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OF THE
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MEMORANDUM

TO: Judge Jeffrey Sutton
Chair, Standing Committee on Rules of Practice and Procedure

FROM: Judge David G. Campbell
Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: Proposed Amendments to the Federal Rules of Civil Procedure

DATE: June 14, 2014

Over the course of the last four years, the Advisory Committee on the Federal Rules of Civil Procedure has developed, published, and refined a set of proposed amendments that will implement conclusions reached at a May 2010 Conference on Civil Litigation held at Duke University Law School. The Committee has also proposed and published amendments that would abrogate Rule 84 and the forms appended to the civil rules, and make a modest change to Rule 55. Final versions of the proposals were approved unanimously by the Committee at its meeting in Portland, Oregon on April 10-11, 2014, and approved unanimously by the Standing Committee at its meeting in Washington, D.C. on May 29-30, 2014.

This report explains the proposed amendments. The text of the proposed rules and the proposed Advisory Committee Notes immediately follow this report. The Committee respectfully requests that you forward the proposed amendments for consideration by the Judicial Conference, the Supreme Court, and Congress.

I. THE DUKE CONFERENCE.

The 2010 Duke Conference was organized by the Committee for the specific purpose of examining the state of civil litigation in federal courts and exploring better means to achieve Rule 1's goal of the just, speedy, and inexpensive determination of every action. The Committee invited 200 participants to attend, and all but one accepted. Participants were selected to ensure diverse views and expertise, and included trial and appellate judges from federal and state courts; plaintiff, defense, and public interest lawyers; in-house counsel from governments and corporations; and many law professors. Empirical studies were conducted in advance of the conference by the Federal Judicial Center ("FJC"), bar associations, private and public interest research groups, and academics. More than seventy judges, lawyers, and academics made presentations to the conference, followed by a broad-ranging discussion among all participants. The Conference was streamed live by the FJC.

The conference planning committee and its chair, Judge John Koeltl of the Southern District of New York, spent more than one year assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers. Materials prepared for the Conference can be found at <http://www.uscourts.gov>, and include more than 40 papers, 80 presentations, and 25 compilations of empirical research. The Duke Law Review published some of the papers in Volume 60, Number 3 (December 2010).

The Conference concluded that federal civil litigation works reasonably well –major restructuring of the system is not needed. There was near-unanimous agreement, however, that the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management. A panel on e-discovery unanimously recommended that the Committee draft a rule to deal with the preservation and loss of electronically stored information ("ESI").

Following the conference, the Committee created a Duke Subcommittee, chaired by Judge Koeltl, to consider recommendations made during the Duke Conference. The Committee also assigned the existing Discovery Subcommittee to draft a rule addressing the preservation and loss of ESI. The work of these subcommittees led to two categories of proposed amendments discussed below: the Duke proposals drafted by the Duke Subcommittee, and proposed new Rule 37(e) drafted by the Discovery Subcommittee. The proposed abrogation of Rule 84 and the proposed amendment to Rule 55 were developed independently of the Duke Conference initiatives.

This report will discuss separately the Duke proposals, proposed Rule 37(e), the abrogation of Rule 84, and the amendment to Rule 55. Additional insight can be gained by reviewing the proposed rule language and committee notes in the Appendix.

II. THE DUKE PROPOSALS.

In a report to the Chief Justice following the Duke Conference, the Committee provided this summary of key conference conclusions: "What is needed can be described in two words – cooperation and proportionality – and one phrase – sustained, active, hands-on judicial case

management.” Since the conference, the Committee and others have sought to promote cooperation, proportionality, and active judicial case management through several means.

First, the FJC has sought to develop enhanced education programs. Among other measures, in 2013 the FJC published a new Benchbook for Federal District Court Judges with a new, comprehensive chapter on judicial case management written with substantial input from members of the Committee and the Standing Committee.

Second, the Committee and the National Employment Lawyers Association (“NELA”) worked cooperatively with the Institute for Advancement of the American Legal System (“IAALS”) to develop protocols for initial disclosures in employment cases. The protocols were developed by a team of experienced plaintiff and defense lawyers and include substantial mandatory disclosures required of both sides at the beginning of employment cases. The protocols are now being used by more than 50 federal district judges. The FJC and the Committee intend to monitor this pilot program and other innovative changes made in several state and federal courts.

Third, the Committee developed proposed rule amendments through the Duke Subcommittee. The Subcommittee began with a list of proposals made at the Duke Conference and held numerous conference calls, circulated drafts of proposed rules, and sponsored a mini-conference with 25 invited judges, lawyers, and law professors to discuss possible rule amendments. The Subcommittee presented recommendations for full discussion by the Committee and the Standing Committee during meetings held in 2011, 2012, and 2013.

The proposed Duke amendments were published as a package in August 2013 along with the other proposed amendments discussed in this report. More than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the Subcommittee withdrew some proposals, amended others, and proposed the package of amendments discussed below.

We believe that this process has resulted in fully-informed rulemaking at its best. The original Duke Conference, the lengthy and detailed deliberations of the Duke Subcommittee, the mini-conference held by the Subcommittee, repeated reviews of the proposals by the full Committee and the Standing Committee, and the vigorous public comment process have provided a sound basis for proposing changes to the civil rules.

Rather than discuss the proposed Duke amendments in numerical rule order, this report will address the discovery proposals, followed by proposals on judicial case management and cooperation.

A. Discovery Proposals.

1. Withdrawn Proposals.

The proposals published last August sought to encourage more active case management and advance the proportional use of discovery by amending the presumptive numerical limits on discovery. The intent was to promote efficiency and prompt a discussion early in each case about the amount of discovery needed to resolve the dispute. Under these proposals, Rules 30 and 31 would have been amended to reduce from 10 to 5 the presumptive number of depositions permitted for plaintiffs, defendants, and third-party defendants; Rule 30(d) would have been amended to reduce the presumptive time limit for an oral deposition from 7 hours to 6 hours; Rule 33 would have been amended to reduce from 25 to 15 the presumptive number of interrogatories a party may serve on any other party; and a presumptive limit of 25 would have been introduced for requests to admit under Rule 36, excluding requests to admit the genuineness of documents.

These proposals received some support in the public comment process, but they also encountered fierce resistance. Many expressed fear that the new presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims or defenses. Some asserted that many types of cases, including cases that seek relatively modest monetary recoveries, require more than 5 depositions. Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that agreement among the parties might require unwarranted trade-offs in other areas; and that the showing now required to justify an 11th or 12th deposition would be needed to justify a 6th or 7th deposition, reducing the overall number of depositions permitted under the rules.

After reviewing the public comments, the Subcommittee and Committee decided to withdraw these recommendations. The intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect. The Committee concluded that it could promote the goals of proportionality and effective judicial case management through other proposed rule changes, such as the renewed emphasis on proportionality and steps to promote earlier and more informed case management, without raising the concerns spawned by the new presumptive limits.

2. Amendments to Rule 26(b)(1): Four Elements.

The proposed amendments to Rule 26(b)(1) include four elements: (1) the factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery in Rule 26(b)(1), identifying elements to be considered in determining whether discovery is proportional to the needs of the case; (2) language regarding the discovery of sources of information is removed as unnecessary; (3) the distinction between discovery of information relevant to the parties' claims or defenses and discovery of information relevant to the subject matter of the action, on a showing of good cause, is eliminated; (4) the sentence allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence" is rewritten. Each proposal will be discussed separately.

a. Scope of Discovery: Proportionality.

There was widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case, but subsequent discussions at the mini-conference sponsored by the Subcommittee revealed significant discomfort with simply adding the word “proportional” to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To provide clearer guidance, the Subcommittee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which currently are incorporated by cross-reference in Rule 26(b)(1), be relocated to Rule 26(b)(1) and included in the scope of discovery. Under this amendment, the first sentence of Rule 26(b)(1) would read 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.¹

This proposal produced a division in the public comments. Many favored the proposal. They asserted that costs of discovery in civil litigation are too often out of proportion to the issues at stake in the litigation, resulting in cases not being filed or settlements made to avoid litigation costs regardless of the merits. They stated that disproportionate litigation costs bar many from access to federal courts and have resulted in a flight to other dispute resolution fora such as arbitration. They noted that the proportionality factors currently found in Rule 26(b)(2)(C)(iii) often are overlooked by courts and litigants, and that the proposed relocation of those factors to Rule 26(b)(1) will help achieve the just, speedy, and inexpensive determination of every action.

Many others saw proportionality as a new limit that would favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy uniform application. They asserted that “proportionality” will become a new blanket objection to all discovery requests. They were particularly concerned that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Some argued that the proposed change is a solution in search of a problem – that discovery in civil litigation already is proportional to the needs of cases.

After considering these public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery, with some

¹The current version of this language in Rule 26(b)(2)(C)(iii) reads as follows: “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 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.”

modifications as described below, will improve the rules governing discovery. The Committee reaches this conclusion for three primary reasons.

Findings from the Duke Conference.

As already noted, a principal conclusion of the Duke Conference was that discovery in civil litigation would more often achieve the goals of Rule 1 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. In its report to the Chief Justice, the Committee observed that “[o]ne area of consensus in the various surveys . . . was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case.”

The FJC prepared a closed-case survey for the Duke Conference. The survey questioned lawyers in 3,550 cases terminated in federal district courts for the last quarter of 2008. Although the survey found that a majority of lawyers thought the discovery in their case generated the “right amount” of information, and more than half reported that the costs of discovery were the “right amount” in proportion to their clients’ stakes in the case, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients’ stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5% of plaintiff attorneys and 39.9% of defendant attorneys in cases that actually settled. On the question of whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs and defendants that the rules should be revised to enforce discovery obligations more effectively.

Other surveys prepared for the Duke Conference showed greater dissatisfaction with the costs of civil discovery. In surveys of lawyers from the American College of Trial Lawyers (“ACTL”), the ABA Section of Litigation, and NELA, more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery. The ACTL Task Force on Discovery and IAALS reported on a survey of ACTL fellows, who generally tend to be more experienced trial lawyers than those in other groups. A primary conclusion from the survey was that today’s civil litigation system takes too long and costs too much, resulting in some deserving cases not being filed and others being settled to avoid the costs of litigation. Almost half of the ACTL respondents believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers. The report reached this conclusion: “Proportionality should be the most important principle applied to all discovery.”

Surveys of ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of

Litigation, 78% percent of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, with 33% of plaintiffs' lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreeing that litigation costs are not proportional in large cases. In the NELA survey, which included primarily plaintiffs' lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce the rules' existing proportionality limitations on their own.

The History of Proportionality in Rule 26.

The proportionality factors to be moved to Rule 26(b)(1) are not new. Most of them were added to Rule 26 in 1983 and originally resided in Rule 26(b)(1). The Committee's original intent was to promote more proportional discovery, as made clear in the 1983 Committee Note which explained that the change was intended "to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry," and "to encourage judges to be more aggressive in identifying and discouraging discovery overuse." The 1983 amendments also added Rule 26(g), which now provides that a lawyer's signature on a discovery request, objection, or response constitutes a certification that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." The 1983 amendments thus made proportionality a consideration for courts in limiting discovery and for lawyers in issuing and responding to discovery requests.

The proportionality factors were moved to Rule 26(b)(2)(C) in 1993 when section (b)(1) was divided, but their constraining influence on discovery remained important in the eyes of the Committee. The 1993 amendments added two new factors: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." The 1993 Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery[.]"

The proportionality factors were again addressed by the Committee in 2000. Rule 26(b)(1) was amended to state that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [now Rule 26(b)(2)(C)]." The 2000 Committee Note explained that courts were not using the proportionality limitations as originally intended, and that "[t]his otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

As this summary illustrates, three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee – that proportionality is an

important and necessary feature of civil litigation in federal courts. And yet one of the primary conclusions of comments and surveys at the 2010 Duke Conference was that proportionality is still lacking in too many cases. The previous amendments have not had their desired effect. The Committee's purpose in returning the proportionality factors to Rule 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes.

Adjustments to the 26(b)(1) Proposal.

The Committee considered carefully the concerns expressed in public comments: that the move will shift the burden of proving proportionality to the party seeking discovery, that it will provide a new basis for refusing to provide discovery, and that it will increase litigation costs. None of these predicted outcomes is intended, and the proposed Committee Note has been revised to address them. The Note now explains that the change does not place a burden of proving proportionality on the party seeking discovery and explains how courts should apply the proportionality factors. The Note also states that the change does not authorize boilerplate refusals to provide discovery on the ground that it is not proportional, but should instead prompt a dialogue among the parties and, if necessary, the court, concerning the amount of discovery reasonably needed to resolve the case. The Committee remains convinced that the proportionality considerations will not increase the costs of litigation. To the contrary, the Committee believes that more proportional discovery will decrease the cost of resolving disputes without sacrificing fairness.

In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to "the importance of the issues at stake" and second to "the amount in controversy." This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The Committee Note was also expanded to emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that, from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies and to ensure that parties seeking such remedies have sufficient discovery to prove their cases.

Also in response to public comments, the Committee added a new factor: "the parties' relative access to relevant information." This factor addresses the reality that some cases involve an asymmetric distribution of information. Courts should recognize that proportionality in asymmetric cases will often mean that one party must bear greater burdens in responding to discovery than the other party bears.

With these adjustments, the Committee believes that moving the factors from Rule 26(b)(2)(C) to Rule 26(b)(1) will satisfy the need for proportionality in more civil cases, as identified in the Duke Conference, while avoiding the concerns expressed in some public comments.

b. Discovery of Information in Aid of Discovery.

Rule 26(b)(1) now provides that discoverable matters include “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” The Committee believes that these words are no longer necessary. The discoverability of such information is well established. Because Rule 26 is more than twice as long as the next longest civil rule, the Committee believes that removing excess language is a positive step.

Some public comments expressed doubt that discovery of these matters is so well entrenched that the language is no longer needed. They urged the Committee to make clear in the Committee Note that this kind of discovery remains available. The Note has been revised to make this point.

c. Subject-Matter Discovery.

Before 2000, Rule 26(b)(1) provided for discovery of information “relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” Responding to repeated suggestions that discovery should be confined to the parties’ claims or defenses, the Committee amended Rule 26(b)(1) in 2000 to narrow the scope of discovery to matters “relevant to any party’s claim or defense,” but preserved subject-matter discovery upon a showing of good cause. The 2000 Committee Note explained that the change was “designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”

The Committee proposes that the reference to broader subject matter discovery, available upon a showing of good cause, be deleted. In the Committee’s experience, the subject matter provision is virtually never used, and the proper focus of discovery is on the claims and defenses in the litigation.

Only a small portion of the public comments addressed this proposal, with a majority favoring it. The Committee Note includes three examples from the 2000 Note of information that would remain discoverable as relevant to a claim or defense: other incidents similar to those at issue in the litigation, information about organizational arrangements or filing systems, and information that could be used to impeach a likely witness. The Committee Note also recognizes that if discovery relevant to the pleaded claims or defenses reveals information that would support new claims or defenses, the information can be used to support amended pleadings.

d. “Reasonably calculated to lead.”

The final proposed change in Rule 26(b)(1) deletes the sentence which reads: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The proposed amendment would replace this sentence with the following language: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

This change is intended to curtail reliance on the “reasonably calculated” phrase to define the scope of discovery. The phrase was never intended to have that purpose. The “reasonably calculated” language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would not be admissible at trial. Inadmissibility was used to bar relevant discovery. The 1946 amendment sought to stop this practice with this language: “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.”

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

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

Most of the comments opposing this change complained that it would eliminate a “bedrock” definition of the scope of discovery, reflecting the very misunderstanding the amendment is designed to correct.

3. Rule 26(b)(2)(C)(iii).

Rule 26(b)(2)(C)(iii) would be amended to reflect the move of the proportionality factors to Rule 26(b)(1).

4. Rule 26(c)(1): Allocation of Expenses.

Rule 26(c)(1)(B) would be amended to include “the allocation of expenses” among the terms that may be included in a protective order. Rule 26(c)(1) already authorizes an order to protect against “undue burden or expense,” and this includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding. The Supreme Court has acknowledged that courts have that authority now, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), and it is useful to make the authority explicit on the face of the rule to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Committee Note explains that this clarification does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding.

5. Rules 34 and 37(a): Specific Objections, Production, Withholding.

The Committee proposes three amendments to Rule 34. (A fourth, dealing with requests served before the Rule 26(f) conference, is described later.) The first requires that objections to requests to produce be stated “with specificity.” The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and should specify a reasonable time for the production. A corresponding change to Rule 37(a)(3)(B)(iv) adds authority to move for an order to compel production if “a party fails to produce documents” as requested. The third amendment to Rule 34 requires that an objection state whether any responsive materials are being withheld on the basis of the objection.

These amendments should eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production. All three practices lead to discovery disputes and are contrary to Rule 1’s goals of speedy and inexpensive litigation.

6. Early Discovery Requests: Rule 26(d)(2).

The Committee proposes to add Rule 26(d)(2) to allow a party to deliver a Rule 34 document production request before the Rule 26(f) meeting between the parties. For purposes of determining the date to respond, the request would be treated as having been served at the first Rule 26(f) meeting. Rule 34(b)(2)(A) would be amended by adding a parallel provision for the time to respond. The purpose of this change is to facilitate discussion between the parties at the Rule 26(f) meeting and with the court at the initial case management conference by providing concrete discovery proposals.

Public comments on this proposal were mixed. Some doubt that parties will seize this new opportunity. Others expressed concern that requests formed before the case management conference will be inappropriately broad. Lawyers who represent plaintiffs appeared more likely to use this opportunity to provide advance notice of what should be discussed at the Rule 26(f) meeting. The Committee continues to view this amendment as a worthwhile effort to focus early case management discussions.

B. Early Judicial Case Management.

The Committee recommends several changes to Rules 16 and 4 designed to promote earlier and more active judicial case management.

1. Rule 16.

Four sets of changes are proposed for Rule 16.

First, participants at the Duke Conference agreed that cases are resolved faster, fairer, and with less expense when judges manage them early and actively. An important part of this management is an initial case management conference where judges confer with parties about the needs of the case and an appropriate schedule for the litigation. To encourage case management conferences where direct exchanges occur, the Committee proposes that the words allowing a conference to be held “by telephone, mail, or other means” be deleted from Rule 16(b)(1)(B). The Committee Note explains that such a conference can be held by any means of direct simultaneous communication, including telephone. Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties’ Rule 26(f) report without holding a conference, but the change in the text and the Committee Note hopefully will encourage judges to engage in direct exchanges with the parties when warranted.

Second, the time for holding the scheduling conference is set at the earlier of 90 days after any defendant has been served (reduced from 120 days in the present rule) or 60 days after any defendant has appeared (reduced from 90 days in the present rule). The intent is to encourage early management of cases by judges. Recognizing that these time limits may not be appropriate in some cases, the proposal also allows the judge to set a later time on finding good cause. In response to concerns expressed by the Department of Justice, the Committee Note states that “[l]itigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way.”

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

Fourth, the proposed amendments identify another topic for discussion at the initial case management conference – whether the parties should be required to request a conference with the court before filing discovery motions. Many federal judges require such pre-motion conferences, and experience has shown them to be very effective in resolving discovery disputes quickly and inexpensively. The amendment seeks to encourage this practice by including it in the Rule 16 topics.

2. Rule 4(m): Time to Serve.

Rule 4(m) now sets 120 days as the time limit for serving the summons and complaint. The Committee initially sought to reduce this period to 60 days, but the public comments persuaded the Committee to recommend a limit of 90 days. The intent, as with the similar Rule

16 change, is to get cases moving more quickly and shorten the overall length of litigation. The experience of the Committee is that most cases require far less than 120 days for service, and that some lawyers take more time than necessary simply because it is permitted under the rules.

Public comments noted that a 60-day service period could be problematic in cases with many defendants, defendants who are difficult to locate or serve, or defendants who must be served by the Marshals Service. Others suggested that a 60-day period would undercut the opportunity to request a waiver of service because little time would be left to effect service after a defendant refuses to waive service. After considering these and other comments, the Committee concluded that the time should be set at 90 days. Language has been added to the Committee Note recognizing that additional time will be needed in some cases.

C. Cooperation.

Rule 1 now provides that the civil rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” The proposed amendment would provide that the rules “be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.”

As already noted, cooperation among parties was a theme heavily emphasized at the Duke Conference. Cooperation has been vigorously urged by many other voices, and principles of cooperation have been embraced by concerned organizations and adopted by courts and bar associations. The Committee proposes that Rule 1 be amended to make clear that parties as well as courts have a responsibility to achieve the just, speedy, and inexpensive resolution of every action. The proposed Committee Note explains that “discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.”

The public comments expressed little opposition to the concept of cooperation, but some expressed concerns about the proposed amendment. One concern was that Rule 1 is iconic and should not be altered. Another was that this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate. To avoid any suggestion that the amendment authorizes such sanctions or somehow diminishes procedural rights provided elsewhere in the rules, the Committee Note provides: “This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.”

The Committee recognizes that a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but believes that the proposed amendment will provide a meaningful step in that direction. This change should be combined with continuing efforts to educate litigants and courts on the importance of cooperation in reducing unnecessary costs in civil litigation.

D. Summary: The Duke Proposals as a Whole.

The Committee views the Duke proposals as a package. While each proposed amendment must be judged on its own merits, the proposals are designed to work together. Case management will begin earlier, judges will be encouraged to communicate directly with the parties, relevant topics are emphasized for the initial case management conference, early Rule 34 requests will facilitate a more informed discussion of necessary discovery, proportionality will be considered by all participants, unnecessary discovery motions will be discouraged, and obstructive Rule 34 responses will be eliminated. At the same time, the change to Rule 1 will encourage parties to cooperate in achieving the just, speedy, and inexpensive resolution of every action. Combined with the continuing work of the FJC on judicial education and the continuing exploration of discovery protocols and other pilot projects, the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process.

III. RULE 37(e): FAILURE TO PRESERVE ESI.

Present Rule 37(e) was adopted in 2006 and provides: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The Committee recognized in 2006 that the continuing expansion of ESI might provide reasons to adopt a more detailed rule. A panel at the Duke Conference unanimously recommended that the time has come for such a rule.

The Committee agrees. The explosion of ESI in recent years has affected all aspects of civil litigation. Preservation of ESI is a major issue confronting parties and courts, and loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith.

The Committee has been credibly informed that persons and entities over-preserve ESI out of fear that some ESI might be lost, their actions might with hindsight be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Many entities described spending millions of dollars preserving ESI for litigation that may never be filed. Resolving the circuit split with a more uniform approach to lost ESI, and thereby reducing a primary incentive for over-preservation, has been recognized by the Committee as a worthwhile goal.

During the two years following the Duke Conference, the Discovery Subcommittee, now chaired by Judge Paul Grimm of the District of Maryland, considered several different approaches to drafting a new rule, including drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by the Duke Conference panel which called for specific provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. The Subcommittee conducted research into existing spoliation law,

canvassed statutes and regulations that impose preservation obligations, received comments and suggestions from numerous sources (including proposed draft rules from some sources), and held a mini-conference in Dallas with 25 invited judges, lawyers, and academics to discuss possible approaches to an ESI-preservation rule.

The Subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible. A rule that attempts to address these issues in detail simply cannot be applied to the wide variety of cases in federal court, and a rule that provides only general guidance on these issues would be of little value to anyone. The Subcommittee chose instead to craft a rule that addresses actions courts may take when ESI that should have been preserved is lost.

Thus, the proposed Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated. Although some urged the Committee to eliminate any duty to preserve information before an action is actually filed in court, the Committee believes such a rule would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in public comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

Proposed Rule 37(e) applies when “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” Subdivisions (e)(1) and (e)(2) then address actions a court may take when this situation arises.

A. Limiting the Rule to ESI.

Like current Rule 37(e), the proposed rule is limited to ESI. Although the Committee considered proposing a rule that would apply to all forms of information, it ultimately concluded that an ESI-only rule was appropriate for several reasons.

First, as already noted, the explosion of ESI in recent years has presented new and unprecedented challenges in civil litigation. This is the primary fact motivating an amendment of Rule 37(e).

Second, the remarkable growth of ESI will continue and even accelerate. One industry expert reported to the Committee that there will be some 26 billion devices on the Internet in six years – more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere on remote servers, often referred to as the “cloud,” complicating the preservation task. Thus, the litigation

challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants.

Third, the law of spoliation for evidence other than ESI is well developed and longstanding, and should not be supplanted without good reason. There has been little complaint to the Committee about this body of law as applied to information other than ESI, and the Committee concludes that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, but repeated efforts made clear that it is very difficult to craft a rule that deals with failure to preserve tangible things. In addition, there are some clear practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, as well as an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e) should be limited to ESI.

B. Reasonable Steps to Preserve.

The proposed rule applies if ESI “that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it.” The rule calls for reasonable steps, not perfection. As explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that a party’s level of sophistication may bear on whether it should have realized that information should have been preserved.

C. Restoration or Replacement of Lost ESI.

If reasonable steps were not taken and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits a court’s powers under Rules 16 and 26 to order discovery to achieve this purpose. At the same time, however, the quest for lost information should take account of whether the information likely was only marginally relevant or duplicative of other information that remains available.

D. Subdivision (e)(1).

Proposed Rule 37(e)(1) provides that the court, “upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice.” This proposal preserves broad trial court discretion to cure prejudice caused by the

loss of ESI that cannot be remedied by restoration or replacement of the lost information. It further provides that the measures be no greater than necessary to cure the prejudice.

Proposed subdivision (e)(1) does not say which party bears the burden of proving prejudice. Many public comments raised concerns about assigning such burdens, noting that it often is difficult for an opposing party to prove it was prejudiced by the loss of information it never has seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

The proposed rule does not attempt to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three general ways: there must be a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures listed in subdivision (e)(2).

E. Subdivision (e)(2).

Proposed (e)(2) provides that the court:

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

- (A) presume that the lost information was unfavorable to the party;
- (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
- (C) dismiss the action or enter a default judgment.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As already noted, some circuits permit such instructions upon a showing of negligence, while others require bad faith. Subdivision (e)(2) permits adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Committee views this definition as consistent with the historical rationale for adverse inference instructions.

The Discovery Subcommittee analyzed the existing cases on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion: when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.") (citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence adopt a different rationale: the adverse inference restores the evidentiary balance, and the party that lost the information should bear the risk that it was unfavorable. *See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some equitable appeal, the Committee has several concerns when it is applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it – negligence does not necessarily reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies. Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

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

Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury that it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of that favorable information.

The Committee Note states that courts should exercise caution in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the

litigation does not require a court to adopt the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

IV. ABROGATION OF RULE 84.

The Federal Rules of Civil Procedure are followed by an Appendix of Forms. The Appendix includes 36 separate forms illustrating things such as the proper captions for pleadings, proper signature blocks, and forms for summonses, requests for waivers of service, complaints, answers, judgments, and other litigation documents. Rule 84 provides that the forms “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”

Many of the forms are out of date. The sample complaints, for example, embrace far fewer causes of action than now exist in federal court and illustrate a simplicity of pleading that has not been used in many years. The increased use of Rule 12(b)(6) motions to dismiss, the enhanced pleading requirements of Rule 9 and some federal statutes, the proliferation of statutory and other causes of action, and the increased complexity of most modern cases have resulted in a detailed level of pleading that is far beyond that illustrated in the forms.

Amendment of the civil forms is cumbersome. It requires the same process as amendment of the civil rules themselves – amendments proposed by the Committee must be approved by the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. Public notice and comment are also required. The process ordinarily takes at least three years.

In addition to being out of date and difficult to amend, the Committee’s perception was that the forms are rarely used. The Committee established a Rule 84 Subcommittee, chaired by Judge Gene Pratter of the Eastern District of Pennsylvania, to consider the current forms and the process of their revision, and to recommend possible changes. Members of the Subcommittee canvassed judges, law firms, public interest law offices, and individual lawyers, and found that virtually none of them use the forms.

Many alternative sources of civil forms are available. These include forms created by private publishing companies and a set of non-pleading forms created and maintained by a Forms Working Group at the Administrative Office of the United States Courts (“AO”). The Working Group consists of six federal judges and six clerks of court, and the forms they create in consultation with the various rules committees can be downloaded from the AO website at <http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx>. A May 2012 survey of the websites maintained by the 94 federal district courts around the country found that 88 of the 94 either link electronically to the AO forms or post some of the AO forms on their websites. Only six of the 94 mention the Rule 84 forms on their websites or in their local rules, confirming that the rules forms are rarely used.

The Subcommittee ultimately recommended that the Committee get out of the forms business. The Committee agreed, and published a proposal in August 2013 to abrogate Rule 84

and eliminate the forms appended to the rules. The two exceptions to this recommendation are forms 5 and 6, which are referenced in Rule 4 and would, under the proposal, be appended to that specific rule.

Very few of the public comments addressed the abrogation of Rule 84. Among the objections, most asserted that the elimination of the forms would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards. A few argued that the forms assist pro se litigants and new lawyers, but of these, only one stated that the writer had ever actually used the forms. The general lack of response to the Rule 84 proposal reinforced the Committee's view that the forms are seldom used.

After considering the public comments, the Committee continues to believe that the forms and Rule 84 should be eliminated. The forms are not used; revising them is a difficult and time-consuming process; other forms are readily available; and the Committee can better use its time addressing more relevant issues in the rules. The Committee continues to review the effects of *Twombly* and *Iqbal*. If it decides action is needed in this area, the more direct approach will be to amend the rules, not the forms.

V. RULE 55.

The Committee proposes that Rule 55(c) be amended to clarify that a court must apply Rule 60(b) only when asked to set aside a final judgment. The reason for the change is explained in the proposed Committee Note.