proportionality of its requests and does not authorize any boilerplate objections to discovery based on proportionality.[2] The modified proposal also recognizes that parties seeking nonmonetary remedies should be able to obtain full and adequate discovery.[3]

Sanctions. Originally, it was feared that Rule 37(e) would be watered down and applied to all evidence. But the committee, with the input of trial lawyers, refused to do this. The new rule will apply only to electronically stored information (ESI). Courts will retain the authority to impose sanctions against the party who has negligently destroyed evidence sufficient to remedy the prejudice to the party who needed the discovery.

However, these sanctions must be less severe than a default judgment against the party at fault or a jury instruction that the spoliated evidence was unfavorable to the party who destroyed it. These sanctions can include preclusion of the spoliating party's evidence and introduction of evidence regarding the party's failure

ROCKING THE RULES DOCKET

When proposed changes to the Federal Rules of Civil Procedure threatened to restrict the ability to conduct meaningful discovery, it took a true team effort—including AAJ members, staff, and other interested parties—to intervene.

By || **SUSAN STEINMAN**

MY FORAY INTO WORKING on proposed changes to the federal rules of discovery took the theme of "it takes a village" to a whole new level. After the Advisory Committee on Civil Rules issued an informal rulemaking, several questions needed to be answered before the formal rulemaking started. First, trial lawyers had to consider the proposed changes carefully. What impact would these changes have on their practices? How do trial lawyers' concerns vary by practice area? Second, who else should review the proposals? The changes could affect many nonprofit organizations: How could they get involved? What would law professors and the government think of the changes? Third, the defense bar and their corporate partners could push for even more aggressive amendments that would be detrimental to plaintiffs' interests. Could a strategic plan for engagement be developed to blunt these forces?

The formal comment period ran from Aug. 15, 2013, to Feb. 18, 2014. It included public hearings in Washington, D.C., Phoenix, and Dallas. When the docket closed, a staggering 2,356 comments had been filed, with a large majority of them by people opposing the rule amendments. How did we get there? It took planning, repeated requests for comments, and breaking down large tasks into smaller ones.

During the informal comment period, we started speaking to AAJ members about the upcoming rulemaking. We encouraged some to file comments early, particularly those with specialized federal practices. For those attorneys who told us they practiced in state court only, we told them that most states would follow suit and adopt the changes. That seemed to resonate and get members' attention.

At AAJ's 2013 Annual Convention in San Francisco, we asked sections and litigation group chairs to help write practice-area-specific comments. We asked some to file early and others to file late to ensure a steady stream of comments on the docket.

Once we knew hearing locations, we worked with state trial lawyer associations located in and near those states to recruit people to testify. Because the slots to testify were available on a first-come, first-served basis, early recruitment helped guarantee that the hearings would not be completely one-sided; corporate and defense counsel representing numerous industries signed up early, too.

The last hearing was held the day before AAJ's 2014 Winter Convention in New Orleans. Only one week remained in the comment period. A few members even testified in Dallas and then flew straight to New Orleans. When we arrived at the convention, about 800 written comments had been filed. By the time we left the convention, another 400 had been added—in part because of AAJ's efforts at the convention. AAJ's Public Affairs team updated members at section and litigation group meetings, encouraging those who had not yet weighed in on the proposed amendments to do so before the deadline. In many of these meetings, the chairs had already submitted comments and encouraged other members to participate, many of whom got involved right away. Many Board of Governors members had already participated, but at the board's meeting, some committed to filing comments before the looming deadline, and others enthusiastically volunteered additional help from their states. In the few days that followed, I was amazed by our members.

Vicki Slater—the chair of the Council of Presidents at the time—contacted every state trial lawyer association president who had not filed comments and encouraged them to do so. The Massachusetts Academy of Trial Lawyers, led by Thomas Bond, Lauren Barnes, Jonathan Feigenbaum, and Michael Conley, spearheaded an effort to get 100 trial lawyers from that state to file during the last few days of the comment period.

Originally, the docket was set to close on Saturday, Feb. 15, 2014, but the deadline was extended until after the President's Day holiday weekend because the website needed routine maintenance. Before the website was taken offline, the last comments submitted were by AAJ members Michael Leizerman and Robert Collins on behalf of AAJ's Trucking Litigation Group.

to preserve the evidence. Only when the party has intentionally destroyed evidence will a court be justified in imposing a severe sanction.

We pointed out that if parties know prior to litigation that the negligent spoliation of ESI can never result in any sanctions, the system will break down. The hope is that the sanctions that still exist under the new rule will remain a bulwark against parties losing electronically stored evidence through mistake or negligence. District courts still have more robust sanctions available for spoliation of evidence that is not ESI.

Discovery costs. Another important concession for plaintiffs in the battle to prevent more draconian amendments involved the cost of complying with discovery requests. The defense bar and industry lawyers wanted to impose cost shifting in discovery and vigorously lobbied the committee to do so. However, in the end, the committee clarified that the responding party will continue to presumptively bear the production cost of complying with discovery requests,

These comments were the first ones visible during the website freeze, which I'm sure did not please proponents of the rules changes.

The evening that the docket was set to close, we were a few letters short of 2,000. I went on the list servers to challenge members to file a few more, and it worked.

We accomplished this feat by asking members and others to participate at whatever level felt right to them. No contribution was too small. Some members filed a simple, short comment on one issue. Others recruited attorneys to file comments or traveled to testify at the hearings. Some members continue to help by speaking on this topic at AAJ education programs.

Others are working on "best practices" protocols; these members all testified at one of the hearings and then attended a conference sponsored by the Center for Judicial Studies at Duke University School of Law (Duke Conference) where the education panels were stacked with speakers who favored defense interests. The Duke Conference is developing best practices and guidelines for implementing Rule 26(b) on proportionality. It remains uncertain whether the actual guidelines will be fair and balanced, but these members are working to ensure that the guidelines do not interfere with parties' rights to obtain discovery.

It Takes a Village

AAJ is well represented at the Advisory Committee on Civil Rules meetings by Valerie Nannery, senior litigation counsel at the Center for Constitutional Litigation in Washington, D.C. Valerie helps AAJ track and monitor all rules changes that affect our members. She is our eyes, ears, and voice at committee meetings. And while AAJ engaged its members, Valerie sought input from law professors and the academic community, who also voiced concern about aspects of the rules.

The Alliance for Justice (AFJ) helped us get other allied organizations, such as Earthjustice and the Mexican American Legal Defense and Educational Fund, as well as members of the academic community, involved. Most nonprofits are stretched thin in terms of tasks and resources. To ask them to do one more thing means that the request must be both compelling and easy to accomplish. AFJ made it easy to participate by encouraging group letters and focusing on only one or two issues within the proposed changes. Fortunately, most groups fundamentally understood how corporate defendants hide documents and how those documents can make or break a plaintiff's case.

WHEN THE FORMAL COMMENT PERIOD CLOSED, A STAGGERING 2,356 COMMENTS HAD BEEN FILED.

Don't Let the Perfect Be the Enemy of the Good

Some members are disappointed that Rule 26(b) is changing from a relevancy standard to a proportionality standard. While I am disappointed, too, our members made a difference in the amendments that were ultimately adopted. The rewrite of Rule 26(b) was improved by reordering proportionality factors and adding a new factor to address asymmetrical access to information. Some of the worst amendments, such as the proposed limits on depositions, interrogatories, and admissions, were dropped.[1]

Other concerns resulted in more reasonable compromises. For example, the proposed change on service of process originally decreased the time frame from 120 days to 60 days. For a few specialized bars, this can be a big problem. Admiralty members frequently have to serve the vessel, and trucking members have to serve interstate truck drivers. The final number is now 90 days. Due in part to comments from products liability lawyers, such as Anthony Tarricone, an additional amendment to the rule will clarify that the time period does not apply to foreign service. A separate comment period on this and other rules closed in February 2015.

The defense bar and corporate interests want to make it more difficult for you to represent your clients by proposing tort "reform" measures. The Judicial Conference and changes to the federal rules were another venue to do that, but with your help, we fought back. It is a collective responsibility to step up and get involved, and AAJ members answered the call. Onward and upward to the next challenge.

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Note

1. See Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, Trial 36 (July 2015).