

# HOW ATYPICAL CASES MAKE BAD RULES: A COMMENTARY ON THE RULEMAKING PROCESS

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## INTRODUCTION

Members of the Advisory Committee on the Rules of Civil Procedure have long worked to address complaints that discovery is too costly, and that cases take too long to resolve.<sup>1</sup> Four decades of rulemaking action have targeted these issues and have resulted in the amendment of the civil procedure rules, particularly the discovery rules, more often than any other body of procedural law.<sup>2</sup> Still, complaints continue to be mounted.<sup>3</sup> The Committee's recent proposed changes to the discovery rules are the latest attempt to address the perceived problem of cost and delay.<sup>4</sup> The proposals have been controversial. Over two thousand comments were submitted to the Committee, and some comments divided along the lines of plaintiffs' lawyers disfavoring the proposed rules and defense lawyers favoring them.<sup>5</sup> Given the considerable debate over the proposed amendments, the question becomes under what circumstances should advisory committees propose and adopt rule amendments.

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<sup>1</sup> JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1 (2010) [hereinafter REPORT TO CHIEF JUSTICE], available at <http://www.uscourts.gov/file/reporttothechiefjusticepdf/>.

<sup>2</sup> *Id.* ("the Civil Rules, particularly the discovery rules, have been amended more frequently than any others."); see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1103 (2012).

<sup>3</sup> See REPORT TO CHIEF JUSTICE, *supra* note 1.

<sup>4</sup> Memorandum from Hon. David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 4 (May 8, 2013), available at <http://www.uscourts.gov/file/14696/> [hereinafter May 2013 Advisory Committee Report].

<sup>5</sup> Tony Mauro, *Lawyers Spar over Discovery Rules: Litigation Costs at Center of Debate*, NAT'L L.J., Feb. 24, 2014, at 1; Rebecca L. Shult, *2,000+ Public Comments Submitted Responding to Proposed Changes to FRCP*, LEXOLOGY (Apr. 21, 2014), <http://www.lexology.com/library/detail.aspx?g=dd0982a2-7c5a-4001-8380-648939119c8a>.

Commentators have criticized the rulemaking process for decades. Legal scholarship in the area has focused primarily on challenging its constitutionality,<sup>6</sup> questioning whether different actors may make better rulemakers,<sup>7</sup> and arguing that some entities have too much power and others have too little.<sup>8</sup> Other commentators have focused on the tools that should be employed by rulemakers when evaluating proposals, focusing on the importance of empirical studies to support rule changes<sup>9</sup> and the role of bias in the formulation of certain rules.<sup>10</sup>

In this symposium article, we add to this scholarship by arguing that advisory committees should refrain from proposing and adopting rule amendments that are motivated by atypical cases. Such rules will also affect typical cases, creating bad law for typical cases because the rules were not formulated for such cases.

Part I discusses the committee rulemaking procedure, previous attempts to modify the scope of discovery with particular emphasis on the 2000 discovery amendments, and creation of the current proposals. Part II describes the thesis of a previous article on how atypical cases make bad law<sup>11</sup> and applies the framework to one of the current amendments, showing that atypical cases make bad rules. Part III offers our brief recommendations on how rulemakers can avoid atypical rule amendments.

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<sup>6</sup> See, e.g., Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006). But see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999) (defending court-based rulemaking as central to developing and maintaining rules that reflect principled deliberation).

<sup>7</sup> See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 293–96 (2009); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 754–59 (1993). But see Bone, *supra* note 6 (arguing for a “centralized, court-based, and committee-centered” system); Jack H. Friedenthal, *The Rule-making Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (arguing that the “legislative process seems particularly unsuited” to rulemaking).

<sup>8</sup> See, e.g., Friedenthal, *supra* note 7; Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976).

<sup>9</sup> See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998) [hereinafter Mullenix, *The Sequel*]; Reda, *supra* note 2; Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60 (2013).

<sup>10</sup> See, e.g., Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

<sup>11</sup> See Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law* (See, e.g., *The Lack of Judicial Restraint in Wal-Mart, Twombly, and Ricci*), 48 WAKE FOREST L. REV. 989 (2013).

## I. DISCOVERY RULEMAKING

A. *An Overview of the Committee Rulemaking Process*

The authority for the present committee rulemaking procedure stems from the Rules Enabling Act (“REA”) which authorizes the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases” in district and appellate level federal courts.<sup>12</sup> Congress delegated the bulk of the rulemaking process between three lower entities: The Judicial Conference of the United States (the “Conference”), the Standing Committee, and Advisory Committees.<sup>13</sup> The Conference is tasked with oversight of the rulemaking process and must “prescribe and publish the procedures for the consideration of proposed rules” under the REA.<sup>14</sup> To facilitate this task, the Conference may appoint advisory committees consisting of “members of the bench and the professional bar, and trial and appellate judges”<sup>15</sup> to recommend rules to be prescribed.<sup>16</sup> Additionally, the Conference must appoint a “standing committee on rules of practice, procedure, and evidence”<sup>17</sup> to oversee the coordination and suggestions of the various advisory committees.

The steps in the rulemaking process involve largely linear interactions between these three entities, the Supreme Court, and Congress in a hierarchical structure.<sup>18</sup> It is a time-consuming procedure requiring several years to complete.<sup>19</sup> It begins when a rule suggestion by a judge, lawyer, professor, or other individual or body is considered by the relevant advisory committee.<sup>20</sup> If the advisory committee is in favor of the change, it must draft and submit a proposed amendment, including an explanatory note and a written report explain-

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<sup>12</sup> 28 U.S.C. § 2072 (2012). See generally Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69 (2010) (providing an overview of the rulemaking process); *Procedures Governing the Rulemaking Process*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx> (revised Sept. 2011) (summarizing the rulemaking process).

<sup>13</sup> 28 U.S.C. § 2073.

<sup>14</sup> *Id.* § 2073(a)(1).

<sup>15</sup> *Id.* § 2073(a)(2).

<sup>16</sup> *Id.* There are currently five advisory committees, each focusing on a specific procedural area: appellate, bankruptcy, civil, criminal, and evidence rules. John D. Bates, *Overview for the Bench, Bar, and Public*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx> (last visited Apr. 2, 2015).

<sup>17</sup> 28 U.S.C. § 2073(b).

<sup>18</sup> *Id.* §§ 2073–2075.

<sup>19</sup> The time to complete the rulemaking process may vary based on the nature of the proposed rule, the advisory committee involved, and the strength and number of affected individuals and groups. Commentator estimates of the usual length of time required to complete the rulemaking process have ranged from two to five years. Bates, *supra* note 16 (“it usually takes two to three years for a suggestion to be enacted as a rule”); Rhee, *supra* note 9, at 145 (estimating the usual rulemaking process to take between three and five years).

<sup>20</sup> Bates, *supra* note 16.

ing its action, to the standing committee.<sup>21</sup> Upon approval, the proposed rule is published for a period of public comment, normally six months.<sup>22</sup> After the public comments are collected and considered, the advisory committee may re-submit the proposal for public comment if significant changes are made to the proposal, or submit a final form of the proposed rule to the Standing Committee for approval.<sup>23</sup> If the Standing Committee approves the proposed rule, the Conference considers it and may recommend it to the Supreme Court.<sup>24</sup> Upon Supreme Court approval, it must be sent to Congress by May 1 in order to take effect that year.<sup>25</sup> Upon Congress's approval or inaction, the rule is enacted in December.<sup>26</sup>

At each step of the process, higher level entities may reject, modify, or re-commit the proposal to a lower level entity for additional consideration.<sup>27</sup> In practice, these actions occur less frequently as proposals move to higher entities in the rulemaking hierarchy, with revisionary action most likely to occur as proposals move between the standing and advisory committees.<sup>28</sup> Also Congressional rejection or modification of a proposed rule has occurred only on rare occasions since the inception of the modern rulemaking procedure.<sup>29</sup>

Commentators have concluded that lower level advisory committees "often dictate the outcome of the [rulemaking] process"<sup>30</sup> and enjoy "near absolute discretion."<sup>31</sup> Because the advisory committee members are the most active and perhaps most influential in the rulemaking process, this paper focuses on the actions of the advisory committee.

#### B. *Early Attempts to Reform the Scope of Discovery*

Discovery reform efforts began in earnest at Chief Justice Burger's 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference").<sup>32</sup> Given the liberal understanding of the discovery rules at the time, the Advisory Committee was hesitant to dramatically narrow the scope of discovery despite considerable pressure from the

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<sup>21</sup> 28 U.S.C. § 2073(d).

<sup>22</sup> Bates, *supra* note 16.

<sup>23</sup> *Id.*

<sup>24</sup> 28 U.S.C. §§ 2072–2074.

<sup>25</sup> *Id.* § 2074(a).

<sup>26</sup> *Id.*

<sup>27</sup> Stancil, *supra* note 12, at 78.

<sup>28</sup> See *id.*; Walker, *supra* note 8, at 468 ("The Standing Committee has modified Advisory Committee action on only a handful of occasions, and the Judicial Conference itself has taken even less action." (footnote omitted)); see also Friedenthal, *supra* note 7, at 676 (criticizing the passive nature of the Supreme Court in rulemaking activity).

<sup>29</sup> See Stancil, *supra* note 12, at 78.

<sup>30</sup> *Id.*, at 72–73.

<sup>31</sup> Walker, *supra* note 8, at 463.

<sup>32</sup> Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 765–66 (2010); Stempel, *supra* note 10, at 543.

Chief Justice.<sup>33</sup> One of the most influential proposals to narrow Rule 26 in the wake of the Pound Conference was a 1977 report by the American Bar Association (“ABA”) Section on Litigation recommending the then-existing “relevant to the subject matter” discovery standard of Rule 26(b)(1) be narrowed to a “relevant to the claims and defenses of the parties” standard.<sup>34</sup> This proposal was supported by the American College of Trial Lawyers (“ACTL”).<sup>35</sup> The Advisory Committee initially adopted the recommendations of the ABA and published the proposal for public comment but ultimately withdrew the proposal in light of significant opposition.<sup>36</sup>

Over the next twenty years, amendments to the Federal Rules of Civil Procedure were adopted in 1983 and 1993 to reduce cost and delay, but the Advisory Committee continued to reject the ABA’s 1977 recommendation.<sup>37</sup> In 1996 the Advisory Committee again began to investigate whether the scope of discovery should be narrowed.<sup>38</sup> The Committee appointed a discovery subcommittee to determine, among other things, the cost of discovery generally and in the most expensive cases, and whether those costs were excessive enough to warrant changes.<sup>39</sup> The subcommittee solicited help from the Federal Judicial Center (“FJC”) and RAND Corporation to investigate the discovery process in federal litigation and held two conferences in 1997 to solicit judicial, practitioner, and academic opinion on the discovery process.<sup>40</sup>

In its initial report to the Advisory Committee that summarized the findings of one of the conferences, the subcommittee noted that discovery was working well in most cases.<sup>41</sup> In discussing potential “core” discovery rule amendments, the Advisory Committee noted:

The reality of discovery practice is not what might seem from talking with lawyers who pursue high-stakes and complex litigation in the major metropolitan centers. The reality is the small and medium case. In these cases, every study and much experience suggests that discovery is working well. And it seems like-

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<sup>33</sup> Stempel, *supra* note 10, at 543–44.

<sup>34</sup> *Id.*, at 544.

<sup>35</sup> *Id.* at 557–58.

<sup>36</sup> *Id.* at 544.

<sup>37</sup> Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 54 (2007); Stempel, *supra* note 10, at 544–49.

<sup>38</sup> Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 84 (2001).

<sup>39</sup> Minutes, Civil Rules Advisory Committee (Oct. 6–7, 1997), available at <http://www.uscourts.gov/file/17737/> [hereinafter Advisory Committee Minutes (October 1997)].

<sup>40</sup> Stempel, *supra* note 10, at 555.

<sup>41</sup> Advisory Committee Minutes (October 1997), *supra* note 39; Minutes, Civil Rules Advisory Committee (Nov. 12–13, 1997), available at <http://www.uscourts.gov/file/15145/> [hereinafter Advisory Committee Minutes (November 1998)] (“The FJC data proved very interesting. The data, in line with earlier studies, show that discovery is not used at all in a substantial fraction of federal civil actions, and that in more than 80% of federal civil actions discovery is not perceived to be a problem.”).

ly that there is nothing the formal rules can do about the cases that now present problems. The rules provide ample power to control discovery; what is needed is actual use of the power.<sup>42</sup>

In light of this information, the Committee expressed interest in exploring solutions to address problem cases without affecting the well-functioning typical cases.<sup>43</sup> Despite sentiment toward a narrow reform approach at this initial meeting, the Committee ultimately proposed a broad rule, which would affect all cases, adopting the 1977 scope amendment that the ABA had proposed, again also supported by the ACTL.<sup>44</sup> In describing the proposal, the Committee noted that the full range of discovery would be available in all cases upon court determination or party agreement, but the Committee was careful to explain that the proposal “makes it clear that there is a reduction in the scope of discovery available as a matter of right.”<sup>45</sup> Despite considerable criticism, the proposal was approved in 2000.<sup>46</sup>

Disapproval of the new rule continued after its adoption. Scholars noted that the rule was not supported by empirical evidence,<sup>47</sup> that it was designed by the legal elite, particularly corporate defense interests,<sup>48</sup> that the rule would generate greater uncertainty for practicing attorneys and judges,<sup>49</sup> and that the rule would result in a dramatic increase in purely procedural motion challenges and posturing,<sup>50</sup> or be completely ignored by the courts.<sup>51</sup> In the years since its passage, many have been dissatisfied with its effectiveness, including some who were initially supportive of the change. Critics have noted that judges and attorneys largely have ignored the rule, rendering it “toothless.”<sup>52</sup>

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<sup>42</sup> Advisory Committee Minutes (October 1997), *supra* note 39, at 8.

<sup>43</sup> *Id.* (“[T]here is no intention to affect discovery as it is practiced in most cases. All of the proposed limits on lawyer-managed discovery would permit discovery without judicial involvement at levels that include the vast majority of cases under actual present practice.”).

<sup>44</sup> Stempel, *supra* note 10, at 556–59; Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1440 (1999) (“[T]he proposed measure would apply to all lawsuits, even though the recent FJC and RAND studies indicate that overbroad discovery principally occurs in a rather small number of complicated cases.”).

<sup>45</sup> Advisory Committee Minutes (November 1998), *supra* note 41.

<sup>46</sup> Stempel, *supra* note 10, at 530–31.

<sup>47</sup> *See, e.g.*, Mullenix, *The Sequel*, *supra* note 9.

<sup>48</sup> *See, e.g.*, Stempel, *supra* note 10.

<sup>49</sup> *See, e.g.*, Tobias, *supra* note 44.

<sup>50</sup> *See, e.g.*, Thomas D. Rowe, Jr., *A Square Peg in A Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 14 (2001).

<sup>51</sup> *See, e.g.*, Noyes, *supra* note 37, at 61.

<sup>52</sup> *Id.* at 63; *see also* Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 126 (2005); John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 578 (2010) (describing a lack of clarity regarding the pre- and post-amendment discovery standards); Christopher C. Frost, *The Sound and the Fury or the Sound of Silence?*, 37 GA. L. REV. 1039, 1062 (2003) (describing an “ingrained mindset of liberal discovery” among the bar and bench).

C. *Proposed Change to Discovery Rule 26(b)(1)*

In light of continued criticism of discovery practice, calls to narrow the scope of discovery persisted.<sup>53</sup> An April 2008 study regarding discovery that surveyed members of the ACTL especially caught the attention of rulemakers. The ACTL and the Institute for the Advancement of the American Legal System (“IAALS”), which jointly conducted the study, concluded that “the system is not working; it takes too long and costs too much. . . . Discovery costs far too much and has become an end in itself.”<sup>54</sup> In response to these concerns, the Standing Committee asked the Advisory Committee to hold a conference on the issues of cost and delay in the federal system.<sup>55</sup> The Advisory Committee began the process of soliciting information about discovery costs from interested parties and requested a study from the FJC to focus on the costs of discovery generally and electronic discovery specifically under the rules.<sup>56</sup> The 2010 Conference on Civil Litigation (the “Duke Conference”) resulted from those planning efforts.

Impressionistic<sup>57</sup> survey data presented at the Duke Conference reflected the general sentiment that litigation was too costly and took too long. A National Employment Lawyers Association survey of member attorneys, an IAALS survey of corporate general counsel, a survey given to members of the ABA Section of Litigation, and the final version of the ACTL-IAALS survey all found that respondent attorneys believed that the discovery process was too costly, took too long, and was unfair.<sup>58</sup> A survey of Fortune 200 companies

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<sup>53</sup> Lee & Willging, *supra* note 32, at 767 (“After further rule amendments in 2000 and 2006, the complaints are louder than ever.”).

<sup>54</sup> AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008) [hereinafter ACTL & IAALS, INTERIM REPORT], available at <http://www.actl.com/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=3650>.

<sup>55</sup> John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 537 (2010).

<sup>56</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5 (2009) [hereinafter FJC REPORT], available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Reda, *supra* note 2 at 1091 n.17.

<sup>57</sup> Lee & Willging, *supra* note 32, at 775; Reda, *supra* note 2, at 1100 (“The bulk of what the Duke Conference labeled ‘empirical data’ consisted of opinion surveys that reflected the concerns and beliefs among legal professionals.” (footnote omitted)).

<sup>58</sup> REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT’L EMP’T LAWYERS ASS’N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009, at 11 (2010), available at <http://www.uscourts.gov/file/document/natl-employment-lawyers-assoc-survey-nela-members-2009> (“Nearly 65% of NELA respondents find that existing discovery mechanisms do not work well, and approximately two-thirds believe that discovery is abused in almost every case.”); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 17 (2010), available at <http://www.uscourts.gov/file/document/institute-advancement-amer-legal-system-civ>

conducted by the Lawyers for Civil Justice (“LCJ”) also found that outside legal fees and costs had increased from an average of \$66 million to \$140 million between 2000 and 2008 for the respondent companies.<sup>59</sup> Several reports since the Duke Conference further supported the general sentiment among attorneys that litigation and discovery in particular were too expensive.<sup>60</sup>

Although these surveys told a story, they did not tell the full story. The surveys were based on lawyers’ perceptions, not on real data, while the FJC based its study on actual cases. The FJC solicited information from more than two thousand attorneys of record about the litigation costs in federal civil cases that were terminated in the last quarter of 2008.<sup>61</sup> The FJC included cases that lasted more than four years and also every tried case to “insure the inclusion of cases likely to encounter the range of litigation issues.”<sup>62</sup> In cases in which one or more types of discovery were reported, the median litigation costs (including attorneys’ fees) were \$15,000 for plaintiffs and \$20,000 for defendants.<sup>63</sup> The reported costs for plaintiffs ranged between \$1,600 at the tenth percentile and \$280,000 at the ninety-fifth percentile; defendant costs ranged from \$5,000 to \$300,000 at the same percentiles.<sup>64</sup> Additionally, respondents were asked to report the ratio of discovery costs to the total costs of litigation for the closed cases. The median percentage was 20 percent for plaintiffs’ attorneys and 27 percent for defendants’ attorneys.<sup>65</sup> At the ninety-fifth percentile, the reported percentage of litigation costs incurred in discovery was 80 percent for plaintiff and defendant attorneys.<sup>66</sup> As noted by Emery Lee and Thomas Willging, authors of the FJC study:

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il-litigation-survey (“an astonishing 97% of respondents responded that the system is ‘too expensive,’ with 78% expressing strong agreement.”); AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 2–3 (2009), available at <http://www.uscourts.gov/file/document/american-bar-association-litigation-section-member-survey-2009> (“82% agree that discovery is too expensive, but within that group only 61% of plaintiffs’ lawyers think it so.”); AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), available at <http://www.actl.com/AM/Template.cfm?template=/CM/ContentDisplay.cfm&ContentID=4008>.

<sup>59</sup> LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), available at <http://www.uscourts.gov/file/document/lawyers-civil-justice-et-al-survey-litigation-costs-major-companies-2010>.

<sup>60</sup> See Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make A Big Difference in Civil Discovery*, 64 S.C. L. REV. 495 (2013).

<sup>61</sup> Lee & Willging, *supra* note 32, at 769–70. (stating that categories of cases that did not generally involve discovery were excluded from the study).

<sup>62</sup> REPORT TO CHIEF JUSTICE, *supra* note 1, at 3.

<sup>63</sup> FJC REPORT, *supra* note 56, at 2; Lee & Willging, *supra* note 32, at 770.

<sup>64</sup> FJC REPORT, *supra* note 56, at 2.

<sup>65</sup> Lee & Willging, *supra* note 32, at 779–80.

<sup>66</sup> FJC REPORT, *supra* note 56, at 38–39 tbls.6 & 7.

The empirical studies of discovery costs . . . indicate that in the typical case—and perhaps even in the typical major case, although that data is very limited—one should expect discovery costs to account for more than 20 percent, on the lower end, and maybe, on the higher end, about half of the total litigation costs. . . . 20 to 50 percent is what we would expect in a typical case.<sup>67</sup>

Survey respondents were also asked to define a normative ratio of discovery costs to total litigation costs.<sup>68</sup> Plaintiffs' attorneys' median response was 33 percent and defense attorneys' median response was 40 percent.<sup>69</sup> A comparison of the closed case ratios to these normative ratios showed that discovery costs were not excessive as the median cost ratio in the closed cases was less than the median normative ratio.<sup>70</sup> Attorney views on proportionality were also evaluated. Participants were asked to rate from one to seven how proportional the discovery in the case was to the client's stakes.<sup>71</sup> A rating of seven was designated as being too excessive, four was just right, and one was too little.<sup>72</sup> More than half of both plaintiff and defendant attorneys gave values of four.<sup>73</sup> Approximately 27 percent of attorneys gave values of five, six, or seven, 15 percent of attorneys surveyed responded with values of six or seven, and only approximately 6 percent responded with seven.<sup>74</sup> Thus, attorneys viewed discovery as highly disproportionate in only about 6–15 percent of cases.<sup>75</sup>

In its letter to the Chief Justice following the conference, the Advisory Committee agreed that “the cases raising concerns are a relatively small percentage of those filed in the federal courts.”<sup>76</sup> However, the Committee drew attention to the costs of the top 5 percent of cases and noted that the cases falling into this top percentile “tend to be the ones that are more complicated and difficult, in which the stakes for the parties, financial or otherwise, are large.”<sup>77</sup> It emphasized that “[i]t would be a mistake to equate the relatively small percentage of such cases with a lack of importance.”<sup>78</sup>

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<sup>67</sup> Lee & Willging, *supra* note 32, at 781.

<sup>68</sup> FJC REPORT, *supra* note 56, at 40.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; Reda, *supra* note 2, at 1106. These values were consistent with three decades of previously conducted empirical research. See Lee & Willging, *supra* note 32, at 780 (describing 1960s Columbia project study, 1970s Civil Litigation Research Project, and 1990s RAND Corporation study showing discovery expense ratios between 20 and 50 percent).

<sup>71</sup> FJC REPORT, *supra* note 56, at 28 fig.14.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (58.8 percent and 56.8 percent respectively).

<sup>74</sup> *Id.*; see also Alexander Dimitrief et al., *Update on the Federal Rules Advisory Committee*, 7 J.L. ECON. & POL'Y 211, 217 (2010).

<sup>75</sup> FJC REPORT, *supra* note 56, at 28 fig.14.

<sup>76</sup> REPORT TO CHIEF JUSTICE, *supra* note 1, at 3.

<sup>77</sup> *Id.* (“In the top 5% of this sample, however, the reported costs were much higher [than the median values]. The most expensive cases were those in which both the plaintiff and the defendant requested discovery of electronic information; the 95th percentile was \$850,000 for plaintiffs and \$991,900 for defendants.”).

<sup>78</sup> *Id.*

In the wake of the Duke Conference, subcommittees were formed. One subcommittee was formed under the direction of Judge Koeltl to “carry through the impetus for further work developed at the Duke Conference.”<sup>79</sup> Three main goals that derived from the Duke Conference became the focus of the subcommittee: “[p]roportionality in discovery, cooperation among lawyers, and early and active judicial case management.”<sup>80</sup> Over the next three years, the subcommittee began the process of crafting rules to meet these goals. It solicited additional studies from the FJC and held a mini-conference in October 2012 to obtain additional comments from select members of the legal community.<sup>81</sup> The standing committee ultimately made a number of rule amendments available for public comment.

This article focuses on the main “proportionality” amendment, which is the proposed change to rule 26(b)(1). The Rule currently reads:

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—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).<sup>82</sup>

Several changes are proposed. The major change is the movement of a version of the proportionality requirement of Rule 26(b)(2)(C)(iii) to 26(b)(1). The new 26(b)(1) would read:

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 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.<sup>83</sup>

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<sup>79</sup> Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 13 (Dec. 6, 2010), available at <http://www.uscourts.gov/file/14733/>.

<sup>80</sup> May 2013 Advisory Committee Report, *supra* note 4.

<sup>81</sup> Agenda, Civil Rules Advisory Committee 77 (Apr. 11–12, 2013) [hereinafter Advisory Committee Agenda (April 2013)], available at <http://www.uscourts.gov/file/15484/>.

<sup>82</sup> FED. R. CIV. P. 26(b)(1).

<sup>83</sup> Agenda, Committee on Rules of Practice and Procedure 80 (May 29–30, 2014) [hereinafter Standing Committee Agenda (May 2014)], available at <http://www.uscourts.gov/file/15343/>. This version is different from the previous version of

## II. ATYPICAL CASES MAKE BAD RULES

A. *The Atypical Framework*

“Atypical” or “oddball” fact patterns have arisen in some recent high-profile and controversial Supreme Court cases.<sup>84</sup> In a previous article, one of us identified such cases and four characteristics common to atypical cases: (1) atypical facts, (2) a change in the law, (3) the atypical facts motivate the change in the law, and (4) the legal change affects typical cases.<sup>85</sup> The article argued that when cases meet these characteristics, judges should exercise judicial restraint and avoid making legal change for a variety of reasons.<sup>86</sup> This framework can be applied outside of the context of Supreme Court jurisprudence to the proposed rule changes. Here, we apply this framework to the change to Rule 26(b)(1) to determine whether restraint should have been exercised.

B. *Change in the Rules*

The rulemakers contend that no real change to the rules will occur by moving a version of Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). They stated “[t]he proportionality factors to be added to Rule 26(b)(1) are not new.”<sup>87</sup> However, if in effect the proposed rule involved no significant change, it is unlikely that there would be significant objections. Instead, as already stated, many in the plaintiffs’ and defendants’ bars are divided. Moreover, though difficult to articulate, the proposed rule significantly changes the rules. Currently under Rule 26(b)(2)(C)(iii), upon motion or on its own, a court can determine whether “the burden or expense of the proposed discovery outweighs its likely benefit” using a number of factors including the needs of the case. This rule comes into play when a party comes to the court requesting relief from searching or production. The court then focuses on the burden/expense/benefit of discovery in its decision whether to order such relief. The proposed rule changes the focus to the determination of the needs of the case from the burden/expense/benefit of discovery, although the significance of this change is unclear. Under the proposed rule, the most important change is that a party would be affirmatively encour-

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the proposed rule that was subject to public commentary. Changes were made as a result of public comments and committee review. *See id.*

<sup>84</sup> *See* Thomas, *supra* note 11 (discussing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), among other cases).

<sup>85</sup> *See id.*; Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2011); *see also* Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. 405 (2013) (using Thomas framework in arbitration).

<sup>86</sup> Thomas, *supra* note 11, at 1017–24.

<sup>87</sup> Standing Committee Agenda (May 2014), *supra* note 83, at 67; *see* Tera E. Brostoff & Jeffrey D. Koelemay, *E-Discovery Rule Gets Late-Night Rewrite, Advisory Committee Approves Rule Package*, 82 U.S.L.W. 1549 (Apr. 15, 2014) (at meeting in Portland adopting proposed rules, Judge Koeltl explained history of proportionality in rules).

aged to determine what it thinks is proportional to the needs of the case and then not disclose or search for documents that go beyond that determination. The party who has requested the search or production must seek an order from the court. In this discovery process, parties are likely to disagree on what is proportional to the needs of the case.

*C. Atypical Cases Motivate the Change to Rule 26(b)(1)*

With median litigation costs of only \$15,000 and \$20,000 for plaintiffs and defendants, discovery costs for plaintiffs and defendants as only 20 percent and 27 percent of the total litigation costs, and the widespread belief that costs were proportional to the stakes in the closed case study, the empirical evidence collected by the FJC indicates that the typical case is not in need of reform.<sup>88</sup> That study's authors had suggested a cautious reform approach (in 2010), noting the best course of action may be to avoid "sweeping, radical reforms of pretrial discovery rules" and instead to "pursue more-focused reforms" of particular federal rules.<sup>89</sup>

From its initial report on the Duke Conference to the present day, the Advisory Committee has repeatedly acknowledged that typical cases work well under the current rules. In its report in 2010 to the Chief Justice on the Duke Conference, the Committee described the results of the FJC study:

The results closely parallel the findings of the 1997 closed-case survey the FJC did for the Advisory Committee . . . . Both FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts . . . .<sup>90</sup>

In describing the typical case, the Committee noted that "[e]mpirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases."<sup>91</sup> The Advisory Committee report in April 2013 also acknowledges that discovery is working fine for most cases.

In most cases discovery now, as it was then [at the time of the 1983 Rule 26 amendments], is accomplished in reasonable proportion to the realistic needs of the case. This conclusion has been established by repeated empirical studies, including the large-scale closed-case study done by the Federal Judicial Center for the Duke Conference.<sup>92</sup>

<sup>88</sup> See *supra* notes 61–75 and accompanying text.

<sup>89</sup> Lee & Willging, *supra* note 32, at 787.

<sup>90</sup> REPORT TO CHIEF JUSTICE, *supra* note 1, at 3.

<sup>91</sup> *Id.* at 7.

<sup>92</sup> Advisory Committee Agenda (April 2013), *supra* note 81, at 83. This language was deleted prior to official publication of the proposed rules. The committee explained its deletion: Is there any need for this defense, which seems directed more at anticipated academic reactions than anything else? "The more you say, the more you invite." These sentences were described as

Similar to the Advisory Committee that proposed the 2000 discovery amendments, the current Advisory Committee has recommended a broad change despite the recognition that discovery works in typical cases. Emphasizing the importance of atypical cases, it stated that “discovery runs out of proportion in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate particularly contentious adversary behavior.”<sup>93</sup> Justifications for the proposed rules rely heavily on attorney belief derived from the conference generally and impressionistic studies that costs are too high in some cases despite attorney belief derived from the FJC study that costs in typical cases are proportional. The 2010 Report to the Standing Committee stated:

Had there been any doubt about perceptions of cost and delay, the 2010 Conference participants and papers dispelled it. To be sure, the Federal Judicial Center closed-case study showed that most lawyers, in most cases, believe that the cost of civil litigation in the federal courts is fairly proportioned to their cases. But particularly for cases involving high stakes, multiple parties, and overzealous advocates, there is widespread agreement that litigation is too often too costly.<sup>94</sup>

Moreover, the final May 2014 Advisory Committee Report to the Standing Committee similarly stated:

A principal conclusion of the Duke conference was that discovery in civil litigation would more often achieve the goal of Rule 1—the just, speedy, and inexpensive determination of every action—through an increased emphasis on proportionality. This conclusion was expressed often by speakers and panels at the conference and was supported by a number of surveys done in preparation for the conference. . . .

Although the FJC study found that a majority of lawyers thought that the discovery in a specific case they handled generated the “right amount” of information, and more than half reported that the costs of discovery were the “right amount” in proportion to their client’s stakes in the closed cases, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients’ stakes in the case. . . .

Other surveys prepared for the Duke conference showed even greater dissatisfaction with the costs and extent of civil discovery.<sup>95</sup>

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an editorial, or as vigorous advocacy, more than something appropriate for the Note. The Subcommittee agreed to delete them.

*Id.* at 112.

<sup>93</sup> *Id.* at 83.

<sup>94</sup> Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 7 (May 17, 2010), available at <http://www.uscourts.gov/file/14694/>; see also Grimm & Yellin, *supra* note 60; Koeltl, *supra* note 55. The Grimm & Yellin paper draws extensively on the impressionistic surveys presented at the conference. Neither the 2008 FJC report, nor any of the previously conducted empirical data refuting the high cost myth are mentioned in the paper. Grimm & Yellin, *supra* note 60.

<sup>95</sup> Standing Committee Agenda (May 2014), *supra* note 83, at 65–66.

In the past, some have pointed out the possible influence on rulemaking from those representing corporations in complex cases. After the 2000 Amendment of Rule 26(b)(1), Professor Stempel discussed particular influences. He stated: “the empirical data available to the Rulemakers neither suggests nor supports Proposed Amended Rule 26(b)(1). The Advisory Committee appears to have determined to fight an unnecessary battle largely because of the political preferences of the leadership of the American College of Trial Lawyers and the ABA Litigation Section.”<sup>96</sup> Professor Stempel’s analysis of the Committee makeup indicated that the Committee consisted primarily of members with certain characteristics, including complex litigation experience.<sup>97</sup> He concluded that “the Advisory Committee vote on scope of discovery, despite a debate of considerable sophistication, in the end resembled Capitol Hill as much as a judicial deliberation.”<sup>98</sup>

In the case of the proposed Rule 26(b)(1) amendments, similar influence can be seen from the earliest stages of the reform process. Consider the previously discussed 2008 ACTL-IAALS survey cited by the Committee, Judge Koeltl, and Judge Grimm as one of the motivators for the current rule reform.<sup>99</sup> Membership in ACTL is “extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy.”<sup>100</sup> Lawyers must have a minimum fifteen years’ experience to be eligible to join the college, and membership cannot exceed one percent of the total lawyer population in a state or province.<sup>101</sup> The survey respondents from ACTL had practiced law for an average of thirty-eight years, approximately three-fourths of the respondents primarily represented defendants,<sup>102</sup> and “[a]bout 40 percent of the respondents litigate[d] complex commercial disputes.”<sup>103</sup>

Additionally, when evaluating proposed rules, committee members likely draw on their own experience with the litigation system. Confirmation bias—increased receptiveness to evidence that confirms what one already believes— affects every player in the rulemaking process and may, in part, explain why so

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<sup>96</sup> Stempel, *supra* note 10, at 580–81; *see also* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach* 15 NEV. L.J. 1559, 1588 (2015) (“In explaining the change in the Committee’s position, Judge Niemeyer invoked persistent pressure for litigation retrenchment from elite elements of the bar and a report from President Bush’s Council on Competitiveness issued back in 1991.”).

<sup>97</sup> Stempel, *supra* note 10, at 614–23; *cf.* *A Self-Study of Federal Judicial Rulemaking: A Report From the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 696 (1995); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1666 (1995).

<sup>98</sup> Stempel, *supra* note 10, at 618.

<sup>99</sup> Koeltl, *supra* note 55. As previously noted, the ACTL has lobbied the Committee to narrow the scope of discovery for many years. *See* Stempel, *supra* note 10, at 557.

<sup>100</sup> ACTL & IAALS, INTERIM REPORT, *supra* note 54.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2.

<sup>103</sup> *Id.*

many rulemakers and attorneys believe that litigation costs are out of control despite empirical evidence to the contrary.<sup>104</sup> The current Advisory Committee includes many individuals who, similar to the members of ACTL, have complex litigation experience. All four practitioners (Elizabeth Cabraser, Peter Keisler, Parker Folse III, and John Barkett), as well as the academic (Dean Klonoff), list extensive complex litigation experience on their respective profile pages.<sup>105</sup> Moreover, many of the federal judges have similar past experiences.<sup>106</sup> For many on the Committee, the “typical” litigation experience appears to be the atypical case. Additionally, research shows the limited ability of humans to consider all the facts, circumstances, and implications of a problem. Instead, they inordinately focus on what is before them.<sup>107</sup> So, the rulemakers may be able to see only the problem presented to them—that is, high costs and delays in discovery, thus motivating the rule change.

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<sup>104</sup> Reda, *supra* note 2, at 1119.

<sup>105</sup> *John M. Barkett*, SHOOK, HARDY & BACON L.L.P., <http://www.shb.com/professionals/b/barkett-john> (last visited June 22, 2015) (“Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark and antitrust), environmental litigator (Comprehensive Environmental Response, Compensation and Liability Act, Resource Conservation and Recovery Act and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental, commercial, or reinsurance contexts.”); *Elizabeth J. Cabraser*, LIEFF CABRASER HEIMANN & BERNSTEIN, <http://www.lieffcabraser.com/Attorneys/Elizabeth-J-Cabraser.shtml> (last visited June 22, 2015) (“Possessing unparalleled expertise in complex civil litigation, Elizabeth has served as court-appointed lead, co-lead, or class counsel in scores of federal multi-district and state coordinated proceedings.”); *Parker C. Folse*, SUSMAN GODFREY L.L.P., <http://www.susmangodfrey.com/Attorneys/Parker-C-Folse/> (last visited June 22, 2015) (“He represents both plaintiffs and defendants in a wide variety of complex commercial litigation matters, including contract disputes, antitrust litigation, patent infringement cases, and audit malpractice suits. Mr. Folse has been a fellow of the American College of Trial Lawyers since 2012 and has extensive experience in difficult, complex commercial cases.”); *Peter D. Keisler*, SIDLEY AUSTIN LLP, <http://www.sidley.com/en/people/peter-keisler>, (last visited June 22, 2015) (“[Keisler] has successfully represented some of the country’s largest companies in the telecommunications, transportation, energy and healthcare industries, as well as a host of national trade associations . . . . His practice representing clients before the United States Supreme Court, federal courts of appeals and federal district courts has included the leading role in the nation’s most important energy lawsuits of the past several years . . . .”); *Law Faculty: Robert Klonoff*, LEWIS & CLARK L. SCH., <http://law.lclark.edu/live/profiles/310-robert-klonoff/> (last visited June 22, 2015) (“[Professor Klonoff’s] areas of expertise include class action litigation, civil procedure, and appellate litigation. . . . At Jones Day, Professor Klonoff handled complex litigation at both the trial and appellate levels and also held the administrative post of chair of the pro bono program for all of the firm’s 20+ offices.”).

<sup>106</sup> Duke Subcommittee chair John Koeltl worked at Debevoise & Plimpton for nearly twenty years. *Biography for Hon. John G. Koeltl*, AM. B. ASS’N, [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/koeltl\\_john.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/koeltl_john.authcheckdam.pdf) (last visited June 22, 2015). Duke Subcommittee member Paul Grimm was a lawyer with Jordan Coyne Savits & Lopata and Niles, Barton & Wilmer for several years. 138 CONG. REC. S7334 (daily ed. Dec. 3, 2012) (statement of Sen. Chuck Grassley).

<sup>107</sup> See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2012).

*D. The Change in the Rule Will Affect Typical Cases*

So, we have showed a change in the rules and that the change in the rules is motivated by atypical cases. The final characteristic of the atypical framework is that the proposed rules will affect typical cases. Although only atypical cases motivate the proposed proportionality amendments, the amendments also apply to typical cases. The result may be an increase in cost and delay in typical, already proportional cases. Under the new rule, a party can choose not to search or produce documents that they deem not “proportional to the needs of the case.”<sup>108</sup> If the party does not search and/or produce such documents, the requesting party may move to compel the documents, which will result in more costs to the parties in motion practice as well as costs to the court in managing discovery, in addition to more delay.<sup>109</sup> Also, plaintiffs in certain typical cases—for example, employment discrimination cases—may be affected more than others. If discovery is not searched and/or produced in such cases in which summary judgment motions often are made, plaintiffs may have even more difficulty defeating summary judgment motions with less discovery. Consequently, certain laws like the employment discrimination laws may enjoy less enforcement.

*E. The Cost of Proposed Rule 26(b)(1)*

Under the atypical framework, change should not be made when atypical cases motivate legal change that affects typical cases because of the cost of such change. One cost of atypical rule amendments is a loss of legitimacy for rulemakers and the rulemaking process.<sup>110</sup> Rulemakers can lose legitimacy when they appear to reject empirical evidence or appear to follow the wishes of special interest groups.<sup>111</sup> At the same time, certain classes of litigants may be placed at a disadvantage under the new rules, creating perceived unfairness in the litigation system.<sup>112</sup>

A second cost of atypical rule amendments also arises from the application of the amendment to typical cases.<sup>113</sup> Judges may have difficulty understanding how to apply the new rule to typical cases given these cases do not drive the rule amendment.<sup>114</sup> This in turn leads to disjointed case law and inconsistent precedent, increasing costs throughout the judicial system.<sup>115</sup>

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<sup>108</sup> Standing Committee Agenda (May 2014), *supra* note 83.

<sup>109</sup> *See, e.g.*, National Employment Lawyers Association, Comments on Proposed Changes to the Federal Rules of Civil Procedure Under Consideration by the Advisory Committee on Civil Rules (Mar. 1, 2013) (on file with authors).

<sup>110</sup> *See* Thomas, *supra* note 11, at 1020.

<sup>111</sup> *See, e.g.*, *supra* text accompanying notes 47–48.

<sup>112</sup> Tobias, *supra* note 44.

<sup>113</sup> *See* Thomas, *supra* note 11, at 1021.

<sup>114</sup> *Id.*

<sup>115</sup> *See, e.g.*, Tobias, *supra* note 44.

Learning costs for legal professionals occur with any rule change but when atypical cases motivate reform, lawyers and judges with more typical experience may face higher learning costs for the new rules.<sup>116</sup> In this respect, atypical rule amendments create high public transition costs as many legal professionals have typical experience and will lack familiarity with the reasons behind the new rules.<sup>117</sup>

Interparty costs are also possible here.<sup>118</sup> As already mentioned, the rule very well will motivate withholding or not searching in situations where such behavior did not occur previously.<sup>119</sup>

A final cost is that once atypical rule amendments are passed, they are unlikely to be revised.<sup>120</sup> Certain features of the rulemaking process create this inertia. First, numerous commentators have argued that rule changes should be made only reluctantly, when there is a substantial need for the change.<sup>121</sup> The Advisory Committee has pursued this approach, which is characterized by constantly monitoring the rules for areas in need of revision but only reluctantly making changes.<sup>122</sup> Even if an advisory committee is willing to reconsider a recently adopted rule amendment, the slow pace of the rulemaking system means several years may pass before any amendment is revised through the committee process.<sup>123</sup>

### III. FUTURE RULEMAKING

To prevent atypical rule changes in the future, changes are necessary in a few areas including committee membership and the rules' focus. First, the current Advisory Committee is largely dominated by individuals with complex litigation experience.<sup>124</sup> Extending Committee membership to include lawyers with smaller practices and different practice areas will help shift the perspective of the Committee away from the smaller subset of issues unique to complex cases and will provide the Committee more perspectives of the litigation system.<sup>125</sup> Perhaps Congress and not the Chief Justice should control who sits on the Advisory Committee. Second, the rulemakers should avoid one-size-fits-all rule amendments that will affect typical cases when the problem that they seek

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<sup>116</sup> See Thomas, *supra* note 11, at 1021.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* at 1022.

<sup>119</sup> See *id.*

<sup>120</sup> See *supra* note 28 and accompanying text.

<sup>121</sup> See, e.g., John P. Frank, *the Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1885 (1989) (“The fundamental precept of rulemaking always ought be that no rule shall be altered unless there is substantial need for the change.”); McCabe, *supra* note 97, at 1679.

<sup>122</sup> McCabe, *supra* note 97, at 1679.

<sup>123</sup> See *supra* note 19 and accompanying text.

<sup>124</sup> See *supra* Part II.C.

<sup>125</sup> Coleman, *supra* note 7, at 295.

to address does not lie with typical cases. Since its inception, the Advisory Committee has assumed that the REA's reference to "general rules" requires transsubstantive rulemaking.<sup>126</sup> Professor Stephen Subrin has championed avoiding such transsubstantive rulemaking to address issues unique to limited sets of cases.<sup>127</sup> While transsubstantive rulemaking has a number of important advantages,<sup>128</sup> Professor Subrin and others have noted that it is sometimes a poor fit for large and complex cases, resulting in unnecessary cost, delay, and complexity in the legal system.<sup>129</sup> To ensure that the same rules are applied to all cases, rulemakers are forced to draft general rules in response to problems in specific, usually complex cases.<sup>130</sup> Consistent with these ideas that transsubstantive rulemaking should be on its last legs, in his testimony before the Advisory Committee against proposed discovery changes, Professor Arthur Miller emphasized that the rulemakers should consider special rules for the problematic, complex cases.<sup>131</sup>

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<sup>126</sup> See Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 543 ("transsubstantivity has remained a foundational assumption for all subsequent advisory committees.").

<sup>127</sup> Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010) [hereinafter Subrin, *Limitations*]. In the *Limitations* article, Professor Subrin defines transsubstantivity as "the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or 'case-type' transsubstantivity; and (2) regardless of the size of the litigation or the stakes involved, or 'case-size' transsubstantivity." *Id.*, at 378; see Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 41 (1994); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2038–43 (1989). Other scholars have also championed this cause. See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333 (2008); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713 n.140 (1988); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

<sup>128</sup> See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989); Subrin, *Limitations*, *supra* note 127, at 387.

<sup>129</sup> Subrin, *Limitations*, *supra* note 127, at 388–91.

<sup>130</sup> Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 711 (2002) ("The misguided approach to procedural reform that treats all litigation as if it were complex litigation can at least be explained, if not justified, by the quest for uniform and transsubstantive regulation that has preoccupied modern American procedural policy."); Subrin, *Limitations*, *supra* note 127, at 388–91. These rules are often drafted to give a great deal of discretion to judges and lawyers to accommodate the large range of potential cases that they may trigger. *Id.* Discretion creates greater precedential uncertainty as different judges are empowered by the rules to treat similar cases differently, increasing the monetary and justice costs of the litigation system as a whole. *Id.*

<sup>131</sup> Transcript of Testimony of Arthur Miller Before Advisory Committee (Jan. 9, 2014), 36–45, available at <http://www.uscourts.gov/file/9446/>.

## CONCLUSION

This article suggests that rulemakers should avoid rule amendments that are motivated by atypical cases and will affect typical cases. When atypical rule amendments are passed, high systemic costs arise. The proposed proportionality amendment provides a useful example of how atypical cases can motivate reform efforts and how atypical rule amendments may negatively affect typical cases. Future changes such as broadening committee membership and a willingness to adopt non-transsubstantive rules can eliminate the problem of such atypical rules.

