SUMMARY OF DISCOVERY RULE CHANGES – CIVIL RULES ADVISORY COMMITTEE
(Updated January 15, 2013)

The following charts detail the total package of changes being considered by the Advisory Committee on Civil Rules for presentation to the Judicial Conference Standing Committee and provide the Advisory Committee's rationale for each proposal. Table 1 contains the proposed changes that NELA believes present the greatest risk of harm to employment and civil rights plaintiffs. Table 2 enumerates the additional changes being considered by the Advisory Committee, some of which may be beneficial. At the end of the document are proposals that were abandoned by the Advisory Committee in the course of its discussions.

TABLE 1. PRIORITY PROPOSED RULES TO CHALLENGE

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 30: Oral Depositions	**(a) When a Deposition May Be Taken. * * *** **(2) *With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1~~2~~): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * **(d) Duration; Sanction; Motion to Terminate or Limit.** **(1) *Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].	* This rule reduces the number of presumptive depositions from 10 to 5. * The Advisory Committee may be willing to reduce the presumptive deposition length to 6 hours rather than 4 hours. * The Advisory Committee recognized that some cases legitimately need more than 5 depositions but reasoned that it is easier to "manage up" from narrow rules rather than "manage down" from broad rules. * The Advisory Committee asserted that limits on depositions had been studied by the Federal Judicial Center. Federal Judicial Center's materials, however, did not support the specific limitations made in the proposals and did not specifically identify depositions as a problem in discovery. * The Advisory Committee stated that further studies would be "carried forward" to further test the strong doubts that have been expressed about lowering deposition limits. They should be encouraged to do so. * The Advisory Committee stated that unreasonable discovery behavior may result from "ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives."[2]

[1] This column contains the redlined version of the proposed changes to the current Federal Rules of Civil Procedure.
[2] Standing Committee on Civil Rules Agenda Book, "Advisory Committee Report," 229 (January 2013), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

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RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 31: Written Depositions	**(a) When a Deposition May Be Taken.** * * * **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *	* This change reduces the presumptive number of written depositions from 10 to 5. * The Advisory Committee's analysis of this rule change mirrors the analysis of Rule 30 limitations on oral depositions.
Rule 33: Interrogatories	**(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.	* The Advisory Committee stated that there has been little controversy over a reduction of presumptive interrogatories. * The Advisory Committee is discussing the creation of a separate limit for multi-party cases. No sketch has been drafted on this suggestion. * Despite discussion of the problems attendant with counting parts and subparts, the Advisory Committee is nonetheless considering this reduction.
Rule 34(a): Requests for Production	**(a) In General.** A party may serve on any other party ~~a~~ no more than [25] request~~s~~ within the scope of Rule 26(b): * * * **(3)** Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).	* The Advisory Committee hoped that a limitation on discovery requests would reduce the number of superfluous requests, but there were many doubts expressed about the efficacy of a strict numerical limit. * Some Advisory Committee members were concerned that requests would become broader in order to circumvent the limits, which would make it more difficult to respond to requests, and thus, be counterproductive. * The Advisory Committee recognized that a numerical limit on discovery requests could encourage collateral fights over counting the number of requests. This would be similar to the discovery disputes that arise with distinguishing parts and subparts of interrogatories. * Some Advisory Committee members noted that concern about a Rule 34 limit may be overdrawn because, in their experience, parties were able to work within scheduling orders containing Rule 34 limits without difficulty. This ignores the fact that such court-imposed limits are based on the specific case, and not presumptive. * The Advisory Committee is also concerned about applicability of the rule, and in particular, whether the rule would cover electronically-stored information or tangible items in addition to documents.

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

TABLE 2. ADDITIONAL PROPOSALS UNDER CONSIDERATION

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 1: Cooperation	**Rule 1. Scope and Purpose.** * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding.	* No specific language about cooperation was added, but the Committee did add language indicating that both parties and the court have certain duties during litigation. * The Advisory Committee could not agree upon a broad definition of cooperation, particularly in light of the adversary principles. * The Advisory Committee abandoned attempts to make cooperation a mandatory duty so as not to encourage tactical motions regarding failure to cooperate and to avoid complicating the professional ethics rules. * A cooperation rule would have a broader reach than discovery and would aim to curb other "tactics in a war of attrition," such as excessive dispositive motion practice.[3] * The Advisory Committee concluded that a cooperation rule may only be aspirational.
Rule 4: Time Limit for Service	**(m) Time Limit for Service.** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *	* Shortens time for service from 120 to 60 days.

[3] *Id.* at 237.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 16(b)(1) & 16(b)(2): Scheduling Orders	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: **(A)** after receiving the parties' report under Rule 26(f); or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~. **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order: within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.	* Reduces the amount of time given to issue a scheduling order to 90 days from 120 after service of defendant or to 60 days from 90 days after defendant appears. * Adds permission to delay for good cause. * The Advisory Committee also discussed requiring that parties have a scheduling conference with the court in order to promote "effective management." The Advisory Committee has not yet added such a conference to the proposed rule. * The Advisory Committee dismissed concerns about Rule 16(b) changes raised by the U.S. Department of Justice (DOJ), stating that the proposed changes will be adequate in the vast majority of cases brought against the U.S. government.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 16(b)(3): Informal Conference Before Discovery Motions	**(3)** ***Contents of the Order.*** **(B)** *Permitted Contents*. The scheduling order may: **(iii)** provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; **(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence; **(v)** direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court; [present (v) and (vi) would be renumbered] * * *	* The Advisory Committee wants to encourage judges to take an active interest in managing discovery disputes by promoting informal pre-motion conferences. * The Advisory Committee cites to a survey, which found that 1/3 of local rules already require an informal conference between parties before filing a discovery motion. * The Advisory Committee had considered mandating a pre-motion conference but declined to pursue such a mandatory conference for fear of resistance among the judiciary.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 26(b): Proportionality and Scope of Discovery	**(b) Discovery Scope and Limits.** **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * * **(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~ **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * * **(iii)** the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.	* The change to Rule 26(b)(1) is meant to explicitly define proportionality in the rules. When deciding whether proportionality is adequate, the court would consider five factors: (1) Amount in controversy; (2) Importance of the issue at stake in the action; (3) The parties' resources; (4) Importance of discovery to resolve the issue; and (5) Expense versus benefit analysis. * This sketch follows many other discarded versions. It transfers the balancing factors of 26(b)(2)(C)(iii) into 26(b)(1)'s definition of the scope of discovery. * The Advisory Committee noted that a high percentage of all cases work well within the existing scope of discovery, but also noted that "grave problems persist" and the "geometric growth in potentially discoverable information generated by electronic storage adds still more imperative concerns."[4] * Substantial concern was expressed about the difficulty in defining proportionality in the rule text and about using costs as a limiting factor on discovery.

[4] *Id.* at 226.

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 26(c): Protective Orders and Cost Shifting	**(c) Protective Orders.** **(1)** ***In General.*** * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * * **(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *	* The purpose of this change is to explicitly permit courts to issue protective orders that shift discovery costs from one party to another.
Rule 26(d): Early Discovery, Discovery Before Parties' Conference	**(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except: **(A)** in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B); **(B)** that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or **(C)** when authorized by these rules, by stipulation, or by court order. **(2) Sequence.** Unless the parties stipulate, or, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery. * * *	* This change permits early discovery for Rule 34(a) requests following a 21-day waiting period after service on the defendant. * The time to respond to an early discovery request would still be set from the Rule 26(f) conference. * The Advisory Committee considered a broader rule that allowed for early discovery for all types of discovery but saw little gained by allowing other early discovery (*e.g.*, deposition lists). * The Advisory Committee expressed concerns that: (1) early requests would be too broad and may later need to be narrowed, and (2) because of the newly proposed 21-day waiting period, requests for additional time would be denied inappropriately.

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

RULE	PROPOSED CHANGES[1]	ADVISORY COMMITTEE RATIONALE
Rule 37: Failure to Produce (*See also* Rule 34(b)(2)(B) changes)	**(a) Motion for an Order Compelling Disclosure or Discovery.** * * * **(3)** ***Specific Motions.*** **(B)** *To Compel a Discovery Response.* [A party seeking discovery may move for an order compelling an answer if:] * * * **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.	* Reflecting the fact that electronically-stored information is typically produced rather than made available for inspection, the purpose of this rule change is to clarify that a party can be compelled to produce electronically-stored information. * The Advisory Committee clarified that this rule change was meant to allow for rolling production. It is unclear whether the Advisory Committee will write this clarification in a comment. * See also Rule 34(b)(2)(B) changes above.

DISCARDED CHANGES

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