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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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September 26, 2014

M E M O R A N D U M

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: Jeffrey S. Sutton

SUBJECT: Summary of Proposed Amendments to the Federal Rules

This memorandum summarizes the amendments to the Federal Rules of Practice and Procedure that will take effect on December 1, 2015, if (1) the Supreme Court adopts the proposed amendments and transmits them to Congress no later than May 1, 2015, and (2) Congress does not reject the amendments. Part I addresses some technical amendments to Bankruptcy Rule 1007. Part II addresses the amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84.

I. Federal Rules of Bankruptcy Procedure

The proposed amendments to Bankruptcy Rule 1007(a) are technical and conforming in nature. Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." Yet the restyled schedules for individual cases scheduled to take effect on December 1, 2015, use slightly different designations. The proposed amendments to Rule 1007(a) change the independent references to Schedules E and F to Schedule E/F, making the rule consistent with the new form designations.

II. Federal Rules of Civil Procedure

The proposed amendments to the Civil Rules are not technical and conforming. Over the last four years, the Advisory Committee on the Federal Rules of Civil Procedure has developed,

published, and refined a set of proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37 designed to implement the conclusions reached at a May 2010 Conference on Civil Litigation held at Duke University Law School. The Advisory Committee also has 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. The Advisory Committee approved the amendments unanimously, and so did the Standing Committee and the Judicial Conference.

A. The Duke Conference

Initiated by two former chairs of the Advisory Committee (Judges Mark Kravitz and Lee Rosenthal), the 2010 Duke Conference was designed to examine the state of civil litigation and to identify ways to further 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. The presenters and participants at the Conference were diverse 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. The 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 Conference generated near-unanimous agreement about three areas where civil litigation could be improved: increased use of proportionality in discovery; early and active case management by trial judges; and increased cooperation among the parties in carrying out their discovery obligations. A panel on e-discovery also unanimously recommended that the Advisory Committee draft a rule to deal with the preservation and loss of electronically stored information ("ESI"). Consistent with these goals, the Advisory Committee created a Duke Subcommittee, chaired by Judge John Koeltl, to consider recommendations made at the Conference, and asked the existing Discovery Subcommittee, chaired by Judge Paul Grimm, to draft a rule addressing the preservation and occasional loss of ESI.

B. The Duke Proposals

Since the conference, the Advisory Committee and others have tried to promote these goals in several ways. First, the Advisory Committee and the FJC looked to enhance educational efforts. In 2013, the FJC published a new Benchbook for Federal District Court Judges with a comprehensive chapter on judicial case management (and discovery management) written with substantial input from members of the Advisory Committee and the Standing Committee.

Second, the Advisory Committee and the National Employment Lawyers Association ("NELA") worked with the Institute for the 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 lawyers who represent plaintiffs and defendants and include substantial mandatory disclosures required of both sides at the beginning of employment cases. More than 50 district court judges now use the protocols. The FJC and the Advisory Committee intend to monitor this pilot program and other discovery-related pilot programs in several state and federal courts.

Third, the Advisory 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 Advisory 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 memorandum. More than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Advisory Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. After the public comment period, the Advisory Committee, under the able leadership of Judge David Campbell, withdrew some proposals and amended others.

It is difficult to overstate the amount of input that went into this rulemaking process. 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 Advisory Committee and the Standing Committee, and the vigorous public comment process have provided a sound basis for proposing changes to the civil rules in three areas: discovery; judicial case management; and cooperation.

1. Discovery Proposals

a. Withdrawn Numerical-Limit Proposals

Before turning to the proposals in front of the Court, it is worth mentioning one set of proposals—new presumptive numerical limits on discovery—that the Advisory Committee withdrew. The goal of these limits was to promote greater efficiency in discovery, to prompt a discussion early in each case about the amount of discovery needed to resolve the dispute, and to connect the numerical limits to empirical data about the amount of discovery conducted in most cases. Under the 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.

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

After reviewing the public comments, the Subcommittee and Advisory Committee withdrew the proposals. Even though the proposals were not designed to limit discovery unnecessarily, many worried that the changes would have that effect. The Advisory Committee concluded that it could promote the goals of proportionality and effective judicial case management in other ways.

b. Amendments to Rule 26(b)(1)

The proposed amendments to Rule 26(b)(1) do four things: (1) limit the scope of discovery to what is relevant to the claims and defenses of the parties *and* proportional to the needs of the case; (2) remove the language regarding the discovery of sources of information; (3) eliminate 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; and (4) rewrite the sentence allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence."

i. Scope of Discovery: Proportionality

There was widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case. But there was widespread discomfort merely with adding the word proportionality to Rule 26(b)(1). Standing alone, the term seemed too open-ended, too dependent on the eye of the beholder. The answer, the Subcommittee proposed, was to use the factors already found in Rule 26(b)(2)(C)(iii), which limits burdensome discovery, and to make proportionality as defined by these factors a limit on the scope of discovery. Under the 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.

This proposal produced a division in the public comments. Many favored the proposal. They noted: (1) the costs of discovery in civil litigation are too often out of proportion to the stakes of the litigation; (2) disproportionate litigation costs bar many from access to federal courts and lead to a flight to private dispute resolution (e.g., arbitration) and to state courts; and (3) the proportionality factors currently found in Rule 26(b)(2)(C)(iii) often are overlooked by courts and litigants.

Many others opposed the proportionality limitation. They noted: (1) the factors in Rule 26(b)(2)(C)(iii) are subjective and will lead to inconsistent application; (2) proportionality will become a new blanket objection to all discovery requests (by defendants in particular) and will impose a new burden on the requesting party to justify every discovery request; and (3) the proposal is a solution in search of a problem because discovery already is proportional to the needs of cases.

After considering these public comments, the Advisory Committee stood by the proposal, with some modifications described below, for three basic reasons.

Findings from the Duke Conference. A central 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.

The FJC prepared a closed-case survey for the Duke Conference. The survey questioned lawyers in 3,550 cases completed 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 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 deserving cases not being filed and undeserving cases 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 plaintiff and defense lawyers. "Proportionality," the report concluded, "should be the most important principle applied to all discovery."

Surveys of the 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 and Rule 26. The proportionality factors proposed for 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 Advisory 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 certifies that the request 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 introduced proportionality as a relevant discovery-limiting consideration.

In 1993, the Advisory Committee moved the proportionality factors to Rule 26(b)(2)(C) when it divided section (b)(1), but their constraining influence on discovery remained important in the eyes of the Advisory 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."

In 2000, the Advisory Committee addressed the proportionality factors again. It amended Rule 26(b)(1) 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 Advisory Committees in three different decades reached the same conclusion as the current Advisory Committee—that proportionality is a critical feature of civil litigation in federal courts. Yet one of the primary conclusions of the Duke Conference was that proportionality continues to be ignored in too many cases. The prior amendments have not had their desired effect. The Advisory 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 from the beginning of the case and throughout the discovery process.

Adjustments to the Rule 26(b)(1) Proposal. The Advisory Committee addressed several concerns raised in the public comments: that the amendment 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 by generating satellite discovery disputes. The Advisory Committee revised the Committee Note to explain that the change does

not place a burden of proving proportionality on the party seeking discovery and to explain how courts should apply the proportionality factors. The Note adds that the change does not authorize boilerplate refusals to provide discovery, noting that the amendment instead should prompt an early (and cost-saving) dialogue among the parties, and if necessary the court, about the amount of discovery reasonably needed to resolve the case.

The Advisory Committee also changed the order of the proportionality factors, so that the first factor is now "the importance of the issues at stake," not "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 Advisory Committee also expanded the Note to emphasize that courts should consider the private and public values at issue in the litigation—values that cannot be addressed exclusively by a monetary award. The Note 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 have sufficient discovery to prove their cases.

Also in response to public comments, the Advisory 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 sometimes means that one party must bear greater burdens in responding to discovery than the other party bears.

ii. 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." These words no longer serve a useful purpose. The discoverability of such information today is a given. Because Rule 26 already includes more than twice as many words as the next longest civil rule, some pruning was in order. The proposal thus removes these words. A few public comments expressed doubt that discovery of these matters is well understood. The Committee Note states that this kind of discovery remains available. (Pruning of the Committee Note will wait for another day.)

iii. 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 Advisory 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 Advisory Committee proposes removing the reference to broader subject-matter discovery available upon a showing of good cause. In its view, the subject-matter provision is virtually never used, and discovery ought to focus on the claims and defenses in the litigation. Only a few public comments addressed this proposal, with a majority favoring it. To alleviate

any potential confusion about the change, the Committee Note includes three examples 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.

iv. "Reasonably calculated to lead"

The final proposed change in Rule 26(b)(1) deletes this sentence: "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 seeks 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 thus 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."

In 2000, in response to concerns that lawyers and courts were using the sentence to define the scope of discovery, the Advisory Committee added the words "relevant information" at the beginning. "Relevant information," it thus now says, "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)]." From the beginning and as recently amended, the "reasonably calculated" phrase was meant to apply only to information that is otherwise within the scope of discovery set forth in Rule 26(b)(1); it was not designed to expand the scope of discovery. Any other reading of "reasonably calculated" would swallow the other limitations on the scope of discovery.

Despite the original objective of the sentence and the 2000 clarification, lawyers and courts continue to use the "reasonably calculated" language to define 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. The proposed amendment will correct this misinterpretation while ensuring 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 seeks to correct.

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

Rule 26(b)(2)(C)(iii) has been changed to reflect the move of the proportionality factors to Rule 26(b)(1).

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

The Advisory Committee proposes amending Rule 26(c)(1)(B) to include "the allocation of expenses" among the terms that a court may include 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 the condition that the requesting party bear part or all of the costs of responding. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), acknowledges that courts already have this authority, and the Advisory Committee thought it would be useful to make the authority explicit in the rule to ensure that courts and 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 responding party. The Committee Note says that this clarification does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily will bear the costs of discovery.

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

The proposal contains three key amendments to Rule 34. 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 electronically stored information 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 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 that state documents will be produced in due course without any indication of when production will occur. All three practices lead to discovery disputes and are contrary to Rule 1's goals of speedy and inexpensive litigation.

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

The Advisory 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.

The proposal received mixed reviews. Some doubt that parties will seize this new opportunity. Others expressed concern that requests formed before the case management conference will be unduly broad. Lawyers who represent plaintiffs appeared more inclined to use this opportunity to provide advance notice of what should be discussed at the Rule 26(f)

meeting. The Advisory Committee continues to view this amendment as a worthwhile effort to focus and shape early case management discussions among the parties and court.

2. Early Judicial Case Management

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

a. Rule 16

Rule 16 includes four sets of changes. First, participants at the Duke Conference agreed that, when judges manage cases early and actively, they resolve them more quickly, more fairly, and less expensively. One way to further this goal is to require 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 Advisory 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 trial courts may hold such a conference 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 should encourage judges to engage the parties directly.

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). Here too, the intent is to encourage early case management. Recognizing that these time limits may not be appropriate in some cases, the proposal 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 continues to impact civil litigation in myriad ways, and the Advisory Committee believes that parties and courts should address it as soon as possible. Rule 502 was designed in part to reduce the expense of producing ESI, and the parties and judges likewise should consider its potential application early in the litigation.

Fourth, the proposed amendments identify one other topic for discussion at the first 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 effective in resolving discovery disputes quickly and inexpensively. The amendment seeks to encourage this practice.

b. Rule 4(m): Time to Serve

Rule 4(m) now sets 120 days as the time limit for serving the summons and complaint. The Advisory Committee initially sought to reduce this period to 60 days, but the public comments persuaded the Advisory Committee to recommend a limit of 90 days. The goal of this change, as with the Rule 16 change, is to shorten the length (and expense) of litigation. As the Advisory Committee sees it, most cases require far fewer than 120 days for service, and some lawyers take more time than necessary simply because the rules permit the delay.

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 Advisory Committee concluded that the time should be set at 90 days. The Committee added language to the Committee Note recognizing the need for additional time in some cases.

3. 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."

Cooperation between the parties was a central theme 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 Advisory 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, 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 Advisory Committee recognizes that a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but it remains convinced 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 litigation costs.

4. Summary: The Duke Proposals as a Whole

The Advisory 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 Advisory Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve federal civil litigation.

C. Rule 37(e): Failure to Preserve ESI

In 2006, present Rule 37(e) was adopted. It says: "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." At that point, the Advisory Committee recognized that the continuing expansion of ESI might provide reasons to adopt a more detailed rule. A panel at the Duke Conference unanimously recommended that this time has come.

The Advisory Committee agrees. The explosion of ESI has affected all aspects of civil litigation. The preservation of ESI challenges plaintiffs and defendants alike. And the appropriate remedy for losses of ESI has produced a 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.

Parties, the Advisory Committee learned, often over-preserve ESI out of fear that some ESI might be lost, that their actions might with hindsight be viewed as negligent, and that they might be sued in a circuit that permits adverse-inference instructions 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. The Advisory Committee thought that resolving this circuit split with a more uniform approach to lost ESI was a worthwhile goal.

The Discovery Subcommittee considered different approaches to the problem. It started with the idea that the rule would identify when the duty to preserve arises, would explain the duty's scope and duration, and would identify sanctions and other measures a court can take when information is lost. In pursuing this approach, 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

would not work for the wide range of cases that comes to federal court, and a rule that provides general guidance would add little value.

The Subcommittee instead crafted a rule that focuses on the actions courts may take when ESI that should have been preserved is lost. Under established and uniform case law, a duty to preserve information arises when a party reasonably anticipates litigation. Proposed Rule 37(e) thus 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) of the proposed Rule then address actions a court may take when this situation arises.

1. Limiting the Rule to ESI

Although the Advisory Committee considered proposing a rule that would apply to all forms of information, it developed an ESI-only rule for several reasons. ESI is the key source of the problem, and it made sense to keep the focus there. That problem, moreover, likely will continue and probably accelerate. One expert reported that there will be 26 billion devices linked to the Internet in six years, what amounts to over three devices for every person on earth. In addition, significant amounts of ESI are created and stored not only by corporations with large IT departments but also by individuals whose lives are recorded on their phones, tablets, cars, and social media pages, to say nothing of tools yet to be foreseen. Most of this information will be stored somewhere on remote servers, often referred to as the "cloud," complicating the preservation task for unsophisticated and sophisticated litigants alike. Finally, outside of ESI preservation, spoliation law is developed and longstanding and should not be supplanted without good reason.

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 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 and 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. Nothing of course prevents the Advisory Committee from revisiting that decision after the new Rule has been in place for a while.

2. Reasonable Steps to Preserve

The proposed rule applies if ESI "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." 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.

3. Restoration or Replacement of Lost ESI

If a party failed to take reasonable steps and lost information as a result, the rule asks whether the party can restore the lost information or replace it 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, any quest for lost information should take account of whether the information is only marginally relevant or duplicative of other information that remains available.

4. 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." The amendment preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement, and requires any measures taken to 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 has never seen. Under the proposed rule, each party is responsible for providing such information and argument as it can on the point. On top of that, 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; any remedies must be no greater than necessary to cure the prejudice; and the court may not impose the severe measures listed in subdivision (e)(2).

5. 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.

The provision seeks to eliminate a circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. 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." The requirement is akin to bad faith but is defined more precisely. Historically, such instructions were based on an inference: when a party destroys evidence for the purpose of preventing another party from using it in litigation, one can reasonably infer that the evidence was unfavorable to the destroying party. Some courts hold to this 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.").

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 Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some equitable appeal, the Advisory 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. An adverse inference thus 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.

The Advisory Committee was persuaded by the traditional reasons for an adverse inference. The Rule limits ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, as well as adverse-inference jury instructions, 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.

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. That is because the finding of intent required by the subdivision supports 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 the information. The Committee Note says 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 suffice to redress the loss.

D. Abrogation of Rule 84

An Appendix of Forms appears at the end of the Federal Rules of Civil Procedure. The Appendix includes 36 separate forms, among them pleading captions, signature blocks, 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."

The Advisory Committee established a subcommittee, chaired by Judge Gene Pratter, to consider the continuing utility of the forms. Members of the subcommittee canvassed judges, law firms, public interest law offices, and individual lawyers. They reached several conclusions. Many of the forms are out of date, and as a result no one uses them. 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 Rules 8 and 9, the proliferation of statutory and other causes of action, and the increased complexity of many modern cases have prompted a detailed level of pleading that has little connection to the forms. Rule 84's purported guarantee that use of the forms "suffice[s]" to comply with the rules is misleading in some instances and false in others. Many sample complaints do not satisfy current pleading requirements under Civil Rule 9.

Based on these considerations, the subcommittee recommended that the Advisory Committee abrogate Rule 84. The Advisory Committee agreed, and published a proposal in August 2013 to abrogate Rule 84 and to 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 rule.

The proposed abrogation of Rule 84 prompted few public comments from the practicing bar. Only one of the comments came from someone who purported to use the forms. The lack of response from litigators reinforced the view that the forms are seldom used.

Several civil procedure professors, however, did critique the proposal. Some were concerned that the elimination of the forms would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards by the Advisory Committee. It is true that emerging caselaw has made many of the forms more out of date than they already were. But independent of the Rule 84 proposal, the Advisory Committee continues to monitor caselaw to determine

what impact *Twombly* and *Iqbal* are having on the resolution of disputes. The Committee plans to continue doing so in the future.

Some wondered why the Advisory Committee could not update all of the forms to comply with current caselaw and modern pleading practices. Yet not only would this approach be time-consuming and cumbersome given the requirements of the Rules Enabling Act, it also would distract the Committee from other essential work and in some instances would not necessarily generate forms that the Committee could guarantee were in compliance with current caselaw. In view of Civil Rule 84, all changes to the forms, like all amendments to the Civil Rules, must go through an extensive process under the Rules Enabling Act: initial approval for publication by the Advisory Committee, initial approval by the Standing Committee for publication, a six-month publication process, final approval by the Advisory Committee, final approval by the Standing Committee, approval by the Judicial Conference, approval by the Supreme Court, and inaction by Congress. At a minimum, this process takes three years to complete; more often than not, it takes four to five years. That process and time frame not only would pose challenges for overhauling the current forms but also would create a going-forward challenge: updating the forms to account for new caselaw through a three-to-five-year amendment process.

Some noted that civil forms can be useful to pro se litigants and to small-firm lawyers, and that they often further access-to-justice goals. The Advisory Committee agrees. The issue is not whether civil pleading forms are a good idea; it is how best to make them useful to the practicing bar and to keep them current. The Committee believes that the best way to further these goals is to use other sources of civil procedure forms. These include a Forms Working Group at the Administrative Office of the United States Courts ("AO") that consists of six federal judges and six clerks of court. The working group has produced a helpful set of non-pleading forms, as well as forms for habeas corpus petitions, that can be downloaded in a useable format 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. Some district courts also have developed their own forms and have made them available on their websites. In addition, many commercial publishers provide valuable civil procedure forms, including scores of civil pleading forms. Some of these commercial sources are available on the Internet, and most are available in county, state, and law school libraries. In view of the pending Rule 84 abrogation proposal, the AO plans to expand the role of this working group and to have it collect the best available forms, potentially create some of their own forms, and place them all on the AO's website. Members of the Advisory Committee expect to work closely with the working group in collecting and updating the forms. If this amendment is approved, forms in short will still be widely available, just not through the Rules Enabling Act process.

E. Rule 55

The Advisory 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.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

September 26, 2014

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: Judge John D. Bates

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rule 1007 of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its March 2014 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am also transmitting: (i) a redline version of the amendments; (ii) an excerpt from the March 2014 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(2) *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a

* New material is underlined; matter to be omitted is lined through.

supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(2) *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms.

* * * * *

Committee Note

In subdivisions (a)(1) and (a)(2), the references to Schedules are amended to reflect the new designations adopted as part of the Forms Modernization Project.

EXCERPT FROM THE MARCH 2014

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), with a recommendation that they be approved and transmitted to the Judicial Conference. Because the amendments are technical and conforming in nature, prior publication for public comment is unnecessary.

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H — reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the advisory committee voted unanimously at its Fall 2013 meeting to propose a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. The conforming amendments change references to Schedules E and F to Schedule E/F.

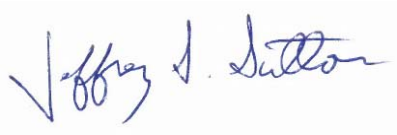
The schedules and other individual forms published in 2013 (other than the means-test forms) are proposed to take effect on December 1, 2015 — a year later than normal — in order to coincide with the effective date of the restyled non-individual forms. Given that the amendments to Rule 1007(a)(1) and (a)(2) are conforming in nature, the advisory committee recommended that the Committee approve the amendments without publication, thereby enabling them to go into effect at the same time as the forms.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2013

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 24 and 25, 2013, at the University of St. Thomas School of Law in Minneapolis, Minnesota.

* * * * *

The Committee is presenting one action item at this time—a technical, conforming amendment to Rule 1007(a). Part II of this report discusses that amendment.

* * * * *

II. Action Item—Rule 1007(a)(1) and (2) for Final Approval Without Publication

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the Advisory Committee voted unanimously at the fall meeting to propose a conforming amendment to subdivision (a)(1) and (a)(2) of that rule. The text of the proposed amendment is included in Appendix A.

The schedules and other individual forms published in 2013 (other than the means test forms) are proposed to take effect on December 1, 2015—a year later than normal—in order to coincide with the effective date of the restyled non-individual forms. That timeline means that if the Standing Committee approves without publication the conforming amendments to Rule 1007(a)(1) and (a)(2) at this or the June 2014 meeting, the rule amendments will be able to go into effect at the same time as the forms.

The Advisory Committee recommends that conforming amendments to Rule 1007(a)(1) and (a)(2), which change references to Schedules E and F to Schedule E/F, be approved and forwarded to the Judicial Conference.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

September 26, 2014

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: Judge John D. Bates

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84, and the Appendix of Forms, which were approved by the Judicial Conference at its September 2014 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am also transmitting: (i) a redline version of the amendments; and (ii) an excerpt from the September 2014 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days

after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) ***Contents of the Order*.**

* * * * *

(B) *Permitted Contents*. The scheduling order may:

* * * * *

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced,

including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

* * * * *

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the 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.

(2) ***Limitations on Frequency and Extent.***

* * * * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

* * * * *

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending —

or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

* * * * *

(d) Timing and Sequence of Discovery.

* * * * *

(2) ***Early Rule 34 Requests.***

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and

witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * * * *

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

* * * * *

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * * * *

Rule 33. Interrogatories to Parties

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

* * * * *

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

* * * * *

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that

inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An

objection to part of a request must specify the part and permit inspection of the rest.

* * * * *

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

(3) ***Specific Motions.***

* * * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit

inspection — as requested under Rule 34.

* * * * *

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

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

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

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

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

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

* * * * *

Rule 55. Default; Default Judgment

* * * * *

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

* * * * *

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

* * * * *

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

* * * * *

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

* * * * *

Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption)

To (*name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the

date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Rule 4 Waiver of the Service of Summons.

(Caption)

To (*name the plaintiff's attorney or the unrepresented plaintiff*):

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But 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

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* New material is underlined; matter to be omitted is lined through.

consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Committee Note

Subdivision (m). The presumptive time for serving a defendant is reduced from 120 days to 90 days. This

change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~unless the judge finds good cause for

delay, the judge must issue it within the earlier of ~~120~~90 days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

(3) ***Contents of the Order*****.**

* * * * *

(B) *Permitted Contents*. The scheduling order may:

* * * * *

(iii) provide for disclosure, ~~or~~discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after

information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(~~v~~vi) set dates for pretrial conferences and for trial; and

(~~vi~~vii) include other appropriate matters.

* * * * *

Committee Note

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation 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. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the 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. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) ***Limitations on Frequency and Extent.***

* * * * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.

* * * * *

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

* * * * *

(d) Timing and Sequence of Discovery.

* * * * *

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(~~2~~3) ***Sequence.*** Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(C) any issues about disclosure, ~~or~~discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is 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. The

new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the 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 relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily

retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in

philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule

adds: "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." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the

pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for

disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan —

issues about preserving electronically stored information and court orders under Evidence Rule 502.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * * * *

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

* * * * *

Committee Note

Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * * * *

Committee Note

Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 33. Interrogatories to Parties

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

* * * * *

Committee Note

Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

* * * * *

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that

inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An

objection to part of a request must specify the part and permit inspection of the rest.

* * * * *

Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to

the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

(3) ***Specific Motions.***

* * * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit

inspection — as requested under Rule 34.

* * * * *

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

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

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

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

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

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

* * * * *

Committee Note

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, 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." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for

spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of

devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including

governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;

the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the

information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw

adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it 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 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) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to

conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

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 information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, 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 any of 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.

Rule 55. Default; Default Judgment

* * * * *

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

* * * * *

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

Committee Note

Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

* * * * *

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

* * * * *

(C) be accompanied by a copy of the complaint, 2 copies of ~~a~~the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using ~~text prescribed in Form 5~~the form appended to this Rule 4, of the consequences of waiving and not waiving service;

* * * * *

Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption)

To (*name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the

date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

_____

(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Rule 4 Waiver of the Service of Summons.

(Caption)

To (*name the plaintiff's attorney or the unrepresented plaintiff*):

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Committee Note

Subdivision (d). Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4.

EXCERPT FROM THE SEPTEMBER 2014

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The advisory committee unanimously approved and submitted proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, with a recommendation that these changes be approved and transmitted to the Judicial Conference. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Duke Rules Package

Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. During the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law, there was nearly unanimous agreement that the disposition of civil actions could be improved. Participants also agreed that this goal should be pursued by several means: education of the bench and the bar; implementation of pilot projects; and rules amendments.

The advisory committee formed a subcommittee to develop rules amendments consistent with the overarching goal of improving the disposition of civil cases by reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding."

A package of rules amendments was developed through numerous subcommittee conference calls, a mini-conference held in October 2012, and discussions during advisory committee and Committee meetings. The proposed amendments published for comment in August 2013 sought to improve early and active judicial case management through amendments to Rules 4(m) and 16; enhance the means of keeping discovery proportional to the action through amendments to Rules 26, 30, 31, 33, 34, and 36; and encourage increased cooperation among the parties through an amendment to Rule 1.

As expected, the proposed amendments generated significant response; the advisory committee received over 2,300 comments and held three public hearings. The public hearings—held in Washington, D.C.; Phoenix, Arizona; and Dallas, Texas—were well attended by the public and the bar, and the advisory committee heard testimony from more than 120 witnesses. The proposed amendments submitted to the Committee for approval are largely unchanged from those published for public comment. The one significant change as a result of the comments is the withdrawal of amendments that would have reduced the presumptive length and numbers of depositions under Rules 30 and 31, the presumptive numerical limit of interrogatories under Rule 33, and would have established a presumptive numerical limit of requests to admit under Rule 36.

Failure to Preserve Electronically Stored Information

Rule 37(e). 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." Since the rule's adoption, it has become apparent that a more

detailed response to problems arising from the loss of electronically stored information (ESI) is required. This is consistent with a unanimous recommendation by a panel at the Duke Conference that a more detailed rule was necessary.

The advisory committee's discovery subcommittee began work on revising Rule 37(e) with the goal of establishing greater uniformity in how federal courts respond to the loss of ESI. The lack of uniformity—some circuits hold that adverse inference jury instructions can be imposed for the negligent loss of ESI and others require a showing of bad faith—has resulted in a tendency to over preserve ESI out of a fear of serious sanctions if actions are viewed in hindsight as negligent.

When it first began its work, the subcommittee considered many approaches, including establishing detailed preservation guidelines—to establish when the duty to preserve arises, its scope and duration in advance of litigation, and actions available to a court when information is lost. The subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible. The subcommittee chose instead to draft a rule focused on court actions in response to a failure to preserve information that should have been preserved in anticipation of litigation.

Therefore, the resulting proposal focuses on the actions a court may take when ESI "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The proposal uses the duty to preserve that has been uniformly established by case law: the duty arises when litigation is reasonably anticipated.

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 Rule 37(e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. It 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."

Abrogation of Civil Forms

Rules 4 and 84, and the Appendix of Forms. Proposed amendments to Rules 4 and 84 would abrogate Rule 84 and the Appendix of Forms, and amend Rule 4(d)(1)(D) to append present Forms 5 and 6. As previously reported, the proposed amendments follow significant efforts to gather information about how often the forms are used and whether they provide meaningful help to litigants. After carefully studying the issue, the advisory committee determined that abrogation was the best course.

However, two forms required special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. Accordingly, the advisory committee determined that Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.

Most of the comments submitted were supportive of the proposal. Members of the academic community expressed concern that the Rules Enabling Act process is not satisfied by publishing a proposal to abrogate Rule 84 and the Appendix of Forms. They reasoned that each form has become an integral part of the rule it illustrates; therefore, abrogating the form abrogates the rule as well. The advisory committee carefully considered this perspective but unanimously determined that the publication process and the opportunity to comment on the proposal fully satisfies the Rules Enabling Act.

Final Default Judgment

Rule 55(c). Also published in August 2013 was a proposed amendment to Rule 55(c), the rule that deals with setting aside a default or a default judgment. Three comments were submitted, each of which favored the proposed amendment.

The amendment corrects an ambiguity in the interplay between Rules 55(c), 54(b), and 60(b). The ambiguity arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b) in turn provides a list of reasons to "relieve a party . . . from a final judgment, order, or proceeding . . . ."

Reading these rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

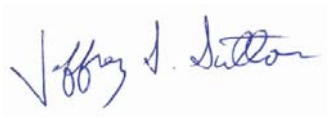
However, some courts have read Rule 55(c) as directing them to consider even nonfinal default judgments within the demanding standards of Rule 60(b). The proposed amendment therefore clarifies that the standards set by Rule 60(b) apply only in seeking relief from a final judgment, by adding in Rule 55(c) the word "final" before "default judgment."

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, and transmit these changes to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



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