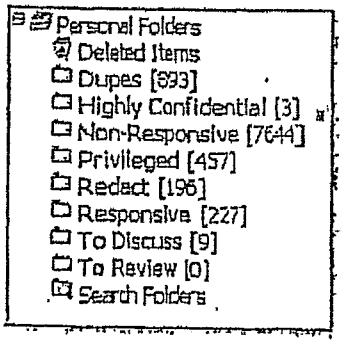
Focusing exclusively on word searches is not, in my view, the end of the story in terms of what I eventually produce. I still think it is crucial to review these emails for relevance, privilege, and confidential or trade secret information.

To accomplish this without having to pay for an external platform to host the emails, I have the search results saved as a .PST file on a CD or thumb drive – ".PST," I have come to learn, stands for Personal Storage Table. I then download the .PST to my desktop. As shown in the screen shot below, I next open Outlook, click on "File," then click on "Open," and then click on "Outlook Data File."



I locate the .PST file containing the emails I want to review and then click on that file name to have the emails contained in the .PST opened in my Outlook under "Personal Folders." Once I have completed this loading process, I have to remind myself to remove the CD or thumb drive and store it in a safe place in case I need to refer to the original assembly of emails.

With the .PST files now loaded onto my Outlook, I then create eight new file folders as shown in the screenshot below: (1) Dupes, (2) Highly Confidential, (3) Non-Responsive, (4) Privileged, (5) Redact, (6) Responsive, (7) To Discuss, and (8) To Review.



Regardless of how the .PST files are organized (they may be assembled in different file folders based on individual users or search term results), my next step is to merge all of the as-yet-unreviewed emails into the "To Review" folder.

Once I have placed all the emails in the "To Review" folder, I work some magic trying to reduce the overall number of emails I need to review by removing any duplicative emails. The program I use, MAPILab Duplicate Email Remover, costs about $25.00 to download as a permanent feature on Outlook. CNET, Topalt, and other companies offer similar types of de-duping software. Whatever software you choose can be downloaded onto your email inbox in no time. The programs are simple to use, enabling the do-it-yourself email reviewer to send all duplicate emails into the "Dupes Folder." This can greatly reduce the number of emails you have to review.

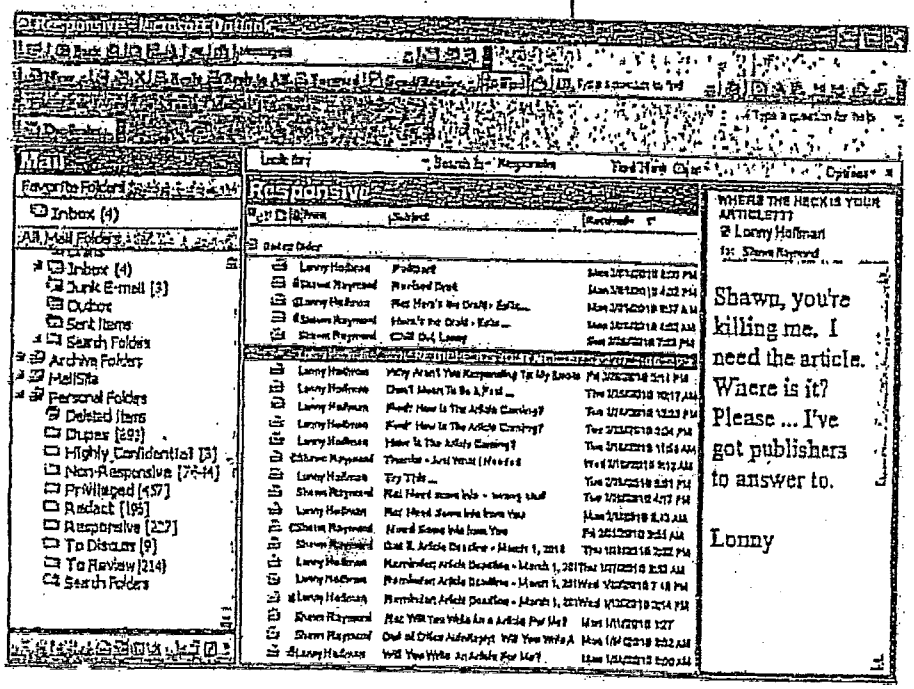
Having "de-duped" the data set, I am now ready to begin the actual review. Well, almost. To eliminate unnecessary keystrokes and to make the review go as quickly as possible (which are important goals if you are reviewing thousands of emails), I click "View," "Reading Pane," and then "Right." That way, as shown in the fictitious email exchange below, I can read the email on the screen without having to use the mouse to open the text of each email being reviewed.

To begin my review, I oftentimes arrange the emails by "Sender" so I can identify emails sent to/from counsel or other persons when a privilege may likely exist. This step allows me to more quickly identify privileged emails for placement into the "Privilege" file folder. This also is a useful way to ferret out spam and other irrelevant emails and move them to the "Not Responsive" folder. I also will sometimes sort the emails by "Subject Matter" to group email chains together. This makes it easier to be consistent and to treat one email in a chain the same way as all others in that chain.

With these housekeeping matters out of the way, I turn to actually reviewing the emails. Once I determine whether the email is responsive, non-responsive, privileged, highly confidential, or needs redaction or further review, I use the mouse to click on the email (or blocks of emails) and drag it into the appropriate file folders I have created.

I use the file folder titled "to Discuss" for emails that I am not sure are responsive or privileged. And I make it a point to review each of these emails with my client to find out in which folder I need to put them.

When the review is complete, the "To Review" file folder is empty, as all the emails in that folder are now in the responsive, non-responsive, privileged, highly confidential, or needs redaction or further review folders.



After I have put all of the emails in the appropriate buckets, I save the now reviewed .PST file to a CD or thumb drive with instructions for my firm's or the client's IT department (or an outside vendor) to produce the appropriate files with the proper confidentiality or redaction stamps ("Produce," "Highly Confidential," and "Redact") as bates-labeled PDF files or in

native format, depending on what agreement I have reached with the other side. I also have the emails located in the "Privileged" folder bates-labeled and printed out for me to create a privilege log.

I find this approach to be an effective, manageable way to tackle email review in cases that do not involve that much data. And if questions arise after the email production has taken place, I always can refer back to the .PST files, which will allow me to find, sort, and retrieve the emails.

Takeaway Thoughts

E-Discovery can be hugely expensive for your client or for you if your firm is advancing expenses in a plaintiff case. But many smaller commercial cases do not require a high-priced vendor to run the entire collection and review process. Coordinating with your client's or your firm's IT department, you can create a fast, efficient format for completing email review. It can save you time and your client (or you) expenses.

I am happy to share in greater detail the process I use to negotiate E-Discovery agreements with opposing counsel and to perform a "do-it-yourself" email document review. Shoot me an email (sorry, no IMs), or give me a call.

Shawn Raymond is a partner at Susman Godfrey in Houston, and he's serious about his offer to visit with you about E-Discovery strategies. Feel free to contact him at sraymond@susmangodfrey.com. ★

EXAMINING THE EMPIRICAL CASE FOR DISCOVERY REFORM IN TEXAS

LONNY HOFFMAN†

I. INTRODUCTION

Discovery reform is back on the Texas Supreme Court's agenda. In the summer of 2016, the Court tasked a subcommittee of its Rules Advisory Committee with conducting a wholesale review of the state's civil discovery rules.[1] The last major amendments made to the discovery rules were back in 1999.[2]

The initial impetus for this most recent directive from the Court seems to have been a request from a lay committee of the State Bar of Texas (the Committee on Court Rules) in March 2016, asking the Court to consider a

† Law Foundation Professor of Law, University of Houston Law Center. I am grateful to Matthew Harper and George Hayek for their assistance. By way of disclosure, I serve on the Texas Supreme Court's Rules Advisory Committee that will take up proposals later this year to revise the state's discovery rules—though I am not a member of the discovery subcommittee that has been working on the initial drafts of proposed rule changes.

1. Letter from Hon. Nathan L. Hecht, Chief Justice, Tex. Supreme Court, to Charles L. "Chip" Babcock, Chair, Supreme Court Advisory Comm. 2 (Apr. 18, 2016) (on file with author) [hereinafter SCAC Letter].

2. Transcript of Meeting of the Supreme Court Advisory Comm. at 27033 (June 10, 2016), http://www.txcourts.gov/media/1405601/SCAC-06-10-16-Transcript.pdf.

couple of very narrow amendments to Rule 192.3, regarding a party's obligation to disclose the names of all persons with knowledge of relevant facts.[3] However, after receiving the state bar committee's proposed revisions to Rule 192.3, the Court decided that a more wholesale review of the discovery rules was needed given that the better part of two decades had passed since the rules had been thoroughly revamped.[4] In April 2016, the Court charged a subcommittee of the Rules Advisory Committee to "consider whether changes should be made to modernize the rules, increase efficiency, and decrease the cost of litigation."[5] Beyond that general charge, the Court also specifically directed that consideration be given to the recent amendments to the Federal Rules of Civil Procedure, which went into effect in December 2015.[6]

In asking the committee to consider whether rule changes are needed to improve efficiency and reduce litigation costs, the Court appears to have assumed the truth of the commonly-held view that discovery costs and abuse have long been out of control across the civil docket. This assumption certainly was a catalyzing driver behind the December 2015 amendments to the federal rules,[7] and has been a persistent theme in prior discovery rule changes at both the state and federal level.[8] However, despite the frequency with which proponents of reform rely on the premise that most cases suffer from excessive discovery costs and abuse, there is little empirical support for it in research done over decades in the federal system. This important point is often lost in debates over discovery rule reform.

At the same time, while relatively little discovery takes place in the vast majority of cases, we also know that high discovery costs bedevil a very small percentage of the civil docket—and in at least some of these cases, those costs are not proportionate to the case's value. Although these likely represent less than 10% of all cases, they constitute the lion's share of discovery problems.[9] The persistent issues of excessive discovery costs and abuse in this small sliver of civil litigation suggest, then, that there are

3. *See id.* at 26990, 27034; *see also* SCAC Letter, *supra* note 1, at 2; TEX. R. CIV. P. 192.3.

4. *Id.* at 27034 ("[I]t's been 20 years . . . . [L]et's see what in the current rules is working and not working and whether we can improve them.").

5. SCAC Letter, *supra* note 1, at 2.

6. *Id.*

7. *See* Memorandum from the Hon. David G. Campbell, Advisory Comm. on Civil Rules to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure at 3 (May 2, 2014), http://www.uscourts.gov/sites/default/files/fr_import/CV05-2014.pdf (noting that amending the discovery rules would improve civil actions and reduce "cost and delay").

8. *See* William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 802 (2013); Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 519 (1998).

9. *See infra* text accompanying notes 40, 49, 57, 65.

reform ideas that are worth pursuing if they are targeted to this narrow class of cases.

This Article is the first part of a two-part project to examine the proposed changes that are being considered to the state's discovery rules. In it, I endeavor to summarize the available empirical evidence. My animating contention is that this evidence must be understood if an informed discussion of rule reform is going to be conducted. In the second installment (to come), I will turn to the primary changes to the discovery rules that the Rules Advisory Committee and the Court are now considering.

II. PERVASIVE PROBLEMS WITH EXCESSIVE DISCOVERY COSTS AND ABUSE? A LOOK AT THE AVAILABLE EMPIRICAL EVIDENCE

In this section, my goal is to summarize what we actually know—and we know a great deal—about discovery practices from the available empirical evidence. This knowledge should inform thinking about undertaking general discovery rule reform.

The most reliable empirical research, spanning decades, has consistently shown that there are not pervasive discovery problems in civil cases—which is to say, problems spread widely throughout the entire civil docket. There is evidence that discovery costs are high in a very small percentage of cases—that is, cases that are complex, contentious, and involve large stakes.

Note that most of the evidence comes from the study of discovery in federal cases. While there is some, limited research into discovery practices that has been done in a few individual states, there has been no systematic examination of state discovery practices. In Texas, neither the Office of Court Administration, which is the state agency responsible for keeping statistics of court information and case activity,[10] nor the individual county clerks (at least not in the major metropolitan areas), track discovery or motions related to discovery practice. However, there is no reason to believe that discovery would be more problematic in state, as compared to federal, court. Indeed, since a much higher percentage of state cases involve smaller amounts in controversy, it is quite likely that an exhaustive study of state practice would reveal far less discovery and, correspondingly, far fewer discovery problems in state court compared to the federal civil docket.

10. *See Office of Court Administration*, TEX. JUD. BRANCH, http://www.txcourts.gov/oca/ (last visited Mar. 9, 2017) (discussing the OCA's statistical collection efforts through its Judicial Information Program).

A. *Empirical Work on Discovery Costs and Abuse System-Wide*

Concerns about controlling discovery, which correspond to similar concerns over pleading standards, have been with us for a long time; indeed, they are as old as our rules of civil procedure. For instance, in 1952 the Ninth Circuit Judicial Conference issued a report critiquing the initial promulgation of the Federal Rules of Civil Procedure in 1938, complaining of "unfounded lawsuits" resulting in "an unjustifiable increase in the volume and scope of the discovery processes."[11] These longstanding concerns have led federal rulemakers over the years to try to gather good information and data about discovery practices. As a result, at this point we have a lot of data to look at. And what is most notable about the data that has been gathered is that it has consistently shown there to be few discovery problems across the entire civil justice system.

1. *Research in the 1960s*

The earliest comprehensive study of discovery was done back in the 1960s, when the Federal Advisory Committee for the Civil Rules asked researchers from Columbia University to study discovery costs and practices in federal cases.[12] What they found, much to the surprise of early critics, was that when there was any discovery taken in a case, discovery costs were usually proportionate to the stakes.[13] They also found clear evidence that whether there was discovery at all, and how much, was directly tied to how much the case was valued. A case where the amount in dispute was low led lawyers to conduct no discovery at all, while at the other end of the spectrum, high-dollar cases prompted lawyers to engage in the highest range of discovery they observed.[14] The Columbia researchers also asked the lawyers they surveyed whether they thought discovery helped or interfered with reaching a just result in the case.[15] Among the

11. *See Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 255 (1952); *see also* Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1493 (2013) ("Most are familiar with the Supreme Court's 1957 landmark decision in *Conley v. Gibson*, which decreed that the primary function of pleading is to give notice of what the pleader intends to prove later in the case. What is less well known is that *Conley* reflected the Court's decision to choose sides in a debate that had been going on since 1938 between rulemakers and opponents over the relaxed pleading standard rulemakers had crafted in Rule 8." (citing Conley v. Gibson, 355 U.S. 41 (1957))).

12. WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 41–43 (1968).

13. *Id.* at 56.

14. *Id.*

15. *Id.* at 112.

lawyers surveyed, 78% said discovery helped reach a just result, 21% said it made no difference and only about 1% said they thought it hindered reaching a just result.[16] The big take away from the Columbia study was readily summarized: "The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation."[17]

2. Research in the 1970s and 1980s

Discovery costs and practices were comprehensively studied again less than a decade later, this time by the Federal Judicial Center (FJC), which was then, and remains, the leading non-partisan organization for empirical research into the federal judiciary.[18] The FJC's assignment was prompted, in large measure, by a report issued by a task force following the Pound Conference, which had been organized in 1976 by then-Chief Justice Warren Burger to discuss perceived issues with cost and delay in the civil justice system, with particular attention focused on discovery as a perceived problem.[19] The task force report cited criticism of how the federal discovery rules were being utilized and suggested that empirical research should be undertaken.[20] Thereafter, the FJC researchers conducted an extensive study and issued an exhaustive report, which was ultimately published in 1978.[21]

To gather data, the researchers looked at every discovery event recorded in the court files for more than 3,000 terminated cases in six judicial districts.[22] Back then, discovery requests and responses were supposed to be filed with the court.[23] The researchers, then, followed up their file review with a survey of the lawyers in the cases to confirm that the docketed discovery events were accurate representations of discovery requests and responses in the cases.[24] Surprising the critics, the FJC's

16. *Id.*

17. FED. R. CIV. P. tit. V, references & annots.

18. The FJC is the education and research arm of the federal judiciary. Congress created it in 1967 to help the courts improve judicial administration. *See The FJC and What It Does: General Information*, FED. JUD. CTR., http://www2.fjc.gov/content/about-fjc-%25E2%2580%2594-general-information (last updated Mar. 7, 2017, 2:33 PM).

19. *See* Lawrence E. Walsh, President, Am. Bar Ass'n, Improvements in the Judicial System: A Summary and Overview, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 223, 224, 228–29 (1976).

20. *See id.* at 228–29.

21. *See generally* PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978), http://www.fjc.gov/public/pdf.nsf/lookup/jcclpdis.pdf/$file/jcclpdis.pdf (containing the 1978 FJC study).

22. *Id.* at xi.

23. *See id.* at 97.

24. *Id.* at 95.

findings were consistent with what the Columbia researchers had previously found in 1968. More than half of the cases in the study (52%) had no recorded discovery requests at all.[25] There were two or fewer discovery requests in more than 70% of the cases (72.3%) and approximately 95% had ten or fewer discovery requests.[26] In the small percentage of cases in which there was more extensive discovery being conducted, the central finding of the report was that "the judiciary's use of effective case and court management techniques can help speed the termination of civil actions without impairing the quality of justice."[27]

The findings of the 1978 FJC study were then confirmed by an independent study in 1983 conducted by the Civil Litigation Research Project, led by a group of five academic researchers.[28] Their empirical study looked at all direct expenditures spent on processing civil disputes through litigation in five judicial districts and one state court in each district.[29] The data included over 1,600 cases and thousands of interviews.[30] Once again, the same results were replicated: despite repeated criticisms of litigation costs as excessive, the researchers found no such evidence to support the criticisms. As the researchers put it:

> Discovery . . . is widely thought to be a cause of delay and spiraling costs. Our data, however, suggest that relatively little discovery occurs in the ordinary lawsuit. We found no evidence of discovery in over half our cases. Rarely did the records reveal more than five separate discovery events.[31]

Less than half of the cases they studied found any recorded discovery events at all.[32] They concluded that, contrary to the frequently voiced concerns over excessive litigation costs, "from the litigant's point of view, most ordinary litigation is cost-effective."[33]

Similar contemporaneous studies of state court cases followed a similar pattern: no evidence was found of pervasive discovery problems with cost or abuse. The most comprehensive of the research was done by the National Center for State Courts (NCSC).[34] The NCSC found no

25. *Id.* at 28–29.
26. *See id.* at 29.
27. *Id.* at 3.
28. *See* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 72, 90 (1983).
29. *Id.* at 75.
30. *Id.*
31. *Id.* at 89–90 (footnote omitted).
32. *Id.* at 90.
33. *Id.* at 123.
34. *See* Susan Keilitz et al., *Attorneys' Views of Civil Discovery*, JUDGES' J., Spring 1993, at 2, 4 [hereinafter Keilitz et. al., *Attorneys' Views of Civil Discovery*]; Susan Keilitz et al., *Is Civil*

discovery was requested in more than 40% of the 2,190 cases they sampled, and among the 58% that had some discovery, the median number of discovery requests was four.[35] An independent researcher studying a random sample of tort, contract, and commercial cases in one Louisiana parish found that 62% of the cases in his dataset had no more than two events, while 44% had no discovery at all.[36] Yet another researcher studied 1,400 civil cases in Iowa state court and found that only 24% had any discovery requests; 76% had none.[37]

In 1998, two researchers for the FJC (who were not involved in any of the prior studies) summarized all of the empirical research of discovery practices that had been conducted to date.[38] The central point of their paper emphasized the gulf between perception and reality: "Formal discovery actually occurs in fewer cases than uninformed observers might estimate."[39] More specifically, they summarized the empirical evidence on discovery frequency as follows:

> Cases involving extensive discovery are in fact relatively rare—the studies using actual file reviews uncovered very few cases involving more than ten discovery requests, perhaps 5–15% depending on the sampling method. In the 1978 FJC study, less than 5% of the case files examined recorded more than ten discovery requests; of cases with at least some discovery, 90% had no more than ten requests.[40]

As for perceptions of discovery abuse, McKenna and Wiggins again pointed out that the available evidence did not support the contemporary critiques. "In the vast majority of cases," they noted, "discovery appears to be the self-executing system the rules contemplate. Most incidents of 'problem' discovery, as perceived by lawyers, do not result in any formal request for relief."[41] Thus, McKenna and Wiggins concluded, "If measured by formal objections, discovery motions activity or sanctions requests, discovery problems do not appear to be extreme."[42]

Discovery in State Trial Courts Out of Control?, ST. CT. J., Spring 1993, at 8, 9 [hereinafter Keilitz et al., *Civil Discovery in State Trial Courts*].

35. Keilitz et al., *Civil Discovery in State Trial Courts*, *supra* note 34, at 10.

36. *See* Dennis J. Krystek, *Discovery Versus Delay in Civil District Court: A Cross-Sectional Pilot Study of Civil District Court Reveals No Significant Correlation*, 42 LA. B.J. 255, 257 (1994).

37. *See* David S. Walker, *Professionalism and Procedure: Notes on an Empirical Study*, 38 DRAKE L. REV. 759, 781, 824 tbl.2 (1988).

38. *See* Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 789–90 (1998).

39. *Id.* at 790.

40. *Id.* at 791.

41. *Id.* at 800.

42. *Id.*

3. *Research in the 1990s*

Despite the consistency of the empirical research over three decades, many lawyers and other observers (especially those familiar with higher stakes litigation involving large corporations) simply refused to believe that discovery costs were proportionate to case values. Not dissuaded by the evidence, those who managed to get their voices heard called for rulemakers and legislators to impose limits on discovery. And, although they could cite no credible evidence of a problem, both rulemakers and Congress were led to restrict discovery. The most significant changes took place in 1993.[43]

After the reforms were put in place, researchers tried to study discovery practices, and once again, the latest empirical research revealed that there were no system-wide problems with disproportionate discovery or discovery abuse. A good summary of the research can be found in one of the leading academic papers from this period.[44] Professor Mullenix concluded that the 1993 amendments could not be justified based on an alleged system-wide problem with disproportionate discovery costs or abuse.[45]

Although the evidence consistently showed that no pervasive discovery problems existed, reformers continued to beat their drums through the 1990s to urge passage of even more amendments to curtail discovery further still. Once again, they paid no heed to either the prior empirical research or the new studies that were conducted. In particular, they ignored the findings of two additional, exhaustive, and non-partisan studies, both published in 1998, that again demonstrated, consistent with the prior research, that discovery costs were, in the main, quite modest and proportional to case values.

One of those studies was conducted by the RAND Institute for Civil Justice, which was studying the effects of the 1993 amendments.[46] The RAND study focused on civil cases after the 1993 amendments had been enacted.[47] What it found was that "lawyer work hours per litigant on discovery are zero for 38% of general civil cases and low for the majority of cases."[48] The researchers continued: "The empirical data show that any

43. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1443 (1994).

44. *See id.* at 1410–43.

45. *See id.* at 1445.

46. *See* James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 614–15 (1998).

47. *See id.* at 616–18.

48. *Id.* at 636.

problems that may exist with discovery are concentrated in a minority of the cases," noting further that the evidence indicates in this minority of cases, "discovery costs can be very high."[49] One last point worth making here (this will be revisited later) is that the RAND researchers also found clear evidence that one of the most effective judicial management tools is for a court to set a firm, early trial date.[50] They found that, as much as anything, setting a trial date and sticking to it as much as possible was correlated with lower discovery costs in cases.[51]

The other empirical study in that period, also from 1998, was conducted by the FJC.[52] One of their primary points of focus in this study was on trying to measure the costs of discovery relative to total litigation costs, to the amount at stake in the case, and to the information needs of the case.[53] The 1998 FJC study found that under the 1993 amendments, the median reported proportion of discovery costs to stakes was 3%, and that the proportion of litigation costs attributable to problems with discovery was about 4%.[54] Thus, the researchers concluded:

> Anecdotal information—and the occasional horror story—suggests that discovery expenses are excessive and disproportionate to the informational needs of the parties and the stakes in the case. Our research suggests, however, that for most cases, discovery costs are modest and perceived by attorneys as proportional to parties' needs and the stakes in the case.[55]

Also notable is that the researchers found a "clear relationship" between how much discovery took place in a case and the monetary stakes of the case.[56] "That is, as the stakes increase, the volume of discovery, and of discovery problems, also increases. To some extent, then, it appears that the amount of discovery and the frequency of problems is driven simply by the size of the case."[57] We will see that in a later study, in 2009, this same important finding was again documented.

Summarizing the RAND and FJC 1998 studies, Bryant Garth (then serving as Director of the American Bar Foundation), noted:

> The recent studies of civil discovery by the RAND Institute for Civil Justice and the Federal Judicial Center ("FJC") establish

49. *Id.*
50. *Id.* at 676–77.
51. *Id.* at 669–70, 676.
52. Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 525–26 (1998).
53. *Id.* at 529.
54. *Id.* at 531–32.
55. *Id.* at 531.
56. *Id.* at 593.
57. *Id.*

> beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity and—although not the subject of these studies—probably even lawyers. The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high-conflict cases, in contrast, raise many more problems and involve much higher stakes.[58]

4. Research in the 2000s

Before continuing, it is worth pausing to summarize: at this point, over four decades, the best empirical evidence established that there were no pervasive discovery problems. Yet, over this same four-decade period, reformers continued to be unwilling to acknowledge the available evidence. So, it should come as no surprise that by the mid-to-late 2000s, calls for further reform of the federal rules were again heard, despite all of the evidence, and despite all of the prior limitations that had been imposed. Those calls became loud enough that the Federal Advisory Committee for the Civil Rules asked the FJC to again look closely at discovery costs in civil cases and to report its findings.[59] The findings were to be reported to the Federal Advisory Committee's Duke Conference in 2010.[60] This was to be the most comprehensive study of federal discovery practices ever conducted.

I was an invited guest at the Duke Conference and attended all of the sessions. And I can say that it came as nothing short of a shocking thunderbolt to many people there that the conference opened with the FJC researchers reporting they found no evidence whatsoever of any pervasive concerns with disproportionate costs or discovery abuse. The researchers were very careful and went out of their way to design their study to find cases that involved as much discovery as possible. Thus, they systematically excluded from their study any cases in which discovery was unlikely to take place. The researchers also eliminated any case that was terminated less than sixty days after it had been filed—once again, to avoid the possibility that these cases would skew the results. What was left, then,

58. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 597 (1998) (footnotes omitted).

59. EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5 (2009), http://www.fjc.gov/public.pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf [hereinafter LEE & WILLGING, PRELIMINARY REPORT].

60. *Id.*

was a study that—if anything—over-represented how much discovery takes place in a typical civil case in federal court.

The FJC reported its careful and exhaustive study in 2009. One of their key findings was that the median cost of litigation, including discovery and attorneys' fees, was $20,000 for defendants and $15,000 for plaintiffs.[61] Note that these figures are medians, not means. They likely did so because the researchers were conscious that reporting an average could give a distorted picture of the actual reality, since a bunch of low-dollar cases—or, correspondingly—a bunch of high-dollar cases, can skew the results.

These figures came as a surprise to many, particularly those proponents of reform who had long assumed that litigation costs routinely careen out of control in federal civil cases. Just as significant—and perhaps just as surprising to many observers—were the findings with regard to the overall percentage of total litigation costs attributable to discovery. Discovery costs were reported by plaintiffs' lawyers to account, at the median, for only 20% of the total litigation costs; the median figure reported by defendants' lawyers was 27%.[62] Standing alone, these findings undercut the conventional wisdom, repeated in headlines and sound bites, that discovery costs are far-and-away the most significant part of total litigation costs in federal cases. And linked to these findings was, perhaps, the most important finding of all: at the median, the reported costs of discovery, including attorney's fees, amounted to just 1.6% of stakes of the case for plaintiffs and only 3.3% of the case's value for defendants.[63] This means that in half of all civil cases, the costs of discovery amounted to even less than 1.6% of the case's value for plaintiffs and less than 3.3% of its value for defendants.

Considering discovery costs in light of a case's value is critical. A comparison of discovery costs in a $100,000 case with those incurred in a case worth $10 million or more is meaningless because the concern about discovery is not the sum of all cases being too high. The real worry is discovery costs that outstrip a case's value.[64]

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61. *Id.* at 2. The lead researchers from the FJC also summarized their study findings in a later published paper as part of the Duke Conference. *See generally* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010) [hereinafter Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*] (containing the Duke Conference study).

62. Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*, *supra* note 61, at 779–80.

63. LEE & WILLGING, PRELIMINARY REPORT, *supra* note 59, at 2.

64. Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*, *supra* note 61, at 771–76 (explaining why empirical questions regarding discovery costs and burdens should be considered relative to the monetary stakes of a case).

The FJC's study goes into even greater detail and depth and is worth reading in its entirety. But, for now, the bottom line is simply this: the FJC's exhaustive 2009 study confirmed the prior empirical research that disproportionate discovery costs are not a systemic problem.

B. Empirical Work on Discovery Cost and Abuse in Complex Cases

While the FJC's 2009 study found no pervasive discovery problems, it was able to identify characteristics that are associated with high litigation costs. The most significant factor turns out to be high stakes, with factual complexity also highly correlated with more expense.[65] Law firm economics also have an important impact on litigation costs. When other variables are controlled, law firm size alone more than doubles litigation costs; hourly billing also tends to make costs higher.[66] These findings are consistent with the results of earlier empirical studies.

But there is something else we need to recognize. Complex, high-stakes cases have more discovery than lower value cases. Whether these costs are unjustifiably high is unclear, but we do know that lowering presumptive limits on discovery or focusing on proportionality is unlikely to affect this class of cases.

Discovery expenditures are rational when the stakes are sufficiently high or the case is factually complex. These cases require more time and effort for information exchanges and settlement bargaining. Moreover, certain litigants will always hire large firms whose higher rates drive up discovery costs. None of these factors are susceptible to decrease due to procedural changes.

In summary, the data establishes that there is not a widespread problem with discovery costs. So, if we are going to engage in rule reform, we should keep that reform focused in the one place—complex cases—where the evidence suggests reform is needed. As the two lead researchers of the FJC's 2009 empirical study have commented:

> Instead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more-focused reforms of particularly knotty issues . . . . Otherwise, we may simply find ourselves considering an endless litany of complaints about a problem that cannot be pinned down empirically and that never seems to improve regardless of what steps are taken.[67]

65. Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation*, *supra* note 61, at 783–84.

66. *Id.* at 784.

67. *Id.* at 787.

It is sobering to reflect on how policy debates are often conducted with little regard for the actual facts. Over the course of his nearly forty-year tenure at Columbia University's School of Law, the much-revered proceduralist, Maurice Rosenberg, often pointed out the challenge of getting reformers and rulemakers to learn the lessons that empirical research can offer:

> Experience in reporting findings to procedural revisers and rulemakers teaches a sobering lesson: Persuading them to accept empirical research results will be a formidable task even if the research speaks directly to precisely defined and topical questions. Data have great trouble piercing made-up minds. Some judges and lawyers believe there are only two kinds of research findings: those they intuitively agree with ("That's obvious!"); and those they intuitively disagree with ("That's wrong!"). Resistance to the counterintuitive is a formidable barrier to the acceptability of procedure-impact research findings.[68]

III. CONCLUDING THOUGHTS—AND LOOKING AHEAD

Tinkering with the discovery rules is not some meaningless technical exercise. If, guided by misinformation and myth, we end up restricting discovery in all civil cases, the consequences to the private enforcement of our law will be great. As Professor Paul Carrington (a former reporter to the Federal Advisory Committee) once observed, "[D]iscovery is the American alternative to the administrative state."[69] In sharp contrast to what is done in other developed nations—which have invested far more heavily in administrative enforcement regimes—in the United States we have privatized enforcement of many legal norms, across many different fields of law. Enforcement by private attorneys general is backed by the power to uncover wrongdoing through discovery. As Carrington soberly reminds us: "Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct."[70]

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68. Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 29 (1988).

69. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

70. *Id.* More recent work by Professors Stephen Burbank and Sean Farhang make the same point in extended detail. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1583–1603 (2014); *see also* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, PENN L. LEGAL SCHOLARSHIP REPOSITORY: FAC. SCHOLARSHIP 96–100 (Nov. 16, 2011), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1346&context=faculty_scholarship.

As we have seen, we already possess a great deal of information about discovery practices in civil cases. Consequently, it is incumbent on rulemakers to take the available evidence into account. In other words, this is one of those rare occasions when we do not have to proceed blindly; history can be our guide. Given what we already know, and absent any new information to the contrary, rulemakers should conclude that justification for amending the state's discovery rules cannot be reasonably based on trying to control cost and abuse for all civil cases.

The good news is that early indicators suggest rulemakers seem to be taking at least some of these lessons to heart. Implicitly acknowledging that warrant does not exist for wholesale changes, initial drafts of proposed discovery rule changes from the Supreme Court's Advisory Committee are focused on improving the rules for outlier cases—not on a dramatic overhaul that would impact all cases. The early indicators, thus, are promising.

This is not to say that I support all of the proposed changes and in a follow-on article I'll have more to say about all of the various suggested rule revisions that are being considered. Nevertheless, given how rarely state and federal rulemakers have actually taken the available evidence into account in reforming discovery rules, one cannot help but feel at least a degree of optimism at the initial direction the rules committee is taking.[71]

71. Rosenberg, *supra* note 68, at 29.

New Rules, New Opportunities

by David G. Campbell

IN May of 2010, some 200 judges, lawyers, and academics gathered for two days at the Duke University Law School to evaluate the state of civil litigation in federal court. The conference was sponsored by the Advisory Committee on the Federal Rules of Civil Procedure. Many studies, surveys, and papers were prepared in advance of the conference to aid the discussion. Although the gathering found that federal civil litigation works reasonably well and that a complete overhaul of the system is not warranted, the participants also concluded that several improvements clearly are needed. Four stood out in particular: greater cooperation among litigants, greater proportionality in discovery, earlier and more active case management by judges, and a new rule addressing the preservation and loss of electronically stored information ("ESI").

The Advisory Committee took the findings of the Duke conference and drafted amendments that address these four areas of focus. The amendments have been approved unanimously by the Advisory Committee, the Standing Committee on the Rules of Practice and Procedure, the Judicial Conference of the United States, and the United States Supreme Court and will take effect on Dec. 1, 2015, unless Congress acts to disapprove them. As Congressional disapproval appears unlikely, judges and lawyers should become familiar with the new rules. The Advisory Committee believes they present a unique opportunity to improve the delivery of civil justice in federal courts.

Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required. As a result, over the course of the next several months the Advisory Committee, the Federal Judicial Center ("FJC"), and other groups will be promoting the new rule amendments and their intended improvements. This article is a small step in that direction. If the amendments have their intended effect, civil litigation will become more efficient and less expensive without sacrificing any party's opportunity to obtain the evidence needed to prove its case.[1]

DAVID G. CAMPBELL is a United States District Court judge for the District of Arizona. His term as chair of the Advisory Committee on the Federal Rules of Civil Procedure concluded in October.

THE DUKE CONFERENCE AND DRAFTING OF THE AMENDMENTS

Participants in the Duke conference included federal and state judges from trial and appellate courts around the country, plaintiff and defense lawyers, public interest lawyers, in-house attorneys from business and government, and distinguished law professors. The FJC and other organizations conducted studies and surveys in advance of the conference, and more than 40 papers and 25 compilations of data were presented. Some 70 judges, lawyers, and academics made presentations to the conference, followed by a broad-ranging discussion among all participants.[2]

The Advisory Committee prepared a post-conference report for Chief Justice John Roberts.[3] The report noted that there was no general sense that the 1938 approach to the Federal Rules of Civil Procedure has failed. "While there is need for improvement, the time has not come to abandon the system and start over."[4] The report identified three specific areas of needed improvement: "What is needed can be described in two words — cooperation and proportionality — and one phrase — sustained,

> "Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required.

active, hands-on judicial case management."[5] The report also noted "significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve [ESI] and the consequences of failing to do so."[6]

Following the Duke conference, the Advisory Committee appointed a subcommittee to develop rule amendments based on conference presentations and conclusions. The subcommittee compiled a list of all proposed rule amendments made at the conference and then held numerous calls and meetings to winnow and refine the suggestions. Over the course of two years, the subcommittee held many discussions, circulated drafts of proposed rule amendments, and sponsored a mini-conference with invited judges, lawyers, and law professors to discuss possible amendments. The subcommittee presented recommendations for full discussion at meetings of the Advisory Committee and the Standing Committee in 2011, 2012, and 2013.

While this work was underway, a separate subcommittee worked on a rule to address the preservation and loss of ESI. This subcommittee also held numerous discussions and meetings, circulated and refined drafts, and sponsored a mini-conference with judges, lawyers, and technical experts to discuss possible solutions to the litigation challenges presented by ESI.

The proposed amendments were published for public comment in August 2013. Over the next six months, more than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Advisory Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the subcommittees revised the proposed amendments and again presented them to the Advisory and Standing Committees, where they were adopted unanimously. The rule amendments were then approved without dissent by the Judicial Conference of the United States and the Supreme Court.

The amendments affect more than 20 different provisions in the civil rules, but this article will address them in terms of the four areas of focus identified at the Duke conference: cooperation, proportionality, early and active judicial case management, and ESI.

COOPERATION

There was near-unanimous agreement at the Duke conference that cooperation among litigants can reduce the time and expense of civil litigation without compromising vigorous and professional advocacy. In a survey of members of the ABA Section of Litigation completed before the conference, 95 percent of respondents agreed that collaboration and professionalism by attorneys can reduce client costs.[7]

Cooperation, of course, cannot be legislated, but rule amendments and the actions of judges can do much to encourage it. Rule 1 now provides that the civil rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment will add the following italicized language: The rules "should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." The intent is to make clear that parties as well as courts have a responsibility to achieve the Rule 1 goals.

The Committee Note to this proposed amendment observes that "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

Sanctions are not the only means of discouraging litigation abuses; judges often have opportunities to remind litigants of their obligation to cooperate. Such admonitions can now be backed with a citation to Rule 1.

PROPORTIONALITY AND OTHER DISCOVERY CHANGES

The Advisory Committee report to the Chief Justice noted "[o]ne area of consensus in the various surveys" conducted before the Duke conference: "that district and magistrate judges must be considerably more involved in managing each case from the outset, to tailor motion practice and shape the discovery to the reasonable needs of the case."[8] This wording captures the meaning of "proportional" discovery; it is discovery tailored to the reasonable needs of the case. It affords enough information for a litigant to prove his or her case, but avoids excess and waste. Unwarranted document production requests, excessive interrogatories, obstructive responses to legitimate discovery requests, and unduly long depositions all result in disproportionate discovery costs.

Studies completed in advance of the Duke conference suggested that disproportionate discovery occurs in a significant percentage of federal court cases. An FJC survey of closed federal cases found that a quarter of the lawyers who handled the cases believed that discovery costs were too high for their client's stake in the case.[9] Other surveys showed greater dissatisfaction. Members in the American College of Trial Lawyers ("ACTL") widely agreed that today's civil litigation system takes too long and costs too much, resulting in some deserv 5 2 4 cases not being filed and other cases

meritorious defenses being settled to avoid the costs of litigation.[10] In a survey of the ABA Litigation Section, 89 percent of respondents agreed that litigation costs are disproportionately high in small cases, and 40 percent agreed that they are disproportionately high in large cases.[11] A survey of the National Employment Lawyers Association ("NELA") found universal sentiment that the discovery process is too costly, with a significant majority indicating that discovery is abused in almost every case.[12] In a report summarizing the surveys prepared for the Duke conference, the Institute for Advancement of the American Legal System ("IAALS") found that between 61 percent and 76 percent of respondents in the ACTL, ABA, and NELA surveys agreed that judges do not enforce existing proportionality limitations.[13]

The concept of proportionality is not new. It has been in the federal rules since [illegible]. Rule 26(b)(2)(C) provides that [illegible] motion or on its own, the court must limit the frequency and extent of discovery . . . if it determines that . . . the burden or expense of the proposed discovery 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." Rule 26(b)(1) — which establishes the scope of permissible discovery — declares that "[a]ll discovery is subject to" the limitations in Rule 26(b)(2)(C). And Rule 26(g)(1)(B)(iii) provides that a lawyer's signature on a discovery request or response constitutes a certification that the request or response is not unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Despite the longstanding existence of these proportionality provisions in the rules, the Duke conference concluded that judges do not apply them. In response, the Advisory Committee chose to move the factors in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). Thus, under the proposed amendment, the scope of discovery in civil litigation now will be defined 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 importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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.

The intent of this change is to make proportionality unavoidable. It will now be part of the scope of discovery. Information must be relevant and proportional to be discoverable.

It is worth emphasizing that this change is not intended to deprive any party of the evidence needed to prove its claims or defenses. The intent is to eliminate disproportionate discovery in cases where such elimination is needed. The change will make a difference, however, only if judges are willing to engage in a dialogue with the parties and make decisions regarding the amount of discovery reasonably needed to resolve a case. This calls for active case management — judges who intervene early, help the parties identify what is needed to prepare the case for trial, and set reasonable schedules to complete that preparation without undue time or expense.

> "The intent of this change is to make proportionality unavoidable. It will now be part of the scope of discovery. Information must be relevant and proportional to be discoverable.

The Advisory Committee changed the order of the Rule 26(b)(2)(C) factors to refer first to "the importance of the issues at stake" and second to "the amount in controversy." This was done to avoid any implication that the amount in controversy is the most important consideration. Cases seeking little or no monetary relief may require significant discovery. The Committee also added a new factor — "the parties' relative access to relevant information" — to highlight the reality that some cases involve an asymmetrical distribution of information. Judges should recognize that proportionality in such cases often will mean that one party must bear greater burdens in responding to discovery than the other party. Discovery is not necessarily disproportionate just because information is flowing mainly from one party to another.

To address concerns raised during the public comment process, the Advisory Committee added a committee note explaining that the amendment to Rule 26(b)(1) does not place the burden of proving proportionality on the party seeking discovery. Nor does it authorize boilerplate refusals to provide discovery on the ground that it is not proportional. The intent is to prompt a dialogue among the parties and, if necessary, the judge, concerning the amount of discovery reasonably needed to resolve the case.

A few other changes to the discovery rules are intended to support the new focus on efficient discovery.

"REASONABLY CALCULATED TO LEAD"

The amendments to Rule 26(b)(1) will delete a familiar sentence that each of us can recite from memory: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This sentence will be replaced with the following language: "Information within this

scope of discovery need not be admissible in evidence to be discoverable."

The "reasonably calculated to lead" phrase was never intended to define the scope of discovery. The language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would be hearsay and would not be admissible at trial. Inadmissibility was used to bar relevant discovery. The 1946 amendment sought to stop this practice.

Recognizing that the sentence was never designed to define the scope of discovery, the Advisory Committee amended the sentence in 2000 to add the words "relevant information" at the beginning: "*Relevant information* need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee Note explained that "relevant means within the scope of discovery as defined in this subdivision [(b)(1)]." Thus, the "reasonably calculated to lead" phrase applies only to information that otherwise falls within the scope of discovery set forth in Rule 26(b)(1); it does not broaden the scope of discovery. As the 2000 Committee Note explained, any broader reading of the "reasonably calculated to lead" phrase "might swallow any other limitation on the scope of discovery."

Despite the original intent of the sentence and the 2000 clarification, lawyers and judges continue to cite the "reasonably calculated to lead" language as defining the scope of discovery. Some even disregard the reference to admissibility, arguing that any inquiry "reasonably calculated to lead" to something helpful is fair game in discovery. The amendment will eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information.

TWO OTHER CHANGES TO RULE 26(b)

The proposed amendments also will delete two existing phrases in Rule 26(b)(1): one that permits discovery relating to the "subject matter" of the litigation on a showing of good cause, and another that permits discovery of "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." The Advisory Committee found that the "subject matter" phrase is rarely if ever used. Parties and courts rightly focus on the claims and defenses in the litigation. The Committee also found that discovery into the existence and location of discoverable information is widely enough accepted that rule language is no longer needed. The Committee Note makes clear that these two changes are not intended to narrow the scope of discovery now permitted under Rule 26(b)(1) and provides some examples of the kinds of discovery still permitted.

> "More than 70 percent of [survey] respondents from the ABA Litigation Section agreed that early intervention by judges helps to narrow issues and reduce discovery; 73 percent agreed that litigation results are more satisfactory when a judge promptly begins managing a case and stays involved.

OTHER DISCOVERY CHANGES

Rule 26(c)(1)(B) will be amended to include "allocation of expenses" among the terms that may be included in a protective order. This change makes express what the Supreme Court has long found implicit in the rule — that courts may allocate discovery costs when resolving protective order issues. (*See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)). The Advisory Committee thought it useful to make the authority explicit on the face of the rule. This is not a change intended to make cost shifting more frequent, nor is it intended to suggest that cost shifting should be considered as part of the proportionality analysis. It simply is a codification of existing protective order authority.

Some have asked the Advisory Committee to consider adoption of a requester-pays system for civil discovery, which would be a significant departure from historical discovery practice. Although the Advisory Committee agreed to consider that idea, the Committee has not acted on it. To make clear that the addition of the "allocation of expenses" language to Rule 26(c)(1)(B) is not an implicit endorsement of a requester-pays system, the Committee Note includes this language: "Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

The amendments also include three changes to Rule 34. The first requires that objections to document production requests be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, but requires the party to identify a reasonable time for the production. The third requires that an objection state whether any responsive documents are being withheld on the basis of an objection.

These amendments should eliminate three relatively frequent problems: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting to a docum request; responses stating that respon-

sive documents will be produced in due course, without indicating when production will occur and which often are followed by long delays; and responses that state various objections, produce some documents, and yet do not say whether any other documents have been withheld on the basis of the objections. All three practices thwart Rule 1's goals of speedy and inexpensive litigation.

Further, an amendment to Rule 26(d) will allow parties to deliver Rule 34 document production requests before the Rule 26(f) meeting between the parties. The 30 days to respond will be calculated from the date of the first Rule 26(f) meeting. The purpose of this change is to facilitate discussion of specific discovery proposals between the parties at the Rule 26(f) meeting and with the court at the initial case management conference.

EARLY, ACTIVE JUDICIAL CASE MANAGEMENT

The Duke conference included some of the best litigators in the country. When discussing ways to improve civil litigation, these lawyers pled for more active case management by judges. This is an excerpt from the report to the Chief Justice:

> Pleas for universalized and invigorated case management achieved strong consensus at the Conference. . . . There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set[.] Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. . . . A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.[14]

Surveys completed before the Duke conference found similar views. More than 70 percent of respondents from the ABA Litigation Section agreed that early intervention by judges helps to narrow issues and reduce discovery. Seventy-three percent agreed that litigation results are more satisfactory when a judge promptly begins managing a case and stays involved.[15] The NELA survey reflects the same view. Almost two-thirds of respondents agreed that overall litigation results are more satisfactory when a judge actively manages a case.[16]

The benefits of early and active case management have been known for years. When Rule 16 was amended in 1983, the Advisory Committee Note included this comment: "Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices."

Of course, Rule 16 already calls for early management of cases by district or magistrate judges. It already contemplates the establishment of a reasonable but efficient schedule for the litigation, with input by the parties in the Rule 26(f) report. And yet lawyers in the surveys and during the Duke conference reported that many federal judges do not actively manage their cases. The rule amendments include four changes aimed at encouraging more active case management.

First, a key to effective case management is the Rule 16 conference where the judge confers with the parties about the needs of the case and sets an appropriate litigation schedule. To encourage case management conferences during which judges and lawyers actually speak with each other, an amendment will delete the language in Rule 16(b)(1)(B) that allows the scheduling conference to be held "by telephone, mail, or other means." This is mostly a matter of emphasis, because the Committee Note explains that conferences may still be held by any means of direct simultaneous communication, including by telephone. And Rule 16(b)(1)(A) will continue to allow courts to base scheduling orders on the parties' Rule 26(f) reports without holding a conference. The change in the text is intended to eliminate the express suggestion that setting litigation schedules by "mail" or "other means" is an adequate substitute for direct communication with parties. In most cases, it is not. The amendment is intended to encourage judges to communicate directly with the parties when beginning to manage a case.

Second, the time for holding the scheduling conference will be moved to the earlier of 90 days after any defendant has been served (reduced from 120 days in the present rule) or 60 days after any defendant has appeared (reduced from 90 days). The intent is to encourage earlier intervention by judges. Recognizing that these time limits may not be appropriate in some cases, the amendment allows judges to set a later time for good cause. The amendments also reduce the time for serving a complaint under Rule 4(m) from 120 days to 90 days. Language has been added to the Committee Note recognizing that additional time will be needed in some cases.

Third, the proposed amendments add two subjects to the list of issues to be addressed in a case management order: the preservation of ESI, and agreements reached under Federal Rule of Evidence 502. ESI is a growing issue in civil litigation, and the Advisory Committee believes that parties and courts should address it early. Rule 502 was designed to reduce the expense of producing ESI or other voluminous documents, and the parties and judges should consider its potential application in every case. Parallel provisions are added to the subjects for the Rule 26(f) meeting.

Fourth, briefing and deciding discovery motions can significantly delay litigation. The amendments suggest that the judge and the parties consider at the initial case management conference whether the parties should be required to hold an in-person or telephone conference with the judge before filing discovery motions. Many federal judges require such conferences now, and experience has shown them to be very effective in resolving discovery disputes quickly and

inexpensively. As the report to the Chief Justice noted, "[a] judge who is available for prompt resolution of pretrial disputes saves the parties time and money."[17] The amendment encourages this practice.

These changes are modest, but the Advisory Committee hopes they will encourage earlier and more active case management by judges. No other practice can do as much to improve the delivery of civil justice in federal courts.

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RULE 37(e): FAILURE TO PRESERVE ESI

Preservation of ESI is a major issue confronting parties and courts, and the loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith. The Advisory Committee was credibly informed that persons and entities over-preserve ESI out of fear that some might be lost, that their actions might with hindsight be viewed as negligent, and that they might be sued in a circuit that permits adverse inference instructions on the basis of negligence. As the report to the Chief Justice noted, "the uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. . . . Conference participants asked for a rule establishing uniform standards of culpability for different sanctions."[18]

The distinguished panel that addressed this issue at the Duke conference suggested that the Advisory Committee draft a rule specifying when a duty to preserve ESI arises, the scope and duration of the duty, and sanctions that can be imposed for breach of the duty. The Committee attempted to write such a rule, but found that it could not identify a precise trigger for the duty to preserve that would apply fairly to the wide variety of cases in federal court. Nor could the Committee specify the scope or the duration of the preservation obligation because both depend heavily on the unique facts of each case.

The Advisory Committee did conclude that helpful guidance could be provided on the sanctions to be imposed when ESI is lost. The circuit split could be resolved, and the rules regulating sanctions could provide parties with some guidance when making preservation decisions.

The new Rule 37(e) does not purport to create a duty to preserve ESI. It instead recognizes the existing common-law duty to preserve information when litigation is reasonably anticipated. Thus, the new rule applies when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The rule calls for reasonable steps, not perfection, in efforts to preserve ESI.

If reasonable steps are not taken and ESI is lost as a result, the rule directs the court to focus first on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in the new rule limits a court's powers under Rules 16 and 26 to order discovery to achieve this purpose.

If the ESI cannot be restored or replaced, Rule 37(e)(1) provides that the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." This provision deliberately preserves broad trial court discretion. It does not attempt to draw fine distinctions as to the various measures a trial court may use to cure prejudice under (e)(1), but it does limit those measures in three general ways: There must be a finding of prejudice to the opposing party, the measures imposed by the court must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures addressed in subdivision (e)(2).

Rule 37(e)(2) limits the application of several specific sanctions to cases in which "the party acted with the intent to deprive another party of the information's use in the litigation." The sanctions subject to this limitation include presuming that the lost information was unfavorable to the party that lost it, instructing the jury that it may or must presume the information was unfavorable to that party, and dismissing the action or entering a default judgment.

Subdivision (e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. Adverse inference instructions historically have been based on a logical conclusion: If a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the party that destroyed it. Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad-faith loss of the information. (*See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak cas (citations omitted).)

Other circuits permit adverse inference instructions on a showing of negligence. They reason that an adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. (*See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002).) While this rationale has some equitable appeal, the Advisory Committee had several concerns about its application to ESI. First, negligently lost ESI may have been favorable or unfavorable to the party that lost it — mere negligence does not reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that may well become more frequent as ESI multiplies. Third, as we already have seen, permitting an adverse inference for mere negligence creates powerful incentives to over-preserve, often at great cost. Fourth, because ESI is ubiquitous and often is found in many locations, the loss of ESI generally presents less risk of severe prejudice than may arise from the loss of a single tangible item or a hard-copy document.

These reasons caused the Advisory Committee to conclude that the circuit split should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or when ruling in bench trials, and adverse inference jury instructions, will be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends this logic to the even more severe measures of dismissal or default. The Advisory Committee thought it incongruous to allow dismissal or default in circumstances that would not justify an adverse inference instruction.

ONE OTHER CHANGE — ABROGATION OF RULE 84

The Federal Rules of Civil Procedure are followed by an appendix of forms, and Rule 84 provides that the forms "suffice under these rules." Many of the forms are out of date, the process for amending them is cumbersome, and the Advisory Committee found that they are rarely used. In addition, many alternative sources of civil forms are readily available, including forms created by commercial publishing companies and forms created by a Forms Working Group at the Administrative Office of the United States Courts, which are available on the federal courts website.

The proposed amendments will abrogate Rule 84 and eliminate the appendix of forms. The Forms Working Group plans to expand the range of forms available on the federal courts website, and the Committee Note makes clear that this change is not intended to signal a change in pleading standards under Rule 8.

CONCLUSION

The American system of civil justice is in many respects the best in the world, but in federal courts it has become too expensive, too time-consuming, and largely unavailable to average citizens and small businesses. The system needs improvement. The proposed amendments on cooperation, proportionality, case management, and the loss of ESI are intended to reduce the cost and delay of civil litigation. They are not intended to accelerate litigation at the cost of justice, deny parties the evidence needed to prove their cases, or create new obstacles to legitimate discovery. The amendments should be applied by courts and parties in an even-handed effort to achieve the goals of Rule 1 — the just, speedy, and inexpensive determination of every action.

The new rules will have no effect, however, unless judges and lawyers also change. Lawyers can increase their cooperation without sacrificing the finest of their legal advocacy skills. They can make the system more accessible by seeking and providing reasonable and proportional discovery. Judges can actively manage cases by intervening early, entering reasonable and proportional case management orders, remaining engaged throughout the life of the case, ruling promptly on discovery disputes and other motions, and setting firm trial dates.

The coming rule amendments provide a new opportunity for all of us to improve our practices, refine our skills, and achieve the just, speedy, and inexpensive determination of every action.

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[1] This paper represents the author's views and not those of the Advisory Committee, although it does borrow from materials prepared by the Committee's superb reporters, Profs. Ed Cooper and Rick Marcus. A more complete description and the actual text of the amendments can be found at http://www.uscourts.gov/file/18218/download.

[2] Materials from the conference ("Conference Materials") can be found at www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

[3] The report to the Chief Justice ("Advisory Committee Report") can be found at www.uscourts.gov/file/reporttothechiefjusticepdf.

[4] *Id.* at 5.

[5] *Id.* at 4.

[6] *Id.* at 8.

[7] Conference Materials, ABA Section of Litigation Member Survey at 3.

[8] Advisory Committee Report at 4.

[9] Conference Materials, FJC Civil Rules Survey at 28.

[10] Conference Materials, Report from the Task Force on Discovery and Civil Justice at 2.

[11] Conference Materials, ABA Section of Litigation Member Survey at 9.

[12] Conference Materials, NELA Survey at 6.

[13] Conference Materials, IAALS, Preserving Access and Identifying Excess at 14.

[14] Advisory Committee Report at 10.

[15] Conference Materials, ABA Litigation Section Member Survey at 3.

[16] Conference Materials, NELA Survey at 13.

[17] Advisory Committee Report at 10.

[18] Advisory Committee Report at 8.

Joint Comments by Professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure

Submitted February 5, 2014

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

To the Committee on Rules of Practice and Procedure:

We write to urge this Committee to reject the proposed amendments that redefine the scope of discovery, lower presumptive limits on discovery devices, and eliminate Rule 84 and the pleading forms. The undersigned are law professors who teach and write in the area of federal civil procedure. Each of us also litigated in the federal courts prior to entering the academy, and remain actively involved in professional practice.

In our judgment, two key issues bear close consideration by the Committee as it considers how to proceed: (1) What problem does the Committee seek to solve? (2) On balance, how likely is it that the proposed amendments will improve the status quo? As in 1993 and 2000, the Committee is focused on addressing a perceived problem of excessive discovery costs. In supporting the current proposed amendments, the Committee recognizes that empirical data show no widespread problem, but nevertheless hopes that new across-the-board limits on discovery will lessen discovery costs in the small number of complex, contentious, high stakes cases where costs are high. The Committee is correct about the data: most critically, the Federal Judicial Center's ("FJC") 2009 closed-case study shows that in almost all cases discovery costs are modest and proportionate to stakes. As in 1993[1] and in 2000,[2] evidence of system-wide, cost-multiplying abuse does not exist, and the proposed amendments are not designed to address the small subset of problematic cases that appear to be driving the Rule changes. We anticipate that,

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[1] Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1411-43 (1994) (strongly criticizing the "soft social science" opinion evidence used by the rulemakers behind the 1993 reforms, while noting that the findings of the methodologically sound empirical studies did not support the reforms).

[2] James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) (evaluating the RAND corporation study of the 1993 reforms, which found that under that set of rules lawyer work hours on discovery were 0 for 38% of general civil cases, and low for the majority of cases.); see also *id.* at 640 (table 2.10 shows that while discovery costs grow with size and complexity of case, the proportion of total costs they represent does not dramatically increase: the median percent of discovery hours for the bottom 75%, top 25%, and top 10% of cases by hours worked were 25%, 33%, and 36% respectively); Thomas E. Willging, Donna Stienstra, John Shepard, and Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531-32 (1998) (finding that under the 1993 amendments, the median reported proportion of discovery costs to stakes was 3%, and that the proportion of litigation costs attributable to problems with discovery was about 4%).

as with past Rule changes, untargeted amendments will fail to eliminate complaints about the small segment of high-cost litigation that elicits headlines about litigation gone wild; instead they will create unnecessary barriers to relief in meritorious cases, waste judicial resources, and drive up the cost of civil justice. The amendments are unnecessary, unwarranted, and counterproductive.

In our view, those who support major change to the Federal Rules are responsible for demonstrating that proposed amendments will, on balance, make the overall system fairer and more efficient. Perceptively, Judge Lee Rosenthal has noted that "[s]ince their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens."[1] Even assuming that a small subset of cases presents a problem that should be solved, the proposed amendments will do little, if anything, to decrease costs in these cases. As the two authors of the FJC's 2009 empirical study commented:

> Instead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more-focused reforms of particularly knotty issues. . . . Otherwise, we may simply find ourselves considering an endless litany of complaints about a problem that cannot be pinned down empirically and that never seems to improve regardless of what steps are taken.[2]

Our concern is not just that the proposed amendments will be ineffectual. Our greater worry is that they will increase costs to litigants and the court system in those average cases that operate smoothly under the current rules. In our view, the amendments are likely to spawn confusion and create incentives for wasteful discovery disputes. Even more troubling, by increasing costs and decreasing information flow, the proposed amendments are likely to undermine meaningful access to the courts and to impede enforcement of federal- and state-recognized substantive rights.

II. Rule 26: Proposed Amendments Re-Defining the Scope of Discovery

Three of the proposed amendments would change the way Rule 26 defines the scope of discovery: eliminating the trial judge's discretion to allow discovery relevant to the "subject matter" of the action; eliminating the well-established "reasonably calculated to lead to the

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[1] Lee & Willging, Defining the Problem, *supra* note 6, at 783.
[2] *Id.* at 784.
[3] *Id.* at 783.

discovery of admissible evidence" language; and inserting proportionality limits into the very definition of matter within the scope of discovery. All three proposals reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable, making the amendments unnecessary. Vague complaints that the proportionality rules are underutilized hardly establish that judges are balancing improperly or are unaware of the need to do so. Yet implicit criticism of the way trial judges are managing cases and ruling on discovery issues animates the proposed rule changes, many of which claim to make little or no change in the substance of Rule 26. This is no substitute for a coherent explanation of the need for change or why the proposed changes are the appropriate tool to fix the perceived problem.

A. Rule 26(b)(1): Elimination of a district judge's discretion to order discovery relevant to the "subject matter" of the action

The Committee's current proposal to amend Rule 26(b)(1) eliminates the power of courts to grant—upon a showing of good cause—access to discovery relevant to the subject matter of the action. This proposed change is without basis, would narrow judicial discretion, and make it more—not less—difficult to carry out reasonable case management. Moreover, these changes would unduly narrow the scope of discovery and lead to additional and complex discovery disputes, while giving courts minimal guidance for resolving them.

Some historical background about Rule 26 can inform this discussion. For the first six decades of the Federal Rules of Civil Procedure, parties were permitted to seek and obtain discovery that was relevant to the "subject matter" of the action.[10] The 2000 Amendments altered this formulation, permitting discovery relevant to the "claims or defenses" in the action, with broader "subject matter" discovery available only upon a showing of good cause. Giving district judges the power to broaden discovery was recognized as necessary to ensure flexibility and encourage judicial involvement in discovery management. The Committee also recognized that defining which information is relevant to subject matter but not to claims or defenses could be difficult.[11] Accordingly, the Committee thought it important to maintain the possibility of court involvement to "permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested."[12]

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[10] In 1978, the Committee considered a proposal nearly identical to the current one, but ultimately rejected it for reasons that resonate today. The Committee reasoned that deleting the term "subject matter" would simply invite litigation over its distinction from "claims or defenses." Moreover, although the Committee was aware of no evidence that discovery abuse was caused by the broad term "subject matter," it also was doubtful "that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 627-28 (1978).

[11] Commentary to Rule Changes, Court Rules, 192 F.R.D. 340, 389 (2000) ("The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.").

[12] *Id.*

The Committee's current proposal gives little consideration to the principles that guided its decision fourteen years ago. The explanation for eliminating the discretionary power of the court is inadequate, based centrally on the conclusory assertion that "[p]roportional discovery relevant to any party's claim or defense suffices."[13] The Committee has offered no substantive reason for moving away from the discretion currently afforded the parties and the court to shape discovery according to "reasonable needs of the action."[14] We urge this Committee to reject this kind of unsupported assertion. Had there been a pattern of judicial abuse of the discretion afforded them by the current Rule 26(b)(1), one would expect that it would be evident in the case law. However, the decisions applying this aspect of Rule 26(b)(1) suggest that courts have exercised their discretion sparingly and appropriately.[15] Perhaps the Committee has a different understanding of how courts have exercised discretion under Rule 26(b)(1) but, if so, the basis for that alternative view has not been shown. Nothing suggests that the authority to allow such discovery—upon a showing of good cause—plays any role in the "worrisome number of cases" where "excessive discovery" is thought to occur.[16]

Not only is the existing evidence insufficient to justify making this change to Rule 26(b)(1), but we believe that the Committee underestimates the potential disruption the proposed rule would have on litigation. For instance, the proposed Advisory Committee Notes state that "[i]f discovery of information relevant to the claims and defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate."[17] But this is precisely the opposite of what the 2000 Committee believed would be

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[13] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 297 (Aug 2013) [hereafter "Preliminary Draft of Proposed Amendments"].

[14] 192 F.R.D. at 389.

[15] Of the reported district court cases we reviewed interpreting the "good cause" standard, none suggests unreasonable decisionmaking. See, e.g., Jones v. McMahon, 2007 WL 2027910 *15 (N.D.N.Y. July 11, 2007) (finding good cause to permit a limited deposition regarding matter relevant to the subject matter of the action, but denying request in large part because of lack of good cause showing); Rus, Inc. v. Bay Indus., Inc., No. 01 Civ. 6133, 2003 WL 174075, * 14 (S.D.N.Y. Apr. 1, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not make "any showing of need"); RLS Assoc., LLC v. United Bank of Kuwait, PLC, No. 01 Civ. 1290, 2003 WL 1563330, *8 (S.D.N.Y. March 26, 2003) (good cause not shown in motion to compel discovery of material relevant only to subject matter of action where movant did not show that "production would serve the reasonable needs of the action"); Johnson Matthey, Inc. v. Research Corp. et al., No. 01 Civ. 8115, 2002 WL 31235717, *2 (S.D.N.Y. Oct. 3, 2002) (finding no good cause for disclosure of documents relevant to subject matter, but not to claims or defenses); Hill v. Motel 6, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (good cause not shown for broad discovery of personnel files in disparate treatment case, where discovery would relate to disparate impact, but finding good cause for the disclosure of specified employees' personnel files); Cobell v. Norton, 226 F.R.D. 67 (D.D.C. 2005) (rejecting request for discovery beyond the scope of plaintiff's statutory claim in a suit seeking an accounting of Indian trust funds. Discovery related more generally to asset management was not permissible as it was beyond the scope of plaintiffs' statutory claim); Jenkins v. Campbell, 200 F.R.D. 498 (M.D. Ga. 2001) (breach of contract plaintiff was entitled to discovery only on those claims remaining after the entry of partial summary judgment against him, although court retained authority to revise partial summary judgment order at any time prior to the entry of final judgment).

[16] Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

[17] *Id.* at 255-56.

achieved by limiting discovery to claims and defenses asserted in the pleadings.[18] It is unclear how discovery limited to what is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims. Thus the elimination of "subject matter" discovery eliminates a tool necessary to address the problem of information asymmetry that is so common when an individual or small business faces a large entity in litigation. If Rule 26(b)(1) were amended to prevent judges from ordering discovery relevant to the "subject matter" of the action, the ability to balance this informational asymmetry would be more severely limited. For example, a plaintiff who has a valid § 1983 claim against a municipal official would be hard-pressed to seek discovery relevant to a potential *Monell* claim against the municipality, absent the power of a court to grant access to material relevant to the subject matter of the action. And the plaintiff with a valid claim against the municipality may have little additional opportunity to develop information necessary to support her claim. Finally and relatedly, we have great concerns that the uncertainties that will follow from this amendment will create incentives for parties resisting discovery to file more motions to litigate relevance, increasing discovery costs and forcing judges to spend time ruling on a new group of motions. We have seen how past changes to Rule 11 increased satellite litigation pertaining to sanctions rather than improving the efficiency or fairness of the civil justice system.

In sum, the Committee has articulated no specific benefit that will outweigh the costs of altering the current framework of Rule 26(b)(1). The existing text requires an affirmative showing of good cause to justify discovery that is relevant to the "subject matter involved in the action" but not to "any party's claim or defense." Even when good cause is shown, such discovery is subject to the limits already articulated in Rule 26(b)(2)(C), and may be limited by a protective order under Rule 26(c). No adequate explanation has been offered for why these existing protections are insufficient to ameliorate any negative consequences of permitting occasional discovery regarding the subject matter of the litigation. There is no basis for believing that the proposed amendment would, on balance, produce more good than harm, and so we urge the Committee not to adopt this proposed change to Rule 26(b)(1).

B. Rule 26(b)(1): Admissibility and Relevance

As the Committee recognizes, it has long been the case that discovery is permitted even as to information that—standing alone—would not be admissible at trial.[19] Yet the Committee's current proposal to amend Rule 26(b)(1) would eliminate an important sentence that has guided courts for decades: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[20] Again the Committee's proposed amendment does not target a documented problem and runs the risk of creating wasteful satellite litigation.

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[18] 192 F.R.D. at 389 ("The rule change . . . signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.").

[19] *See* Preliminary Draft of Proposed Amendments, *supra* note 13, at 266.

[20] In its place, the proposal would add a sentence that omits the phrase "reasonably calculated to lead to the discovery of admissible evidence." *See id.* at 289-90 ("Information within this scope of discovery need not be admissible in evidence to be discoverable.").

The Committee explains that this change is not meant to modify the definition of "relevance," but rather to prevent improper use of the "reasonably calculated" language to allow discovery into information that is not, in fact, relevant.[21] As an initial matter, these concerns appear to be based on nothing more than anecdotal impressions.[22] There is no empirical evidence that this language has had the effect hypothesized by the Committee. The current Rule already makes clear that the "reasonably calculated" language applies only to "*[r]elevant* information"; that was the point of the 2000 amendment.[23]

Even if viewed in isolation, however, the phrase "reasonably calculated to lead to the discovery of admissible evidence" cannot permit discovery beyond what is otherwise authorized by Rule 26(b)(1). Under the Federal Rules of Evidence, evidence is only admissible if it *is* relevant.[24] The need to obtain information that is "reasonably calculated" to lead to the discovery of admissible, relevant evidence is especially crucial in the context of pretrial discovery. As the Committee recognized in 2000:

> A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.[25]

The "reasonably calculated" language does not give parties carte blanche, of course. All discovery is subject to the limits articulated in Rule 26(b)(2)(C), and may be limited by a Rule 26(c) protective order.

To delete the "reasonably calculated" language, by contrast, will send courts and litigants a misguided and fundamentally incorrect message: that there is some category of information that *is* "reasonably calculated to lead to the discovery of admissible evidence" but is *not* relevant to the claims or defenses and, therefore, wholly outside of the permissible scope of discovery. This will almost certainly be perceived as narrowing the definition of relevance and mandating a

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[21] *Id.* at 266 (expressing concern that the "reasonably calculated" language is being improperly invoked "as though it defines the scope of discovery" and as setting "a broad standard for appropriate discovery").

[22] Minutes of the April 2013 Meeting make reference to a survey that revealed "hundreds if not thousands of cases that explore" the language "reasonably calculated to lead to the discovery of admissible evidence," with "many" of these cases suggesting that courts thought this phrase "defines the scope of discovery." Committee on Rules of Practice and Procedure Agenda Book, June 3-4, 2013, at 147 (draft minutes of April 2013 Advisory Committee meeting). There is no indication that any analysis of the cases was made to determine whether they permitted discovery that would not be considered "relevant" under the current or proposed Rule.

[23] 192 F.R.D. at 390 ("Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.").

[24] *See* FED. R. EVID. 402 ("Relevant evidence is admissible . . . Irrelevant evidence is not admissible.").

[25] 192 F.R.D. at 389.

more restrictive approach to discovery that is wholly unjustified. This proposal is a particular cause for concern because it affects the meaning of a word—"relevant"—that has been called by a leading treatise in the field as "[p]erhaps the single most important word in Rule 26(b)(1)."[26] At a minimum, the proposed change will invite wasteful satellite litigation over the amendment's purpose and effect—an unintended outcome that would undermine the goal of reducing unnecessary costs and delay.

C. Rule 26(b)(1) & (b)(2)(C): Proposal to incorporate the "proportionality" factors into the "scope of discovery"

We also oppose the proposal to move the cost-benefit considerations that are currently set forth in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). There is a serious risk that the amendment will be misread to impose a more restrictive discovery standard across the board, contrary to the Committee's intent and without any empirical justification for a more restrictive approach. There is also a danger that the rewritten rule would be misinterpreted to place the burden on the discovering party, in every instance, to satisfy each item on the (b)(2)(C)(iii) laundry list in order to demonstrate discoverability. This would improperly shift the responsibility to show burdensomeness from the party resisting discovery to the party seeking discovery, which in turn will encourage a higher degree of litigation over the scope of discovery and increase costs both for litigants and the court system. Moreover, the rule change does not explain how the cost-benefit analysis is to be undertaken or shown, and we are concerned that the requirement will create perverse incentives for the hiring of experts, the holding of additional court conferences, and the over-litigation of discovery requests.

We recognize that the Committee has not expressed the view that the cost-benefit considerations that now appear in Rule 26(b)(2)(C)(iii) should be re-balanced to make discovery harder to obtain. Rather, the proposed Committee Note states that the proposal will merely "move" Rule 26(b)(2)(C)(iii)'s already "familiar" considerations to Rule 26(b)(1).[27] During public hearings on these proposals, Committee members emphasized repeatedly that this change will not alter the burdens that currently exist.[28]

The Committee appears to believe that the cost-benefit provisions are underutilized and that they will acquire greater attention, use, and citation if relocated to an earlier portion of Rule 26. The Committee provides no evidence that lawyers and judges are unaware of the provision's current existence. It seems far more likely that the standards for proportionality are infrequently cited because—as the empirical evidence suggests—discovery is usually proportional and appropriate. Rule 26 is already crystal clear about a party's obligation to respect Rule 26(b)(2)(C)(iii)'s considerations when making discovery requests, a party's ability to object to discovery requests that it believes are excessive in light of Rule 26(b)(2)(C)(iii)'s considerations, and the court's obligation to limit discovery requests that run afoul of Rule 26(b)(2)(C)(iii)'s

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[26] CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, 8 FEDERAL PRACTICE & PROCEDURE § 2008.

[27] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments)

[28] See Transcript of Nov. 7, 2013 Hearing [hereinafter "Nov. 7 Hearing"], at 32, 139-40, 154-56, 180-81.

considerations. Although the proposed Committee Note states that moving these considerations to Rule 26(b)(1) will require parties to observe them "without court order,"[29] that obligation already exists under Rule 26(g).[30]

Relatedly, the Committee asserts that these cost-benefit considerations are "not invoked often enough to dampen excessive discovery demands."[31] But this assertion also lacks empirical support. If the lawyers who expressed concerns about "excessive discovery" in response to the survey questions are the same ones who are "not invok[ing] Rule 26(b)(2)(C) often enough,"[32] then it is their advocacy on behalf of their clients—not Rule 26—that requires improvement. It seems especially improbable that the cases about which the Committee is most concerned—"those that are complex, involve high stakes, and generate contentious adversary behavior"[33]—are the same ones in which parties are not "invok[ing]" cost-benefit considerations often enough. More likely, lawyers complaining about excessive discovery are fully aware of Rule 26(b)(2)(C)(iii)'s considerations, but they are not uniformly successful in limiting discovery requests that *they* view as excessive.[34]

Admittedly, judges may sometimes make mistakes in concluding that a particular discovery request should not be limited pursuant to Rule 26(b)(2)(C)(iii)—just as they may sometimes make mistakes in concluding that a particular discovery request *should* be limited pursuant to Rule 26(b)(2)(C)(iii). But there is no empirical support for the idea that transplanting the same considerations one subsection earlier in Rule 26(b) will improve the discovery process. It is difficult to believe that judges and attorneys regularly fail to read past Rule 26(b)(1) and that, even when they make it that far, they deliberately ignore its explicit reference to "the limitations imposed by Rule 26(b)(2)(C)."

It would also be unwise for the Committee to proceed with this proposal on the view that, because it makes no substantive change to the discovery standard, the amendment at least would do no harm. In fact, the amendment could have serious, unfortunate consequences. The puzzling justification for the proposal is precisely why so many who have commented on it perceive it to make the overall discovery standard more restrictive than it currently is. For there is no other logical purpose for making the proposed change: judges would be hard-pressed to imagine that the goal is simply to remind them of the existence of a provision within Rule 26 that is already

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[29] Preliminary Draft of Proposed Amendments, *supra* note 13, at 296 (page 16 of the redlined proposed amendments).

[30] Fed. R. Civ. P. 26(g)(1) ("By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, [any] discovery request . . . is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and . . . neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."). *See also* Nov. 7 Hearing, at 139, 154, 172-73 (discussing Rule 26(g)).

[31] Preliminary Draft of Proposed Amendments, *supra* note 13, at 265.

[32] *Id.*

[33] *Id.*

[34] *Cf.* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 361 (2013) ("[A]ccording to the practicing bar, . . . litigation abuse is anything the opposing lawyer is doing.").

known and employed. Because the Committee's proffered explanation for the transition is so difficult to comprehend, there is a real danger that judges will mistakenly infer that the Committee must have intended a more restrictive discovery standard, or at least one that places greater burdens on the requesting party. This would be a perverse result; but it is a quite predictable one, and one that can and should be avoided.

Accordingly, the Committee should leave Rule 26(b)(2)(C)(iii)'s cost-benefit factors where they currently reside. If there is concern that litigants are failing to realize that those considerations must be "observed without court order,"[15] then an alternative would be to suggest discussion of these factors at the preliminary discovery conference already contemplated under Rule 26(f).

III. Restricted Use of Discovery Devices: Rules 30, 31, 33 & 36 and Lower Presumptive Limits

The Committee defends proposed limits to the presumptive number of discovery devices each party can use as a way to reduce cost and increase efficiency. However, like the Committee's proposed amendments to Rule 26, they are insufficiently supported by relevant empirical evidence, and they will likely spawn more discovery disputes and undermine the Rule's goal of achieving just outcomes in individual cases. The most problematic proposal in the current package of reforms is the change from a presumptive limit of ten depositions per party to a presumptive limit of five. In certain types of cases, depositions are the most important discovery device that parties use. Thus, especially as to this discovery device, limiting access should be justified only if there is a strong basis to believe that this reform is needed and that desired benefits will follow.

[Remainder of this section deleted]

IV. Elimination of the Forms

Finally, we turn to a proposed change that is perhaps the simplest but most significant: the abrogation of Rule 84 and the elimination of the Forms. The Forms were once described as "the most important part of the rules," particularly for pleading, because "when you can't define you can at least draw pictures to show your meaning."[18] The Committee offers two principal reasons for abandoning them: (1) according to "informal inquiries that confirmed the initial impressions of . . . members," lawyers and pro se litigants do not tend to rely on the Forms; and (2) the current Forms "live in tension with recently developed approaches to general pleading standards."[19] The Committee's first justification is wholly lacking in empirical rigor and, moreover, ignores the fact that federal judges at every level *do* look to the Forms for assistance. The second justification is certainly accurate—*Twombly* and *Iqbal* create tension with the Forms—but that tension is not insurmountable and, even if it were, one still needs a rationale for choosing one over the other. The Committee has provided no explanation for opting to abandon the Forms rather than to reexamine plausibility pleading.

The Committee's first explanation for why it is abandoning the Forms is based on casual empiricism and self-evident bias. As we understand it, a Subcommittee to study the Forms apparently started with the intuition that lawyers tend not to rely on the Forms, and then conducted an informal survey of undisclosed lawyers—unsurprisingly concluding that their initial intuitions were correct.[20] Needless to say, this is not a valid way to answer the question of whether lawyers rely on the Forms to construct their complaint. If one starts with a bias in one direction or another, one should be extremely cautious in conducting empirical research so as to ensure that the initial bias does not influence the ultimate interpretation of the results. Given the Committee's description of its research, we are not comforted that any steps were taken to reduce the potential for this confirmatory bias.

Furthermore, it is surprising that the Advisory Committee would rely on the supposed irrelevance of the forms, when its own staff prepared a memo for the April 2013 Meeting that summarized in great detail the numerous lower courts that have grappled with the ongoing viability of the forms after *Iqbal* and *Twombly*.[51] Although we do not claim to have conducted a rigorous survey, our examination of the case law is consistent with the material already presented to the Committee. We note that the Supreme Court has relied on the Forms in the pleading context numerous times—perhaps most significantly in *Twombly* itself.[52] Moreover, lower court opinions cite to the forms often, relying on them as indicative of the pleading required under the Federal Rules, even after *Twombly* and *Iqbal*.[53] If federal judges have found the Forms illustrative of the relevant pleading standard, as our and the Committee's research suggests, it stands to reason that practicing lawyers have done so as well. Indeed, practitioner "blogs" indicate that lawyers pay close attention to lower courts' reliance on the Forms, particularly in the area of intellectual property.[54]

The Committee's second explanation, that the Forms cannot be squared with the Supreme Court's decisions in *Twombly* and *Iqbal*, prematurely resolves a question that the Committee has yet to fully consider. As the Committee is aware, the conflict between the rulemaking contemplated under the Rules Enabling Act and the Court's decisions in *Twombly* and *Iqbal* is a live one. Indeed, the Committee has noted in the past that it will be open to considering instituting rulemaking if it is shown that plausibility pleading is having a significant impact on the business of federal courts. It is premature to call an end to the debate, especially in light of recently emerging empirical data.[55] Given that the Committee has yet to take a definitive position on plausibility pleading, striking the Form Complaints commits the Committee to a position that implicitly adopts plausibility pleading as the standard going forward. This is all the more troubling given that one trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process rather than through case adjudication.[56] If the Committee adopts this proposal, the door will be effectively shut and the pleading rules will have been altered without any of the participatory deliberation that legitimizes the Federal Rules.

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[51] *See* Memorandum by Andrea L. Kuperman at 8-26 (July 6, 2012), in Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 230-248.

[52] *See Twombly*, 550 U.S. at 565 n.10 (arguing that there was no conflict between Form 9 (now Form 11) and plausibility pleading); *see also* Mayle v. Felix, 545 U.S. 644, 660 (2005); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 513 n.4 (2002).

[53] *See, e.g.*, K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc., 714 F.3d 1277, 1288 (Fed. Cir. 2013) (resolving tension between Form 18 and *Twombly* and *Iqbal*); Hamilton v. Palm, 621 F.3d 816, 818 (8th Cir. 2010) (relying on Form 13); Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008) (drawing analogy from Form 9).

[54] *See, e.g.*, Charles J. Hawkins, *Iqbal, And Twombly Notwithstanding: Form 18 Is The Standard For Direct Infringement Allegations*, available at http://www.mondaq.com/unitedstates/x/243158/Patent/Iqbal+And+Twombly+Notwithstanding+Form+18+Is+The+Standard+For+Direct+Infringement+Allegations (last visited January 23, 2014) (posting "practice note" related to intellectual property).

[55] *See, e.g.*, Kevin M. Clermont and Stuart Eisenberg, *Plaintiphobia in the Supreme Court*, 162 U. PENN. L. REV. __ (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347360.

[56] *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514-15 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993).

Moreover, the Committee's explanation of its proposal to abrogate Rule 84 and the Forms seems strikingly inconsistent. For although it acknowledges the tension in its report to the Standing Committee, it states in the proposed Committee Notes that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[57] This public explanation, however, flies in the face of its description of the conflict between the Forms and plausibility pleading. The real problem may be that the plausibility standard articulated by the Court is so vague, standardless, and subjective that it is at odds with efforts to provide examples of pleadings that are sufficient. At times, the Committee's report to the Standing Committee suggests this conclusion.[58] This, however, is an indictment of the plausibility standard of pleading, not of the Form Complaints. Eliminating the Forms may eliminate the conflict, but in this case conflict avoidance may amount to a derogation of the Committee's institutional obligations.

CONCLUSION

In conclusion, we urge the committee to closely attend to the two key questions that we think must be answered as it considers how to proceed. As to the first—whether the Committee is solving a well-identified problem—the empirical evidence is clear that in the vast majority of cases discovery costs are not disproportionate to their estimated value. Given the available empirical record, it appears to us that a key underlying assumption made by those who support these amendments is fundamentally called into question.

As to second inquiry—whether proponents have shown that the proposed amendments will make things better—we believe that their burden has not been satisfied. Indeed, quite to the contrary, in our judgment the proposed amendments unnecessarily risk a host of adverse consequences, including that they are likely to spawn confusion and wasteful satellite litigation, outcomes that, perversely, are contrary to the Committee's expressed intent to reduce costs and improve judicial efficiency.

Perhaps most perplexing to us is that many of the proposed amendments are predicated on a lack of faith in the ability or willingness of trial judges to manage the cases that come before them. We are aware that a majority of Supreme Court Justices in both *Twombly* and in *Iqbal* expressed their belief that "careful case management" has been beyond the ability of most district judges.[59] That view is at odds with the best current empirical evidence suggesting that trial judges are managing the vast majority of their dockets well.[60] Even assuming that a small subset of cases present problems that the current rules cannot solve, the proposed changes do not address and so cannot resolve these problems. Rather, the amendments will generate different problems and shift costs to litigants in cases where the rules are working well. We urge the Committee to reconsider and to reject the package of proposed amendments.

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[57] Preliminary Draft of Proposed Amendments, *supra* note 13, at 329.

[58] *See* Preliminary Draft of Proposed Amendments, *supra* note 13, at 276-77 ("Attempting to modernize the existing forms . . . would be an imposing and precarious undertaking.")

[59] *Iqbal*, 556 U.S. at 685 (*citing Twombly*, 550 U.S. at 559).

[60] *See, e.g.*, Lee & Willging, Defining the Problem, *supra* note 6, at 779-81 (summarizing empirical literature demonstrating that discovery costs are generally low).

Respectfully submitted,

Helen Hershkoff
Herbert M. and Svetlana Wachtell
Professor of Constitutional Law and Civil Liberties
New York University School of Law

Adam N. Steinman
Professor of Law and
Michael J. Zimmer Fellow
Seton Hall University School of Law

Lonny Hoffman
Associate Dean and
Law Foundation Professor
University of Houston Law Center

Elizabeth M. Schneider
Rose L. Hoffer Professor of Law
Brooklyn Law School

Alexander A. Reinert
Professor of Law
Benjamin N. Cardozo School of Law

David L. Shapiro
William Nelson Cromwell Professor of Law, Emeritus
Harvard Law School

Institutional affiliations provided for identification purposes only

THE NEW LAW OF ELECTRONIC SPOLIATION

By Gregory P. Joseph

EFFECTIVE DEC. 1, 2015, FEDERAL RULE OF CIVIL PROCEDURE 37(e) WILL CHANGE DRAMATICALLY THE LAW OF SPOLIATION.

Prior to the adoption of this rule, the Circuits had split on the question whether negligence in the destruction of relevant evidence was sufficient, in at least some circumstances, to support the sanction of an adverse inference. The First, Second, Sixth, Ninth, and, in at least one circumstance, the D.C. Circuits had all concluded that negligence could be sufficient.[1] As discussed below, Rule 37(e) changes this result when the evidence lost consists exclusively of electronically stored information ("ESI"), but does not change the law as to tangible evidence.

Moreover, all Circuits required a showing of prejudice before an adverse inference instruction could issue as a sanction for loss of evidence. Rule 37(e) also changes this result, requiring no showing of prejudice as a prerequisite to issuance of an adverse ▸

GREGORY P. JOSEPH, of Joseph Hage Aaronson LLC, is past president of the American College of Trial Lawyers and former chair of the American Bar Association Section of Litigation. He served on the Advisory Committee on the Federal Rules of Evidence and is president of the Supreme Court Historical Society.

PRINCIPAL TAKEAWAYS

Electronic vs. Tangible Evidence. Rule 37(e) applies only to electronically stored information ("ESI"). It does not apply to tangible evidence. This distinction is critical. To the extent the rule changes the law of spoliation (as it does in several Circuits), different rules will apply to spoliation of electronic, as opposed to tangible, evidence. This has sometimes outcome-determinative impact.

Intent Requirement. Prior to Rule 37(e), five Circuits (First, Second, Sixth, Ninth, and sometimes D.C.) allowed an adverse inference instruction sanction absent an intent to spoliate. Rule 37(e) requires intent before an adverse inference or certain other specified sanctions may issue. But, while the Rule significantly restricts the availability of certain harsh sanctions absent intent, other severe sanctions remain at the court's disposal.

Rule vs. Inherent Power. The law of spoliation developed as an application of the inherent power of the court. Within its scope, this rule displaces inherent power. Therefore, to the extent that two branches of spoliation law apply to ESI vs. tangible evidence after Dec. 1, 2015, they derive from different sources of authority and in several Circuits have different requirements.

inference instruction if intent to deprive the adverse party of the lost evidence is established.

Following is a discussion of the principal aspects of the Rule 37(e).

INTRODUCTORY CLAUSE

ELECTRONIC VS. TANGIBLE EVIDENCE ("IF ELECTRONICALLY STORED INFORMATION")

Rule 37(e) applies only to ESI. It does not apply to tangible evidence. This distinction is critical. To the extent the rule changes the power of the court to remedy spoliation (as it does in several Circuits), different powers will apply to spoliation of electronic and tangible evidence — unless or until those Circuits change their spoliation law in light of the rule. This has potentially outcome-determinative impact.

There are some cases in which the loss of tangible evidence is devastating. The classic example is *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), in which the plaintiff destroyed the product at issue in a products liability action (a car), perhaps negligently, and thereby prevented the defendant from analyzing and testing the product and defending the claim. The Fourth Circuit concluded that, regardless of the spoliating party's intent, decimation of the defendant's inability to defend the claim warranted dismissal: "We agree . . . that dismissal is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of bad faith or other 'like action.' . . . But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *Id.* at 593. Rule 37(e) has no impact on this holding because only tangible evidence is involved.

The Intentional But Incompetent Spoliator. One interesting question is the impact of Rule 37(e) on the intentional destruction of evidence that is maintained in both electronic and tangible form, but only the tangible evidence is permanently lost. The case of the intentional but unsuccessful spoliator is instructive. If a party intentionally destroys electronic evidence but the evidence is obtained from a third party, then no sanctions or curative measures are awardable under Rule 37(e) because no evidence "is lost," a prerequisite to judicial action under the first sentence of the Rule. There may be sanctions available under other powers, such as Rule 37(b) if the misconduct violated a discovery order; Rule 26(g) if the spoliator served a false discovery response in the course of its attempted spoliation; 28 U.S.C. § 1927 if the misconduct unreasonably and vexatiously multiplied the proceedings (as by causing the issuance of a subpoena on the third party that would not otherwise have been necessary); and the inherent power of the court for the bad faith litigation misconduct in the course of the attempted spoliation. But these sanctions would presumably not include the sanctions listed in Rule 37(e)(2)(A)–(C).

If the same party were to set out to destroy tangible evidence with the same malign intent but the evidence were to survive, the party's unsuccessful spoliation would be subject to sanction under the inherent power of the court — and perhaps other sanctions powers — without any limitation imposed by Rule 37(e). Just as attempted but unsuccessful subornation of perjury evidences consciousness of guilt or culpability, intentional but unsuccessful spoliation may evidence consciousness of guilt or culpability and in appropriate circumstances may legitimately give rise to an adverse inference instruction, dismissal, or entry of a default judgment.

Consider now the intentional but incompetent spoliator who sets out to destroy all tangible and electronic evidence, but the evidence is restored or replaced, as by service of a subpoena on a third party. No curative measures or sanctions are available for spoliation of the electronic evidence because no ESI "is lost," as required by the introductory language of Rule 37(e). For the attempted destruction of tangible evidence, however, the Rule does not preclude issuance of harsh sanctions under the inherent power of the court or other sanctions powers. This can be viewed as an incongruous result wher 5 4 3 the tangible evidence is merely a print-

out of the ESI. There is little reason, however, to protect the malevolent spoliator from sanctions that the court, in its discretion, deems appropriate in the circumstances.

"SHOULD HAVE BEEN PRESERVED"

Rule 37(e) does not set forth a standard for preservation. It does not alter existing federal law concerning whether evidence should have been preserved or when the duty to preserve attached. This is determined by the common law test: Was litigation pending or reasonably foreseeable?[2] In the words of the Advisory Committee Note, "Rule 37(e) is based on th[e] common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve attaches." Nor does the rule tell you when that duty arose.

Independent of the common-law obligation, statutes, rules, internal policies, or other standards may impose preservation obligations. Is disregard of an independent obligation to preserve enough to warrant a spoliation sanction? The Advisory Committee Note says this is to be determined on a case-by-case basis ("The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and . . . does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.").

There are multiple ways that disregard of an independent obligation to preserve may be relevant to a spoliation decision under Rule 37(e).

First, disregard of the independent obligation may give rise to an inference of intentionality, if, for example, it can be shown that the spoliating party was aware of the obligation and customarily honored it.

Second, if a party fails to preserve evidence in disregard of an independent obligation and the adverse party harmed by the loss of evidence is within the class of persons protected by the statute, rule, or other standard imposing that obligation, that fact may lead the court to conclude that litigation by the injured person was reasonably foreseeable and spoliation sanctions are therefore appropriate.[3]

"IS LOST"

Rule 37(e) curative measures or sanctions are available only if ESI that should have been preserved "is lost." The Advisory Committee Note provides that: "Because electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere." This states the unremarkable proposition that loss from one location causes no prejudice if the ESI can be found elsewhere (prejudice is a prerequisite for curative measures under subdivision (e)(1)). But the more important point is that information that is "found elsewhere" is not "lost" at all — because this precludes any curative measures or sanctions under either subdivision (e)(1) or (e)(2). This accords both with common sense and with prior law. *See, e.g., Carlson v. Fewins*, No. 13-2643, 2015 U.S. App. LEXIS 16149 (6th Cir. Sept. 11, 2015) (no spoliation where only backups of 911 recordings were destroyed and other copies remained).

As noted below, the rule also precludes any curative measures or sanctions if the ESI can "be restored or replaced through additional discovery." Given the rule's structure, ESI that can be restored would appear to be "lost," even if only temporarily lost. Once restored, it is no longer "lost." But "replaced" information remains "lost," as replacement describes substitution, not identity (Dictionary.com definition of "Replace: 1. to . . . substitute for (a person or thing); 2. to provide a substitute or equivalent in the place of.").

"A PARTY"

Rule 37(e) applies only to ESI "lost because *a party* failed to take reasonable steps to preserve it." Thus, the rule applies only to parties. The rule does not by its terms apply to spoliation by a relevant nonparty — or sanctions to be imposed on a party as a result of spoliation by a third party. If the third party is the agent or otherwise under ▸

THE TEXT OF RULE 37(e)

Effective Dec. 1, 2015, Federal Rule of Civil Procedure 37(e) provides:

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

the control of the party, logic dictates that the party is the actor within the meaning of Rule 37(e) and the rule therefore authorizes the imposition of curative measures or sanctions. This is consistent with prior spoliation case law, under which a party's responsibility for third-party spoliation is a function of the party's "control" over the spoliating third party. "Control" is often, but not always, determined by the breadth with which the phrase "possession, custody and control" in Rule 34 is construed.[4]

For example, the defendant in *Gordon Partners v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, 244 F.R.D. 179 (S.D.N.Y. 2007), did not have physical custody of the ESI that was lost, but it was subjected to an adverse inference because that information had been in its control years earlier. It then entered bankruptcy and relinquished control over the ESI to a new entity formed in the bankruptcy process. This new entity — which had control of the documents but was not a defendant — failed to preserve the ESI. A securities fraud class action had been commenced before NTL, Inc., went into bankruptcy. Two entities emerged — the liability for the lawsuit was left with one of them (NTL Europe, the defendant), but all documents and ESI went to the other (New NTL, a nonparty), together with the operating business. New NTL did a computer upgrade which decimated a great deal of electronically stored information. The *NTL* Court found that defendant NTL Europe had "control" over the documents and ESI for three independent reasons: (1) it would be patently unfair to allow the post-bankruptcy structure that the defendants were involved in arranging to frustrate discovery; (2) a demerger agreement between the entities entitled defendant NTL Europe to access the documents and ESI, and (3) the duty to preserve was triggered prior to the separation of old NTL into the two new entities. In this setting, if defendant NTL Europe failed to preserve access to the documents under the demerger agreement, that would by definition constitute an inadequate litigation hold on the part of the defendant.

If a party has the contractual right to maintain or obtain responsive evidence from a third party, the party has control over the documents sufficiently to warrant sanctions for failure to preserve it. Sanctions have issued, for example, for a party's failure to make payments to a third party storing its ESI, resulting in its deletion.[5]

A party's personal or family relationship with the third party having custody over the ESI may give the party sufficient control over the information to trigger a duty to preserve it. A wife and her co-defendant business colleagues, for example, have been sanctioned for the failure to preserve ESI on a hard drive that was destroyed by the wife's husband because they did not take affirmative steps to preserve the data and because the court found it incredible that the husband acted unilaterally in destroying data relevant to his wife's pending case.[6]

"REASONABLE STEPS"

Curative measures or sanctions can be imposed under Rule 37(e)(1) or (2) only if a party "failed to take reasonable steps to preserve" the ESI that is lost. This is an objective test. Subjective states of mind such as good faith or intentionality (prevailing tests for adverse inference instructions under preexisting law) are not relevant as to this threshold determination.[7] Subdivision (e)(2) applies a subjective test — intentionality — as a prerequisite to imposing any of four specific sanctions (presuming the lost information was unfavorable to the spoliator; issuing an adverse inference instruction; or entering a default judgment or dismissal), but the subjective state of mind identified in subdivision (e)(2) is not reached unless, in the first instance, the party failed to satisfy the objective test of taking reasonable steps to preserve. There is no need to inquire into state of mind in conducting the objective test of determining whether "reasonable steps to preserve" were taken.

The Advisory Committee Note stresses that "perfection in preserving relevant electronically stored information is often impossible" and that the rule "does not call for perfection." The line between "reasonable steps" and "perfection" is a fact-based determination. *See, e.g., Resendez v. Smith's Food & Drug Ctrs., Inc.*, No. 2:15-cv-00061-JAD-PAL, 2015 U.S. Dist. LEXIS 34037, *18–*19 (D. Nev. Mar. 16, 2015) (adverse inference instruction for destruction of video evidence in slip-and-fall case: "I . . . categorically reject [Defendant] Smith's arguments in its written opposition that spoliation sanctions are not required because this is not a perfect world and employees do not always follow policies. A failure to follow internal policies and procedures does not, in and of itself, amount to spoliation of evidence. However, . . . Smith's was on notice that Plaintiff had retained counsel to pursue a claim for damages resulting from personal injuries she sustained in the store . . . ten days after the accident. . . . Smith's arguments that this is not a perfect world and employees do not always follow policy represent a cavalier disregard of its legal preservation duties.").

The Advisory Committee urges courts to "be sensitive to the party's sophistication with respect to litigation in evaluating preservations efforts. . . . " A higher degree of awareness of preservation obligations is reasonably expected of sophisticated parties.

Because the rule requires only "reasonable steps to preserve," curative measures or sanctions may not be warranted, the Advisory Committee Note observes, if the ESI "is not in the party's control" or is "destroyed by events outside the party's control" (*e.g.*, a flood). The Note cautions, however, that the court may "need to assess the extent to which a party knew of and protected against" the risk of loss of the evidence.

As is always the case, what is "reasonable" is a fact-specific determination. The Advisory Committee Note emphasizes that "proportionality" should be considered in evaluating the reasonableness of preservation efforts, and that the "court should be sensitive to party resources. . . ."

"CANNOT BE RESTORED OR REPLACED"

No curative measures or sanctions may issue under Rule 37(e) if the ESI can be "restored or replaced through additional discovery."

"Restored" connotes replication of the original (Dictionary.com: "1. to bring back into existence, use, or the like"). The Advisory Committee Note refers to the possibility of the court's ordering production of otherwise inaccessible (e.g., backup) data.

"Replaced" suggests an alternative that produces equivalent information (Dictionary.com: "1. to . . . substitute for (a person or thing); 2. to provide a substitute or equivalent in the place of"). Preexisting case law recognizes that the existence of alternate equivalent evidence may overcome any prejudice or need for sanctions. *See, e.g., Vistan Corp. v. Fadei USA, Inc.*, 547 F. App'x 986 (Fed. Cir. 2013) (destruction of one of many identical, allegedly infringing machines after adverse party examined it caused no prejudice and did not constitute actionable spoliation).

The Advisory Committee "emphasize[s] that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information. . . . [S]ubstantial measures should not be employed to restore or replace information that is marginally relevant or duplicative." This is part and parcel of the proportionality emphasis of the 2015 discovery rules amendments, which added the concept of proportionality to the scope of discoverability in Rule 26(b)(1).

SUBDIVISION (e)(1)

PREJUDICE

Before any curative measures may be ordered under subdivision (e)(1), the court must find "prejudice to another party from loss of the [electronically stored] information." Prejudice has always been a factor in assessing whether spoliation sanctions are appropriate. *See, e.g., McLeod v. Wal-Mart Stores, Inc.*, 515 F. App'x 806, 808 (11th Cir. 2013) ("In determining whether spoliation sanctions are warranted, courts consider five factors: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the spoliating party acted in good or bad faith; and (5) the potential for abuse if the evidence is not excluded.") (internal quotation marks and brackets deleted); *McCauley v. Bd. of Comm'rs for Bernalillo Cty.*, 603 F. App'x 730 (10th Cir. 2015) (no abuse of discretion in denying spoliation sanction absent demonstration of sufficient prejudice).

BURDEN OF PROOF ON THE ISSUE OF PREJUDICE

The degree of prejudice is a function in part of the importance of the lost information in the litigation. Determining the importance of the information may be difficult given that the information is by definition unavailable. Therefore, whether the burden of proof is placed on the proponent or opponent of sanctions is an important, potentially dispositive issue — and one that Rule 37(e) does not address. "The rule does not place a burden of proving or disproving prejudice on one party or the other," leaving "judges with discretion to determine how best to assess prejudice in particular cases" (Advisory Committee Note to Rule 37(e))).

The questions of burden of proof and how to determine whether the loss of evidence was prejudicial are not new. The courts have developed a number of approaches that assist in determining prejudice — including:

- the more intentional the destruction of the evidence, the more reliable the inference that the evidence would have been harmful to the spoliator's position;
- destruction of evidence during the pendency of litigation may alone suffice to support the inference that the evidence was destroyed because it was harmful; and
- the more central to the case the spoliated evidence is (e.g., the product at issue in a products liability action) — the more prejudicial its loss is often deemed to be.[8]

"MEASURES NO GREATER THAN NECESSARY TO CURE THE PREJUDICE"

Subdivision (e)(1) provides that, upon finding prejudice, the court "may order measures no greater than necessary to cure the prejudice." This is akin to the least-severe-sanction requirement of Rule 11(c)(4).[9]

> "The Advisory Committee "emphasize[s] that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information.

There is one clear limitation on curative measures under subdivision (e)(1). They cannot include the four severe sanctions imposable only on a finding of intent under subdivision (e)(2) — namely, presuming that the lost information was unfavorable to the non-preserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment.

That, however, does not mean that serious sanctions may not be imposed as curative measures under subdivision (e)(1), including, for example:

- directing that designated facts be taken as established for purposes of the action;
- prohibiting the nonpreserving party from supporting or opposing designated claims or defenses;
- barring the nonpreserving party from introducing designated matters in evidence;
- striking pleadings;

- allowing the introduction of evidence concerning the failure to preserve (*see, e.g., Decker v. GE Healthcare Inc.*, 770 F.3d 378 (6th Cir. 2014) (declining to impose punitive sanctions or issue adverse inference instruction but permitting testimony from sanctions hearing to be introduced at trial); *Dalcour v. City of Lakewood*, 492 F. App'x 924 (10th Cir. 2012) (allowing witnesses to be questioned about missing evidence));
- allowing argument on the failure to preserve;
- giving jury instructions other than adverse inference instructions "to assist [the jury] in its evaluation of" testimony or argument concerning the failure to preserve (Advisory Committee Note to Rule 37(e)).

Most of these are identified in the Advisory Committee Note to Rule 37(e), which also cautions that "[c]are must be taken . . . to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2)."

SUBDIVISION (e)(2)

INTENT TO DEPRIVE ANOTHER PARTY OF THE INFORMATION'S USE

Four of the most severe sanctions — presuming that the lost information was unfavorable to the nonpreserving party; issuing a mandatory or permissive adverse inference instruction; dismissal of the action; or entering a default judgment — can be imposed only "upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation" (Rule 37(e)(2)).

Subdivision (e)(2) therefore changes the law in several Circuits that allowed the issuance of adverse inference instructions arising from the loss of ESI due to negligence (the First, Second, Sixth, Ninth and sometimes the D.C. Circuit — *see* note 1).

The law is changed in these Circuits only insofar as the failure to preserve ESI is concerned — Rule 37(e) has no effect on these Circuits' spoliation law as it pertains to tangible evidence.

JUDGE OR JURY ISSUE

A fundamental question under subdivision (e)(2) is whether the determination of intent is a question for the judge or jury. The Advisory Committee Note is opaque on this issue. It observes that intent will be a question for the court on a pretrial motion, at a bench trial, or when deciding whether to give an adverse inference instruction, but then adds: "*If a court were to conclude that the intent finding should be made by a jury*, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury finds that the party acted with the intent to deprive another party of the information's use in the litigation." Nowhere does the Advisory Committee indicate why or when the issue is appropriately left to the jury.

The issue of intent in Rule 37(e)(2) would appear to be a jury issue under Federal Rule of Evidence 104(b) if the court makes the preliminary determination under Rule 104(a) that a reasonable jury could find by a preponderance of the evidence that the nonpreserving party acted with the intent to deprive its adversary of the use of the evidence. Rule 104 provides:

a. *In General.* The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

b. *Relevance That Depends on a Fact.* When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

A party's destruction of evidence is relevant if the party's intent is to deprive its opponent of access to the evidence — in criminal parlance, it is evidence of consciousness of guilt. That is the premise of the law of spoliation and the reason adverse inference instructions are given. This is explicitly acknowledged in the Advisory Committee Note to Rule 37(e)(2) ("Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence.").

Therefore, the question whether evidence was destroyed with the intent of rendering it unavailable to an adverse party is a question of conditional relevance for the jury under Rule 104(b). There is caselaw applying Rule 104 in the context of spoliation evidence, leaving to the jury the question whether the spoliating act occurred. *See, e.g., United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir. 1991) ("Rule 104(b) addresses the question of 'conditional relevancy.' By its terms, the rule involves a situation in which 'the relevancy of evidence depends upon the fulfillment of a condition of fact . . . .' Fed. R. Evid. 104(b). We have previously held that spoliation evidence, including evidence that the defendant threatened a witness, is generally admissible because it is probative of consciousness of guilt"; holding it was appropriate to allow the jury to hear the spoliation-related testimony); *Paice LLC v. Hyundai Motor Co.*, No. MJG-12-499, 2015 U.S. Dist. LEXIS 108477 (D. Md. Aug. 18, 2015) (court held hearing under Rule 104 to ascertain whether, as a preliminary matter, the plaintiff offered sufficient evidence of spoliation to present the issue to the jury).

INTENT VS. BAD FAITH

Subdivision (e)(2) requires a showing of "intent to deprive another party of the information's use," not a showing that the party acted in "bad faith." It is difficult to conceive of a situation in which a party could in good faith take an intentional act to deprive another party of relevant evidence, but the distinction between intentionality and bad faith is one that the case law draws. There is a practical benefit to this: Once intent is proven, no further showing of state of mind is necessary. *See, e.g., Moreno v. Taos Cty. Bd. of Comm'rs*, 587 F. App'x 442, 444 (10th Cir. 2014) ("to warrant

an adverse inference instruction, a party must submit evidence of intentional destruction or bad faith"); *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013) ("Although the conduct must be intentional, the party seeking sanctions need not prove bad faith.").

SEVERE SANCTIONS LISTED ARE DISCRETIONARY

Subdivision (e)(2) provides that, upon the showing of intent, the court "may" — not must — impose any of the four severe sanctions listed, specifically: presuming that the lost information was unfavorable to the nonpreserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment. Use of the word "may" is permissive, not mandatory, vesting discretion in the court as to whether any of these sanctions is appropriate in the circumstances. *See* Advisory Committee Note to Rule 37(e)(2) ("The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) [*sic* — no measures are specified in subdivision (e)(1)] would be sufficient to redress the loss.").

NO PREJUDICE REQUIREMENT

Although the sanctions listed in subdivision (e)(2) are severe — indeed, potentially outcome-determinative — there is no requirement that the adverse party actually be prejudiced by the spoliating conduct, as there is in subdivision (e)(1). This is a change in the law. Under preexisting law, spoliation sanctions — especially the four most severe sanctions listed in subdivision (e)(2) — could issue only on a showing of prejudice. *See, e.g., Rives v. LaHood*, 2015 U.S. App. LEXIS 4838 (11th Cir. Mar. 25, 2015 ("A party moving for spoliation] sanctions must establish, among other things, that the destroyed evidence was relevant to a claim or defense such that the destruction of that evidence resulted in prejudice") (internal quotation marks and brackets deleted); *McCauley v. Board of Comm'rs for Bernalillo Cnty.*, 2015 U.S. App. LEXIS 3361 (10th Cir. Mar. 2, 2015) (no abuse of discretion in denying spoliation sanction absent demonstration of sufficient prejudice); *Gutman v. Klein*, 2013 U.S. App. LEXIS 5438 (2d Cir. Mar. 20, 2013) ("A sanction for spoliation of evidence 'should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'"); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) ("a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction.")

The absence of a prejudice requirement may at first seem somewhat counterintuitive since both of these are requirements for the presumably less severe sanctions of subdivision (e)(1). But it is consonant with the case law enforcing the inherent power of the court to sanction abusive litigation practices undertaken in bad faith, which is the power pursuant to which spoliation was historically sanctioned. The fact that the abusive litigation conduct did not succeed in disrupting the litigation does not preclude the imposition of an inherent power appropriate sanction if the conduct was intended to do so. *See, e.g., Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 145 (2d Cir. 2012) ("We read *Chambers* [*v. NASCO, Inc.*, 501 U.S. 32 (1991)] to mean that sanctions may be warranted even where bad-faith conduct does not disrupt the litigation before the sanctioning court. This accords with our sanctions jurisprudence, which counsels district courts to focus on the purpose rather than the effect of the sanctioned attorney's activities."). The court is vested with broad discretion to fashion an appropriate inherent power sanction to redress litigation abuse. In all events, the absence of prejudice is clearly an important factor in the court's determination whether any sanction is appropriate and, if so, which one.

CHECKLIST

Did a duty to preserve exist at the time the ESI was lost?

- Prior to the commencement of suit, this is determined under the preexisting common-law test: Was litigation reasonably foreseeable?

Were reasonable steps taken to preserve the lost ESI?

- This is an objective test.

Did a party fail to take those steps?

- The rule applies only to "a party."

Can the lost information be (a) restored or (b) replaced? If the lost information cannot be restored or replaced:

- Did its loss prejudice another party (subdivision (e)(1))?
- What measures are the minimum necessary to cure the prejudice (subdivision (e)(1))?
  1. This is akin to the least-severe-sanction requirement codified in Rule 11(c)(4).
  2. None of the four sanctions set forth in subdivision (e)(2) (presuming that the lost information was unfavorable to the non-preserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment) may be imposed.
  3. Nor may any sanction having the effect of a subdivision (e)(2) sanction be imposed.
- Did the party that lost the ESI act with the intent to spoliate (subdivision (e)(2))?
  1. If intent is established, no prejudice need be shown for a sanction to be imposed, including the four severe sanctions listed in subdivision (e)(2).

LEAST SEVERE SANCTION NOT REQUIRED

Unlike subdivision (e)(1), there is no requirement in subdivision (e)(2) that the court impose the least severe sanction. That does not mean that the court will or should impose a sanction more severe than necessary. Were it to do so, the sanction would by definition be unfair and unlikely to be sustained on appeal. The Advisory Committee Note to Rule 37(e)(2) counsels that "the remedy should fit the wrong," and this is precisely what was required under preexisting inherent power sanctions case law. *See, e.g., Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011) (in imposing a sanction for spoliation, the court "must select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim."); *Jackson v. Murphy*, 468 F. App'x 616, 619 (7th Cir. 2012) ("The severity of a sanction should be proportional to the gravity of the offense."); *Ross v. Am. Red Cross*, 2014 U.S. App. LEXIS 1827 (6th Cir. Jan. 27, 2014) ("Because failures to produce relevant evidence fall along a continuum of fault — ranging from innocence through the degrees of negligence to intentionality, the severity of a sanction may, depending on the circumstances of the case, correspond to the party's fault" (internal quotations and citations omitted)); *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065 (6th Cir. 2014) ("The severity of sanction issued is determined on a case-by-case basis, depending in part on the spoliating party's level of culpability.").

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[1] *See, e.g., United States v. Laurent*, 607 F.3d 895, 902–903 (1st Cir. 2010) (negligence may suffice to support adverse inference instruction, although "ordinarily" it does not); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (negligence may suffice to support adverse inference instruction (this is the leading case for this view)); *Automated Solutions Corp. v. Paragon Data Sys.*, 756 F.3d 504 (6th Cir. 2014) (negligence may suffice to support adverse inference instruction); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) ("a finding of 'bad faith' is not a prerequisite to" an adverse inference instruction); *Grosdidier v. Broad. Bd. of Governors*, 709 F.3d 19 (D.C. Cir. 2013) (bad faith not required where spoliator destroys documents it is required by regulation to maintain, and injured party is within the class of persons protected by the regulation) (Title VII context).

[2] *See, e.g., Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 457 (2d Cir. 2007) ("'Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'").

[3] *See Grosdidier*, 709 F.3d at 28 (Title VII employment action; negligent destruction of notes despite EEOC regulation requiring preservation for one year: "As a Title VII litigant, [Plaintiff] is within the class protected by the EEOC regulation, and the destroyed notes are likely to have had information regarding her responses and those of the other applicants during the interview as well as the types of questions asked of her and other applicants, all of which could be relevant to her contention that the [Defendant] is hiding the real reason for its selection decision. [Plaintiff] is therefore entitled to an adverse inference. . . . ").

[4] *See, e.g., United States v. Stein*, 488 F. Supp. 2d 350 (S.D.N.Y. 2007) (Party A serves a document demand on Party B. Party B has the unconditional right, by contract, to obtain responsive documents held by Party C. Held, the documents in the possession of Party C are in Party B's "possession, custody or control" within the meaning of Fed. R. Civ. P. 34).

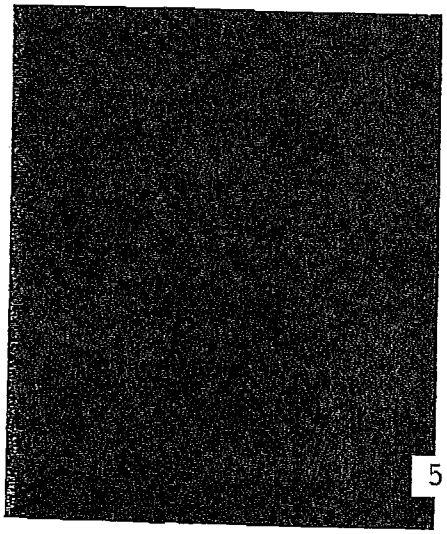
[5] *See Cyntegra, Inc. v. Idexx Labs., Inc.*, No. CV 06-4170 PSG (CTx), 2007 U.S. Dist. LEXIS 97417, at *14–*15 (C.D. Cal. Sept. 21, 2007) ("courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to, or indirect control over, such evidence").

[6] *See, e.g., World Courier v. Barone*, No. C 06-3072 TEH, 2007 U.S. Dist. LEXIS 31714 (N.D. Cal. Apr. 16, 2007) (defendant wife and two co-defendants downloaded plaintiff's databases prior to leaving plaintiff's employ; wife's husband destroyed the hard drive that contained relevant evidence; court rejected all defendants' argument that they could not be sanctioned because the spoliator was a nonparty on three grounds: (1) "it overlooks a party's affirmative duty to preserve relevant evidence both prior to and during trial;" (2) "courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to or indirect control over such evidence;" and (3) "it is difficult to imagine a scenario in which a husband would secretly create a copy of, and subsequently destroy, a hard drive relating to his spouse's pending legal matters and professional career without any knowledge, support or involvement of his wife." Adverse inference instruction and monetary sanctions imposed.)

[7] Under preexisting case law, most Circuits that rejected the negligence standard of *Residential Funding* applied a bad faith test. *See, e.g., Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) ("a finding of bad faith is pivotal to a spoliation determination"); *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) ("The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of 'bad faith.'"), quoted with approval in *Clayton v. Columbia Cas. Co.*, 547 F. App'x 645 (5th Cir. 2013); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to [defendant], we must find that [defendant] intentionally destroyed the documents in bad faith."); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) ("[A] district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction."); *Rutledge v. NCL (Bahamas), Ltd.*, 464 F. App'x 825 (11th Cir. 2012) (unpublished) ("'[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.'") (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)); *Silver v. Countrywide Home Loans, Inc.*, 483 F. App'x 568, 572 (11th Cir. 2012).

[8] *See generally* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 52(A) (5th ed. 2013).

[9] *Id.* at § 16(C)(1).



Questions to think about in advance of Hickman v. Taylor

1. How did this interlocutory order on a discovery matter get to the United States Supreme Court?

2. Why would the defendant tug owners and attorney Fortenbaugh litigate the discovery issue all the way to the Supreme Court? Thinking about this may help clarify what is at stake with work product doctrine.

3. Why were Fotenbaugh's interviews not protected by the attorney client privilege? In this regard, a frequently invoked test for the attorney client privilege looks like this:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

HICKMAN

v.

TAYLOR et al.

Argued Nov. 13, 1946.

Decided Jan. 13, 1947.

Mr. Justice MURPHY delivered the opinion of the Court.

This case presents an important problem under the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

On February 7, 1943, the tug 'J. M. Taylor' sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which responden Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: 'State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor'.

Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.'

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had

been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called 'for privileged matter obtained in preparation for litigation' and constituted 'an attempt to obtain indirectly counsel's private files.' It was claimed that answering these requests 'would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel.'

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting en banc, held that the requested matters were not privileged. 4 F.R.D. 479. The court then decreed that the tug owners and Fortenbaugh, as counsel and agent for the tug owners forthwith 'Answer Plaintiff's 38th interrogatory and supplemental interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.' Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting en banc, reversed the judgment of the District Court. 153 F.2d 212. It held that the information here sought was part of the 'work product of the lawyer' and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts, [1] led us to grant certiorari. 328 U.S. 876, 66 S.Ct. 1337.

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. [2] Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. [3] The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. [4]

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In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an

individual plaintiff. Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pelinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. [8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad aith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation

of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any oth r rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. [9] Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this

case (153 F.2d 212 , 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essentia to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate

reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted. [10]

Rule 30(b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy. Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

We fully appreciate the w de-spread controversy among the members of the legal profession over the problem raised by this case. [11] It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

We therefore affirm the judgment of the Circuit Court of Appeals.

Affirmed.

Mr. Justice JACKSON, concurring.

The narrow question in this case concerns only one of thirty-nine interrogatories which defendants and their counsel refused to answer. As there was persistence in refusal after the court ordered them to answer it, counsel and clients were committed to jail by the district court until they should purge themselves of contempt.

The interrogatory asked whether statements were taken from the crews of the tugs involved in the accident, or of any other vessel, and demanded 'Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.' The question is simply whether such a demand is authorized by the rules relating to various aspects of 'discovery'.

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

'Discovery' is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. See Ragland, Discovery Before Trial (1932) 13-16. Since 1848 when the draftsmen of New York's Code of Procedure recognized the importance of a better system of discovery, the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, amicus briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. See Report of the Commission on the Administration of Justice in New York State (1934) 330, 331; Ragland, Discovery Before Trial (1932) 35, 36. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. Cf. Report of Commission on the Administration of Justice in New York State (1934) 41, 42. It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with any of the crews of the vessels in question or of any other, to 'set forth in detail the exact provision of any such oral statements or reports.' Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into 'a battle of wits between counsel.' But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a 'battle of wits.' I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will

not be departures in some respects. Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's 'inexact' statement could lose nothing by saying, 'Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not.' Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressi g evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he, too, may be examined under the Rules. He may be compelled on discovery as fully as on the trial to disclose his version of the facts. But that is his own disclosure—it can be used to impeach him if he contradicts it and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. So the literal language of the Act of Congress which makes 'Any writing or record * * * made as a memorandum or record of any * * * occurrence, or event,' 28 U.S.C.A. § 695, admissible as evidence, would have allowed the railroad company to put its engineer's accident statements in evidence. Cf. Palmer v. Hoffman, 318 U.S. 109, 111, 63 S.Ct. 477, 479, 87 L.Ed. 645, 144 A.L.R. 719. But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. We reviewed the background of the Act and the consequences on the trial of negligence cases of allowing railroads and others to put in their statements and thus to shield the crew from cross-examination. We said, 'Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication.' 318 U.S. at page 114, 63 S.Ct. at page 481. We pointed out that there, as here, the 'several hundred years of history behind the Act * * * indicate the nature of the reforms which it was designed to effect.' 318 U.S. at page 115, 63 S.Ct. at page 481. We refused to apply it beyond that point. We should follow the same course of reasoning here. Certainly nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed.

The question remains as to signed statements or those written by witnesses. Such statements are not evidence for the defendant. Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477. Nor should I think they ordinarily could be evidence for the plaintiff. But such a statement might be useful for impeachment of the witness who signed it, if he is called and if he departs from the statement. There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available. Production of such statements are governed by Rule 34 and on 'Showing good cause therefor' the court may order

their inspection, copying or photographing. No such application has here been made; the demand is made on the basis of right, not on showing of cause.

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

UPJOHN COMPANY et al., Petitioners,
v.
UNITED STATES et al.

Argued Nov. 5, 1980. Decided Jan. 13, 1981.

Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925, 100 S.Ct. 1310, 63 L.Ed.2d 758. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. [1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

"All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.' " *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the "control group" could be made. In a concluding footnote the court stated that the work- product doctrine "is not applicable to administrative summonses issued under 26 U.S.C. § 7602." *Id.*, at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co. v. Kirkpatrick*, 312 F.2d 742 (CA3 1962), cert.

denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963), reflected a similar conceptual approach:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel*, *supra*, at 51, 100 S.Ct., at 913; *Fisher*, *supra*, at 403, 96 S.Ct., at 1577. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

"A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 393-394, 91 L.Ed. 451 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below-"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"-who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (CA8 1978) (en banc):

"In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he interviews employees not having "the very highest authority", their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the "very highest authority", he may find it extremely difficult, if not impossible, to determine what happened.' " *Id.*, at 608-609 (quoting Weinschel Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C.Ind. & Com. L.Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e. g.*, *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1164 (DSC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena,24 Bus.Law. 901 , 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, *e. g., United States v. United States Gypsum Co.* , 438 U.S. 422 , 440-441, 98 S.Ct. 2864 , 2875-2876, 57 L.Ed.2d 854 (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). [2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g., Hogan v. Zletz* , 43 F.R.D. 308, 315-316 (ND Okl.1967), aff'd in part *sub nom.* Natta v. Hogan , 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with *Congoleum Industries, Inc. v. GAF Corp.* , 49 F.R.D. 82, 83-85 (ED Pa.1969), aff'd, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research). The communications at issue were made by Upjohn employees [3] to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments* ." (Emphasis supplied.) 78-1 USTC ¶ 9277, pp. 83,598, 83,599.

Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. [4] The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.* , at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.* , at 39a, 43a, and have been kept confidential by the company. [5] Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create

a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

"[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (q2.7).

See also *Diversified Industries*, 572 F.2d., at 611; *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S., at 516, 67 S.Ct., at 396: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S.Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); *Trammel*, 445 U.S., at 47, 100 S.Ct., at 910-911; *United States v. Gillock*, 445 U.S. 360, 367, 100 S.Ct. 1185 1190, 63 L.Ed.2d 454 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals, in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602. [6]

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510, 67 S.Ct., at 393. The Court noted that "it is essential that a lawyer work with a certain degree of

privacy" and reasoned that if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.* , at 511, 67 S.Ct., at 393-394 .

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in *United States v. Nobles* , 422 U.S. 225 , 236-240, 95 S.Ct. 2160 , 2169-2171, 45 L.Ed.2d 141 (1975) , and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3). [7]

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States v. Euge* , 444 U.S. 707 , 714, 100 S.Ct. 874 , 879-880, 63 L.Ed.2d 741 (1980) . Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work- product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81(a)(3). See *Donaldson v. United States* , 400 U.S. 517 , 528, 91 S.Ct. 534 , 541, 27 L.Ed.2d 580 (1971) . While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in *Hickman* :

"We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S., at 511 , 67 S.Ct., at 394 .

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman* , however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.* , at 512, 67 S.Ct., at 394 . As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters petitioner's case is not of that type." *Id.* , at 512-513, 67 S.Ct., at 394-395 . See also *Nobles, supra* , 422 U.S., at 252-253 , 95 S.Ct., at 2177 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513 , 67 S.Ct., at 394-395 ("what he saw fit to write down regarding witnesses' remarks"); *Id* , at 516-517, 67 S.Ct., at 396 ("the statement would be his [the attorney's] language, permeated with his inferences") (Jackson, J., concurring). [8]

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C.App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman*

opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, *e. g.*, *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); *In re Grand Jury Investigation*, 412 F.Supp. 943, 949 (ED Pa.1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, *e. g.*, *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (CA3 1979) ("special considerations . . . must shape any ruling on the discoverability of interview memoranda . . .; such documents will be discoverable only in a 'rare situation' "); Cf. *In re Grand Jury Subpoena*, 599 F.2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

Discovery Practice Exercises

Here are two questions from two different exams, relating to work product and attorney client privilege issues that we may discuss in class tomorrow. My guess is that we will have a bit of time to cover these but that you will probably be able to spend more time on them in your TA groups this week:

From Fall 2003 exam *[note, this was two different questions on the exam, and the work product/attorney client material only relates to the second question. Still, because the second question references the facts from the first question, I needed to include it here]:*

Ernst & Young, L.L.P. and Cendant Corporation are co-defendants in a securities case brought in the United States District Court for the Southern District of Texas. Assume that Ernst & Young is a Pennsylvania corporation and that Cendant is incorporated in Delaware, and that both have their principal place of business in New York.

The plaintiffs, a group of investors all of whom are from Texas, allege that the two companies conspired to defraud them as to the true financial condition of Cendant. They claim that they never would have bought shares in the company if they had known of Cendant's poor financial condition. They allege claims arising under federal securities law. In particular their claims are based on Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (the "SEC"), Sections 10(b) and 20(a) of the Exchange Act and Rule 10b- 5 promulgated thereunder by the SEC. Section 10(b) of the Exchange Act and Rule 10b-5 prohibit "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security."

Both Cendant and Ernst & Young file pre-answer motions for dismissal under Fed. R. Civ. P. 12(b)(2). In addition to its answer, Ernst & Young files and serves a cross-claim against Cendant under Federal Rule of Civil Procedure 13(g). Ernst & Young alleges that Cendant owes it indemnity, based on the terms of the audit contract between Cendant and Ernst & Young, for any monies it might pay—by judgment or by settlement—to the plaintiffs. That contract was negotiated and finalized in New York, following extensive discussions between Cendant and Ernst & Young in Cendant's New York office. Please note that the cross-claim necessarily is based on state law since, for purposes of the claim, neither Cendant nor its auditor are considered "purchasers" or "sellers" of securities within the meaning of Section 10(b) and Rule 10b-5. Cendant timely files an answer to the cross-claim, asserting as its principal defense that because Ernst & Young was negligent in preparing the audits, it does not owe contractual indemnity.

Exactly one month later, the plaintiffs settle all of their claims against Cendant and Ernst & Young. All parties appear before the court to announce that a settlement has been reached as to the plaintiffs' claims, and they ask the court to sign a judgment disposing of all of plaintiffs' claims. The judge enters the judgment and dismisses all of the plaintiffs' claims. At this same hearing, Ernst & Young emphasizes that its cross-claim against Cendant remains and asks for a trial setting. The judge acknowledges that the cross-claim survives the settlement, but says she wants to wait before setting the case for trial.

[the first question asked students the following: If Cendant does not want to have to continue to litigate in this federal district court, what argument(s) should it make. Prepare a memorandum outlining the options available to Cendant, citing any specific authority. Be certain to assess the likelihood of success for any option you discuss.]

In the same litigation, assume that Cendant decides it wants to remain in the United States District Court for the Southern District of Texas and does not take any of the actions you may have discussed in your previous answer. Instead, Cendant notices and takes the oral deposition of Simon Wood, a former Ernst & Young senior manager and auditor who prepared the Cendant financial statements at issue in the underlying litigation. At Wood's deposition, Cendant inquires into communications that took place between Wood, Ernst & Young's counsel (who also represented Wood) and Dr. Phillip C. McGraw of Courtroom Sciences, Inc. Dr. McGraw is a consulting expert in trial strategy and deposition preparation who was retained as a non-testifying trial expert to assist Ernst & Young's counsel in preparing the case. Dr. McGraw participated in a deposition preparation meeting with Wood and his counsel before the deposition was conducted.

At the deposition, Cendant's counsel specifically asks Wood, "Did Dr. McGraw provide you with guidance in your conduct as a witness?" and "Did you rehearse any of your prospective testimony in the presence of Dr. McGraw?

Counsel for Wood objects, citing the work product doctrine, and directs his client not to answer. After the deposition, Cendant brings a motion to compel. If you were the trial judge ruling on whether to allow these inquiries, how would you rule?

From Fall 2002 exam:

In May 2001, Mary Lou Scott was badly injured when a car in which she was a passenger crashed. Ms. Scott filed suit against XYZ Company, the manufacturer of the tire, alleging that defects in the tire design caused the accident. She has noticed the deposition of XYZ's general counsel for next month. You are an associate in a private law firm retained by XYZ. In interviewing the general counsel of the company you learn that he plays golf once a month with the company's chief of engineering and has done so for the last ten years. You learn further that at their last outing together, the chief of engineering informed the general counsel that he, the chief of engineering, had raised questions with a now-deceased XYZ vice-president concerning the safety of the company's X-12 tire in 1998, two years before the product was sold to the public.

Is the general counsel's conversation with the Chief of Engineering privileged from disclosure? Must the general counsel testify about his conversation if he is asked about it at the deposition? Write a memorandum to the file addressing these questions.

NOTABLE ISSUES IN FEDERAL SUMMARY JUDGMENT PRACTICE

BY HON. DAVID HITTNER & MATTHEW HOFFMAN

I. Introduction

The dispositive impact of summary judgment rulings, together with the procedural changes that have increased the influence of summary judgments on federal litigation, have led commentators to characterize summary judgment practice as "the focal point of modern litigation."[1] At the forefront of any discussion on federal summary judgment practice is the so-called trilogy of cases announced by the U.S. Supreme Court in its 1986 term—*Celotex Corp. v. Catrett*, *Anderson v. Liberty Lobby, Inc.*, and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[2] The burden-shifting framework enunciated by the Court in this trilogy, as well as its clarification of Federal Rule of Civil Procedure 56's "material fact" standard, has had such widespread ramifications for federal summary judgment practice that former Chief Justice William Rehnquist characterized *Celotex* as the most important decision of his tenure.[3] But beyond this vital procedural framework, a number of similarly critical aspects of federal summary judgment practice perhaps are less well known, yet sometimes equally as dispositive of an individual case. This article focuses on litigating summary judgments in federal court, with a particular emphasis on several of those discrete, yet important issues often overlooked by practitioners.

II. The Rule 56 Standard: Burden Shifting and the Trilogy

Federal Rule of Civil Procedure 56 sets forth the procedures governing the litigation of motions for summary judgment in federal court. Rule 56 was significantly amended, effective December 1, 2010, resulting in technical changes to the rules surrounding federal summary judgment practice. As amended, Rule 56(a) mandates that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[4] The amended Rule thus includes more mandatory language—"shall" has replaced "should"—and a slightly altered standard of review—"genuine *dispute* as to any material fact" has replaced "genuine *issue* as to any material fact"—than its pre-amendment predecessor. Although the language of the rule has changed, many practitioners, and even courts, still frequently recite the more familiar standard of genuine "issue" as opposed to genuine "dispute."[5] Attorneys should be aware of the amended rule and incorporate the revised language into their summary judgment briefing.

The primary procedural issue a practitioner should be aware of when litigating summary judgment motions in federal court is the burden-shifting framework enunciated by the Supreme Court's 1986 summary judgment trilogy.[6] In *Matsushita* and *Liberty Lobby*, the Court expounded on the "material fact" standard, while in *Celotex* the Court initially outlined the manner in which the burden shifts from the movant to the nonmovant in a typical summary judgment.[7] As described by one commentator, "*Celotex* has made it easier to make the motion, and *Anderson* and *Matsushita* have increased the chances that it will be granted."[8]

The primary procedural issue a practitioner should be aware of when litigating summary judgment motions in federal court is the burden-shifting framework enunciated by the Supreme Court's 1986 summary judgment trilogy.

Under *Celotex*'s burden-shifting framework, the movant bears an initial burden to demonstrate the absence of a genuine dispute as to any material fact on the adverse party's claim.[9] To satisfy this initial burden, although the moving party is not required to present evidence proving the absence of a genuine dispute of material fact, it is not enough merely to make conclusory statements that the nonmovant has no evidence.[10] Rather, the movant must point the Court to an absence of evidence in support of the nonmovant's case.[11]

If the movant satisfies its initial burden, the burden then shifts, and the nonmovant must go beyond the pleadings and come forward with specific evidence demonstrating that there is a genuine dispute for trial.[12] There is no genuine dispute for trial when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmovant.[13] If the nonmovant fails to meet this burden, summary judgment

in the movant's favor is appropriate.[14] Thus, the burden to demonstrate that there is a genuine dispute of material fact is on the party who seeks to avoid summary judgment.

III. Examining a Sample of Discrete Issues

Citing an outdated standard of review is just one way that practitioners often run afoul of the procedural rules governing federal summary judgment practice. For example, misunderstanding the timing rules, conflating a court's review of the pleadings with its review of the evidence, or confusing the various rules governing the appealability of orders on summary judgment could all result in delays or, in some instances, barriers to an advantageous ruling. A sample of these issues, and other important matters, are explored below.

A. Deadline to Respond

Rule 56(c) formerly required a party opposing summary judgment to respond within twenty-one days.[15] As altered by the 2010 amendments, however, Rule 56 does not establish an explicit deadline to respond.[16] Rather, a district court's local rules or scheduling orders may specify a date by which a response must be filed.[17] Because the rules often vary between districts—even districts within the same circuit—attorneys should always consult the local rules of the district in which their case is pending. In both the Southern and the Northern Districts of Texas, for example, the response must be filed within twenty-one days of the filing of the motion, while the Western District of Texas requires a response within fourteen days from the motion being filed, and the Eastern District of Texas sets fourteen days from the date of service as the deadline.[18] Like responses, the former timing rules of Rule 56 governing replies have been withdrawn and local rules and procedures should instead be referenced.[19]

B. Failure to Respond

Wholesale failure to respond is construed as a representation of no opposition under the local rules of many districts, and such a failure may lead to the entry of summary judgment against the non-responding party.[20] However, summary judgment cannot be granted solely on the basis of a nonmovant's failure to respond.[21] Rule 56(e) no longer explicitly provides, in the same way that it did prior to the 2010 amendments, that if no response is filed, the court should, if appropriate, grant summary judgment.[22] Instead, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion [and] grant summary judgment."[23] Thus, summary judgment may only be granted if the moving party satisfies its initial burden of demonstrating that there is no genuine dispute as to any material fact and the nonmovant fails to meet its burden in response.

C. Rule 12(b)(6) Motions to Dismiss Treated as Rule 56 Motions for Summary Judgment

When matters outside the pleadings are considered on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), Rule 12(d) requires the court to treat the motion as one for summary judgment and to dispose of it as required by Rule 56.[25] If a Rule 12(b)(6) motion to dismiss has been converted to a Rule 56 motion for summary judgment, the summary judgment rules govern the standard of review. In this manner, the respondent is entitled to the procedural safeguards of summary judgment.[27]

Under Rule 56, the district court is not required to provide parties notice beyond its decision to treat a Rule 12(b)(6) motion as one for summary judgment.[28] An express warning by the court that it plans to convert the motion is unnecessary—the nonmovant merely must be aware that the movant has submitted matters outside the pleadings for the court's review.[29] The standard is whether the opposing party had notice after the court accepted for consideration matters outside the pleadings.[30] The notice required is only that the district court *may* treat the motion as one for summary judgment, not that the court *will* in fact do so.[31] The Fifth Circuit has found that when a defendant attaches evidence to its motion to dismiss and the plaintiff attaches evidence to its response, the plaintiff is on notice that the court may treat the motion as one for summary judgment, and no additional notice by the court is required.[32] Practically speaking, judges will often issue an order notifying the parties that the court will convert a motion to dismiss into a motion for summary judgment. Nevertheless, practitioners should be mindful that such an express notification is not required and, when responding to a motion to dismiss, attaching evidence to the response, if the movant has attached evidence to the motion, could result in the court's conversion of the motion into one for summary judgment without further notice from the court.

D. Summary Judgment Hearings

Oral hearings for summary judgment motions are not required under the Federal Rules and consequently are rarely granted.[33] The Rules likewise do not provide for a specific time by which motions must be served upon the opposing party.[34] Courts are generally permitted to rule on summary judgment motions without first giving the parties advance notice of the court's intention to decide the motion by a certain date.[35] As such, federal courts typically rule on such motions solely based on the parties' submissions. Attorneys who wish to have an oral hearing prior to the court's ruling should consult the relevant

local rules and the individual judge's procedures and consider filing a motion specifically requesting an oral hearing.[36]

E. The District Court's Order on Summary Judgment

Rule 56(a) provides that "[t]he court should state on the record the reasons for granting or denying the motion."[37] In practice, because there is, in most instances, no appellate review of summary judgment denials, district courts often issue denials without giving extensive reasons, or any reasons at all.[38] In contrast, a prevailing movant should seek an order from the court with a specific finding that the movant carried his burden of proof and there is no genuine dispute as to any material fact. When a district court provides a detailed explanation supporting the grant of summary judgment, the appellate court "need not scour the entire record while it ponders the possible explanations" for the entry of summary judgment.[39] As such, the Fifth Circuit has stated that a detailed discussion is of great importance.[40] A statement of the reasons for granting summary judgment usually proves "not only helpful, but essential."[41] The movant therefore should submit a proposed order with reasons for granting the motion rather than a form order merely stating that the motion is granted.

F. When Summary Judgments Are Appealable

If the trial court grants summary judgment and disposes of all claims, the judgment is appealable, and the court's order is subject to de novo review.[42] However, a district court's denial of a motion for summary judgment is not ordinarily reviewable on appeal.[43] In this situation, the court's decision constitutes an interlocutory order from which the right to appeal is unavailable until entry of judgment following a trial on the merits.[44] Specific exceptions to this rule exist in situations such as the denial of qualified immunity, pursuant to the collateral order doctrine.[45] Further, upon certification by the trial judge, the district court's denial of a motion for summary judgment may be reviewed by permissive interlocutory appeal,[46] but such certifications are relatively rare.[47]

Moreover, the Fifth Circuit has repeatedly held that orders denying summary judgment are not generally appealable when final judgment adverse to the movant is rendered following a full trial on the merits.[48] In *Ortiz v. Jordan*, the Supreme Court resolved a circuit split on this issue by unanimously confirming the Fifth Circuit's rule of law, holding that a party may not "appeal an order denying summary judgment after a full trial on the merits."[49] Consequently, in most instances, litigants should be prepared to proceed to a trial on the merits following the denial of a motion for summary judgment and should not rely on arguments made within a motion for summary judgment to preserve error for appeal.

IV. Conclusion

The burden-shifting framework controlling federal summary judgment practice is critical for any federal practitioner to master. Yet, recent amendments to Rule 56 are still, in many cases, misunderstood. The discrete issues identified by this article are merely a sampling of the many technicalities that federal practitioners encounter when litigating summary judgments. Attorneys should constantly familiarize themselves with the local rules of the district in which they are practicing and stay abreast of amendments to Rule 56 and precedent-setting cases opining on issues related to summary judgment.

David Hittner is a Judge of the United States District Court for the Southern District of Texas and formerly Judge of the 133rd Judicial District Court of Harris County, Texas, and is the author of a three-volume book on federal civil procedure.

Matthew Hoffman is a law clerk to Judge David Hittner. He will be joining the Houston office of Vinson & Elkins this fall.

An extended version of this article, including commentary on summary judgment practice in state court, will appear next year in 52 HOUS. L. REV. (forthcoming Mar. 2015). ★

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1 Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984, 1016 (2003) (capitalization omitted); *see also* Brooke D. Coleman, *The Celotex Initial Burden Standard and an Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 295 (2008) ("Summary judgment, which started as an obscure procedural rule, is now a standard part of the litigation process. The percentage of federal cases ended by summary judgment increased from 3.7% in 1975 to 7.7% in 2000.").

2 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

3 Telephone Interview with Aaron Streett, Partner, Baker Botts, Former Law Clerk, Chief Justice William H. Rehnquist, U.S. Supreme Court (Sept. 24, 2013). Chief Justice Rehnquist's revelation is borne out by the empirical evidence, as gathered by Professor Adam Steinman in, most recently, a 2010 examination of the most highly cited Supreme Court cases. According to Professor Steinman's research, the 1986 summary judgment trilogy of cases were, individually, the three most frequently cited Supreme Court decisions of all time, with *Celotex* and *Liberty Lobby* both garnering more than 120,000 federal citing references as of 2010. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 app. (2010).

4 FED. R. CIV. P. 56(a).

5 *See, e.g.*, *Clayton v. ConocoPhillips Co.*, 722 F.3d 279, 290 (5th

CELOTEX CORPORATION, Petitioner
v.
Myrtle Nell CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased.

Argued April 1, 1986.

Decided June 25, 1986.

Justice REHNQUIST delivered the opinion of the Court. (Joined by White, Marshall, Powell and O'Connor)

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. Catrett v. Johns-Manville Sales Corp., 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom.* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). [1] We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217. [2] Respondent appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure, [3] and this

Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C. at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.*, at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.*, at 166, 756 F.2d, at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. [4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505 2511, 91 L.Ed.2d 202 (1986).

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. [5]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the

"pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.*, at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the

Adickes Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to *facilitate* the granting of motions for summary judgment would be interpreted to make it more difficult to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion. *It is so ordered.*

Justice WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect of the case, I agree that the case should be remanded for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 05–1631

TIMOTHY SCOTT, PETITIONER *v.* VICTOR HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 30, 2007]

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a law enforcement officinl can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking

lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to "'[g]o ahead and take him out.'" *Harris* v. *Coweta County*, 433 F. 3d 807, 811 (CA11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle.[1] As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. §1979, 42 U. S. C. §1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Harris* v.

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[1]Scott says he decided not to employ the PIT maneuver because he was "concerned that the vehicles were moving too quickly to safely execute the maneuver." Brief for Petitioner 4. Respondent agrees that the PIT maneuver could not have been safely employed. See Brief for Respondent 9. It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.

Coweta County, No. 3:01-CV-148-WBH (ND Ga., Sept. 23, 2003), App. to Pet. for Cert. 41a-42a. On interlocutory appeal,[2] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial.[3] Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." 433 F. 3d, at 816. The Court of Appeals further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.*, at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari, 549 U. S. __ (2006), and now reverse.

II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do

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[2] Qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). Thus, we have held that an order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be "effectively unreviewable." *Id.*, at 527. Further, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) (*per curiam*).

[3] None of the other claims respondent brought against Scott or any other party are before this Court.

the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States* v. *Treasury Employees*, 513 U. S. 454, 478 (1995) (citing *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established." *Saucier*, *supra*, at 201.[4] We therefore turn to the threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

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[4] Prior to this Court's announcement of *Saucier*'s "rigid 'order of battle,'" *Brosseau* v. *Haugen*, 543 U. S. 194, 201–202 (2004) (BREYER, J., concurring), we had described this order of inquiry as the "better approach," *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998), though not one that was required in all cases. See *id.*, at 858–859 (BREYER, J., concurring); *id.*, at 859 (STEVENS, J., concurring in judgment). There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. See, *e.g.*, *Brosseau*, *supra*, at 201 (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring); *Bunting* v. *Mellen*, 541 U. S. 1019 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari); *id.*, at 1025 (SCALIA, J., joined by Rehnquist, C.J., dissenting). See also *Lyons* v. *Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring). We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is, as discussed in Part III–B, *infra*, easily decided. Deciding that question first is thus the "better approach," *Lewis*, *supra*, at 841, n. 5, regardless of whether it is required.

III

A

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962) *(per curiam)*; *Saucier*, *supra*, at 201. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.[5] For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F. 3d, at 815. Indeed, reading the lower court's opinion, one gets

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[5] JUSTICE STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See *post*, at 4 (dissenting opinion) ("In sum, the factual statements by the Court of Appeals quoted by the Court . . . were entirely accurate"). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb and in Clerk of Court's case file.

the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

> "[T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.*, at 815–816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[5] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in

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[5] JUSTICE STEVENS hypothesizes that these cars "had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights," so that "[a] jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance." *Post*, at 3. It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.

the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[7]

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U. S. 574, 586–587 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 247–248 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury

[7] This is not to say that each and every factual statement made by the Court of Appeals is inaccurate. For example, the videotape validates the court's statement that when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)

could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment. Scott does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a "seizure." "[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied." *Brower* v. *County of Inyo*, 489 U. S. 593, 596–597 (1989) (emphasis deleted). See also *id.*, at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). It is also conceded, by both sides, that a claim of "excessive force in the course of making [a] . . . 'seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham* v. *Connor*, 490 U. S. 386, 388 (1989). The question we need to answer is whether Scott's actions were objectively reasonable.[5]

1

Respondent urges us to analyze this case as we analyzed *Garner*, 471 U. S. 1. See Brief for Respondent 16–29. We

[5] JUSTICE STEVENS incorrectly declares this to be "a question of fact best reserved for a jury," and complains we are "usurp[ing] the jury's factfinding function." *Post*, at 7. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, see Part III–A, *supra*, the reasonableness of Scott's actions—or, in JUSTICE STEVENS' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force," *post*, at 7—is a pure question of law

must first decide, he says, whether the actions Scott took constituted "deadly force." (He defines "deadly force" as "any use of force which creates a substantial likelihood of causing death or serious bodily injury," *id.*, at 19.) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;[9] and (3) where feasible, the officer must have given the suspect some warning. See Brief for Respondent 17–18 (citing *Garner*, *supra*, at 9–12). Since these *Garner* preconditions for using deadly force were not met in this case, Scott's actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham*, *supra*, at 388, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary sus-

[9] Respondent, like the Court of Appeals, defines this second precondition as "'necessary to prevent escape,'" Brief for Respondent 17; *Harris v. Coweta County*, 433 F. 3d 807, 813 (CA11 2005), quoting *Garner*, 471 U. S., at 11. But that quote from *Garner* is taken out of context. The necessity described in *Garner* was, in fact, the need to prevent "serious physical harm, either to the officer or to others." *Ibid.* By way of example only, *Garner* hypothesized that deadly force may be used "if necessary to prevent escape" when the suspect is known to have "committed a crime involving the infliction or threatened infliction of serious physical harm," *ibid.*, so that his mere being at large poses an inherent danger to society. Respondent did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in *Garner*, it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm . . . to others." *Ibid.*

pect, 471 U. S., at 21, by shooting him "in the back of the head" while he was running away on foot, *id.*, at 4, and when the officer "could not reasonably have believed that [the suspect] . . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id.*, at 21. Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general . . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams* v. *St. Lucie County Sheriff's Dept.*, 962 F. 2d 1563, 1577 (CA11 1992) (Edmondson, J., dissenting), adopted by 998 F. 2d 923 (CA11 1993) (en banc) *(per curiam)*. Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case. Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U. S. 696, 703 (1983). Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating

Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III–A, *supra*. It is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent—though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner*, *supra*, at 4, or pulling alongside a fleeing motorist's car and shooting the motorist, cf. *Vaughan* v. *Cox*, 343 F. 3d 1323, 1326–1327 (CA11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.[10]

[10]The Court of Appeals cites *Brower* v. *County of Inyo*, 489 U. S. 593, 595 (1989), for its refusal to "countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any

But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Cf. *Brower*, 489 U. S., at 594. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.[11]

Second, we are loath to lay down a rule requiring the

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possible liability for all ensuing actions during the chase," 433 F. 3d, at 816. The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant: a seizure occurs whenever the police are "responsib[le] for the termination of [a person's] movement," 433 F. 3d, at 816, regardless of the reason for the termination. Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.

[11] Contrary to JUSTICE STEVENS' assertions, we do not "assum[e] that dangers caused by flight from a police pursuit will continue after the pursuit ends," *post*, at 6, nor do we make any "factual assumptions," *post*, at 5, with respect to what would have happened if the police had gone home. We simply point out the *uncertainties* regarding what would have happened, in response to *respondent's* factual assumption that the high-speed flight would have ended.

police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

* * *

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ROBERT R. TOLAN *v.* JEFFREY WAYNE COTTON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–551. Decided May 5, 2014

PER CURIAM.

During the early morning hours of New Year's Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. Tolan sued, alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton, and the Fifth Circuit affirmed, reasoning that regardless of whether Cotton used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right. 713 F. 3d 299 (2013). In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986). For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion.

I

A

The following facts, which we view in the light most favorable to Tolan, are taken from the record evidence and the opinions below. At around 2:00 on the morning of December 31, 2008, John Edwards, a police officer, was on patrol in Bellaire, Texas, when he noticed a black Nissan

sport utility vehicle turning quickly onto a residential street. The officer watched the vehicle park on the side of the street in front of a house. Two men exited: Tolan and his cousin, Anthony Cooper.

Edwards attempted to enter the license plate number of the vehicle into a computer in his squad car. But he keyed an incorrect character; instead of entering plate number 696BGK, he entered 696BGK. That incorrect number matched a stolen vehicle of the same color and make. This match caused the squad car's computer to send an automatic message to other police units, informing them that Edwards had found a stolen vehicle.

Edwards exited his cruiser, drew his service pistol and ordered Tolan and Cooper to the ground. He accused Tolan and Cooper of having stolen the car. Cooper responded, "That's not true." Record 1295. And Tolan explained, "That's my car." *Ibid.* Tolan then complied with the officer's demand to lie face-down on the home's front porch.

As it turned out, Tolan and Cooper were at the home where Tolan lived with his parents. Hearing the commotion, Tolan's parents exited the front door in their pajamas. In an attempt to keep the misunderstanding from escalating into something more, Tolan's father instructed Cooper to lie down, and instructed Tolan and Cooper to say nothing. Tolan and Cooper then remained facedown.

Edwards told Tolan's parents that he believed Tolan and Cooper had stolen the vehicle. In response, Tolan's father identified Tolan as his son, and Tolan's mother explained that the vehicle belonged to the family and that no crime had been committed. Tolan's father explained, with his hands in the air, "[T]his is my nephew. This is my son. We live here. This is my house." *Id.*, at 2059. Tolan's mother similarly offered, "[S]ir this is a big mistake. This car is not stolen. . . . That's our car." *Id.*, at 2075.

While Tolan and Cooper continued to lie on the ground

in silence, Edwards radioed for assistance. Shortly thereafter, Sergeant Jeffrey Cotton arrived on the scene and drew his pistol. Edwards told Cotton that Cooper and Tolan had exited a stolen vehicle. Tolan's mother reiterated that she and her husband owned both the car Tolan had been driving and the home where these events were unfolding. Cotton then ordered her to stand against the family's garage door. In response to Cotton's order, Tolan's mother asked, "[A]re you kidding me? We've lived her[e] 15 years. We've never had anything like this happen before." *Id.*, at 2077; see also *id.*, at 1465.

The parties disagree as to what happened next. Tolan's mother and Cooper testified during Cotton's criminal trial[1] that Cotton grabbed her arm and slammed her against the garage door with such force that she fell to the ground. *Id.*, at 2035, 2078–2080. Tolan similarly testified that Cotton pushed his mother against the garage door. *Id.*, at 2479. In addition, Tolan offered testimony from his mother and photographic evidence to demonstrate that Cotton used enough force to leave bruises on her arms and back that lasted for days. *Id.*, at 2078–2079, 2089–2091. By contrast, Cotton testified in his deposition that when he was escorting the mother to the garage, she flipped her arm up and told him to get his hands off her. *Id.*, at 1043. He also testified that he did not know whether he left bruises but believed that he had not. *Id.*, at 1044.

The parties also dispute the manner in which Tolan responded. Tolan testified in his deposition and during the criminal trial that upon seeing his mother being pushed, *id.*, at 1249, he rose to his knees, *id.*, at 1928. Edwards and Cotton testified that Tolan rose to his feet.

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[1]The events described here led to Cotton's criminal indictment in Harris County, Texas, for aggravated assault by a public servant. 713 F. 3d 299, 303 (CA5 2013). He was acquitted. *Ibid.* The testimony of Tolan's mother during Cotton's trial is a part of the record in this civil action. Record 2066–2087.

Id., at 1051–1052, 1121.

Both parties agree that Tolan then exclaimed, from roughly 15 to 20 feet away, 713 F. 3d, at 303, "[G]et your fucking hands off my mom." Record 1928. The parties also agree that Cotton then drew his pistol and fired three shots at Tolan. Tolan and his mother testified that these shots came with no verbal warning. *Id.*, at 2019, 2080. One of the bullets entered Tolan's chest, collapsing his right lung and piercing his liver. While Tolan survived, he suffered a life-altering injury that disrupted his budding professional baseball career and causes him to experience pain on a daily basis.

B

In May 2009, Cooper, Tolan, and Tolan's parents filed this suit in the Southern District of Texas, alleging claims under Rev. Stat. §1979, 42 U. S. C. §1983. Tolan claimed, among other things, that Cotton had used excessive force against him in violation of the Fourth Amendment.[2] After discovery, Cotton moved for summary judgment, arguing that the doctrine of qualified immunity barred the suit. That doctrine immunizes government officials from damages suits unless their conduct has violated a clearly established right.

The District Court granted summary judgment to Cotton. 854 F. Supp. 2d 444 (SD Tex. 2012). It reasoned that Cotton's use of force was not unreasonable and therefore did not violate the Fourth Amendment. *Id.*, at 477–478. The Fifth Circuit affirmed, but on a different basis. 713 F. 3d 299. It declined to decide whether Cotton's actions

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[2]The complaint also alleged that the officers' actions violated the Equal Protection Clause to the extent they were motivated by Tolan's and Cooper's race. 854 F. Supp. 2d 444, 465 (SD Tex. 2012). In addition, the complaint alleged that Cotton used excessive force against Tolan's mother. *Id.*, at 468. Those claims, which were dismissed, *id.*, at 465, 470, are not before this Court.

violated the Fourth Amendment. Instead, it held that even if Cotton's conduct did violate the Fourth Amendment, Cotton was entitled to qualified immunity because he did not violate a clearly established right. *Id.*, at 306.

In reaching this conclusion, the Fifth Circuit began by noting that at the time Cotton shot Tolan, "it was . . . clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.'" *Id.*, at 306 (quoting *Deville* v. *Marcantel*, 567 F. 3d 156, 167 (CA5 2009)). The Court of Appeals reasoned that Tolan failed to overcome the qualified-immunity bar because "an objectively-reasonable officer in Sergeant Cotton's position could have . . . believed" that Tolan "presented an 'immediate threat to the safety of the officers.'" 713 F. 3d, at 307.[3] In support of this conclusion, the court relied on the following facts: the front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet and calm"; and Tolan's words had amounted to a "verba[l] threa[t]." *Ibid.* Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother, *id.*, at 305, and that Cotton therefore could reasonably have feared for his life, *id.*, at 307. Accordingly, the court held, Cotton did not violate clearly established law in shooting Tolan.

The Fifth Circuit denied rehearing en banc. 538 Fed. Appx. 374 (2013). Three judges voted to grant rehearing. Judge Dennis filed a dissent, contending that the panel opinion "fail[ed] to address evidence that, when viewed in

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[3]Tolan argues that the Fifth Circuit incorrectly analyzed the reasonableness of Sergeant Cotton's beliefs under the second prong of the qualified-immunity analysis rather than the first. See Pet. for Cert. 12, 20. Because we rule in Tolan's favor on the narrow ground that the Fifth Circuit erred in its application of the summary judgment standard, we express no view as to Tolan's additional argument.

the light most favorable to the plaintiff, creates genuine issues of material fact as to whether an objective officer in Cotton's position could have reasonably and objectively believed that [Tolan] posed an immediate, significant threat of substantial injury to him." *Id.*, at 377.

II

A

In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]" *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham* v. *Connor*, 490 U. S. 386, 394 (1989). The inquiry into whether this right was violated requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee* v. *Garner*, 471 U. S. 1, 8 (1985); see *Graham*, *supra*, at 396.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ibid.* "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.*, at 741.

Courts have discretion to decide the order in which to

engage these two prongs. *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009). But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau* v. *Haugen*, 543 U. S. 194, 195, n. 2 (2004) (*per curiam*); *Saucier*, *supra*, at 201; *Hope*, *supra*, at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U. S., at 249. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970); see also *Anderson*, *supra*, at 255.

Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier*, *supra*, at 201; see also *Anderson* v. *Creighton*, 483 U. S. 635, 640–641 (1987). Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See *Brosseau*, *supra*, at 195, 198 (inquiring as to whether conduct violated clearly established law "'in light of the specific context of the case'" and construing "facts . . . in a light most favorable to" the nonmovant).

B

In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U. S., at 249.

First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." 713 F. 3d, at 307. The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was "'fairly dark,'" and lit by a gas lamp that was "'decorative.'" *Id.*, at 302. In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." Record 1552. He said that it was not. *Ibid.* Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, *id.*, at 2496, and Cotton acknowledged that there were two motion-activated lights in front of the house. *Id.*, at 1031. And Tolan confirmed that at the time of the shooting, he was "not in darkness." *Id.*, at 2498–2499.

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." 713 F. 3d, at 307 (internal quotation marks omitted). But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that

Tolan's mother was "very agitated" when she spoke to the officers. Record 1032–1033. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated." *Id.*, at 2075, 2077.

Third, the Court concluded that Tolan was "shouting," 713 F. 3d, at 306, 308, and "verbally threatening" the officer, *id.*, at 307, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." Record 1928. But Tolan testified that he "was not screaming." *Id.*, at 2544. And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Cf. *United States* v. *White*, 258 F. 3d 374, 383 (CA5 2001) ("A threat imports '[a] communicated intent to inflict physical or other harm'" (quoting Black's Law Dictionary 1480 (6th ed. 1990))); *Morris* v. *Noe*, 672 F. 3d 1185, 1196 (CA10 2012) (inferring that the words "Why was you talking to Mama that way" did not constitute an "overt threa[t]"). Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. Record 2078–2079. A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. 713 F. 3d, at 305; see also *id.*, at 308 (characterizing Tolan's behavior as "abruptly attempting to approach Sergeant Cotton," thereby "inflam[ing] an already tense situation"). The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Record 1121–1122. Tolan testified at

trial, however, that he was on his knees when Cotton shot him, *id.*, at 1928, a fact corroborated by his mother, *id.*, at 2081. Tolan also testified in his deposition that he "wasn't going anywhere," *id.*, at 2502, and emphasized that he did not "jump up," *id.*, at 2544.

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag v. MacDougall* 454 U. S. 364, 366 (1982) (O'Connor, J., concurring), we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. Cf. *Brosseau*, 543 U. S., at 197–198 (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard"); see also *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981) (*per curiam*) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's sovereign immunity jurisprudence).

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning

during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

* * *

The petition for certiorari and the NAACP Legal Defense and Educational Fund's motion to file an *amicus curiae* brief are granted. The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Summary Judgment Problem

Paul is a salesman. He claims that he reached a deal with New York Yachts, a New York company, to be its Texas representative and that it would pay him a 5% commission on all boats he sold in Texas. He brought suit in federal court against New York Yachts claiming that it owed him $100,000 in unpaid commissions. In support of his claim, Paul has produced a letter in which New York Yachts offered to pay him the 5% commission rate.

New York Yachts moves for summary judgment, attaching an affidavit from its sales manager that Paul never responded to the letter offer and that New York Yachts never knew or approved of Paul selling its yachts.

Assume that the applicable contract law requires proof of an offer and acceptance in order for there to be a binding contract. Also further that to hold New York Yachts liable under a quasi-contract theory there must be proof that it had knowledge that Paul was working on its behalf but failed to put a stop to it.

Has New York Yachts satisfied its burden of production for making a summary judgment motion under Celotex? If so, what is Paul's burden in response to New York Yachts's motion?