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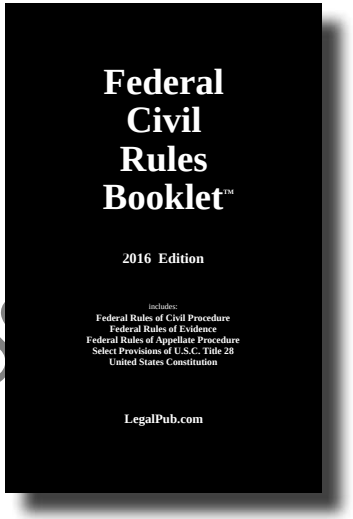

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The
Duke Conference Amendments
to the
Federal Rules of Civil Procedure

Scheduled to Take Effect December 1, 2015

Report to the Chief Justice
on the 2010 Conference on Civil Litigation,
Excerpts from the September 2014 Report
of the Committee on Rules of Practice & Procedure,
The June 2014 Report of the Civil Rules Advisory Committee

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Preface

On April 29, 2015, the United States Supreme Court approved amendments to the following Federal Rules of Civil Procedure: Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, 84, and the Appendix of Forms. The amendments were transmitted to Congress in accordance with the Rules Enabling Act and will take effect on December 1, 2015, absent congressional action to the contrary.

These amendments represent the most sweeping changes to the Federal civil rules in years. For example:

- The iconic definition of "scope of discovery" in Rule 26(b) has been rewritten. It now expressly includes "proportionality" factors. The definition no longer has the language authorizing the court to "order discovery of any matter relevant to the subject matter involved in the action" or the "reasonably calculated to lead to the discovery of admissible evidence" language;

- The provision for protective orders in Rule 26(c) has been revised to allow for allocation of expenses;

- Rule 26(d) is amended to provide for early Rule 34 requests;

- The discovery plan required under Rule 26(f) must now address any issue of "preservation" of electronically stored information ("ESI");

- The "exceptional circumstances" standard for imposing sanctions for loss of ESI in Rule 37(e) has been deleted. It has been replaced with a rule that authorizes and specifies measures a court may employ if information that should have been preserved is lost;

- New Rule 37(e)(1) authorizes the court to order measures to remedy the loss of ESI—but only if the 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, the information could not be restored or replaced by additional discovery, and the court finds prejudice to another party resulting from the loss of the information;

- New Rule 37(e)(2) authorizes the court to take severe measures for the loss of ESI such as adverse-inference instructions, dismissal, or entry of default judgment, but only upon a finding of "intent to de-

prive." Thus, court rulings that have allowed such measures upon a finding of mere "negligence" or "gross-negligence" are no longer permitted;

- The time limit for service of process in Rule 4(m) has been reduced from 120 to 90 days;

- The time to issue the scheduling order under Rule 16(b) has been 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;

- Scheduling orders under Rule 16(b) may provide for "preservation" of ESI, may include agreements reached under Evidence Rule 502, and may direct that before filing a motion for an order relating to discovery, the movant must request a conference with the court;

- The provision in Rule 16(b) for consulting at a scheduling conference by "telephone, mail, or other means" had been deleted;

- Rule 34(b) is amended to require that objections to Rule 34 requests be stated with specificity and must state whether any responsive materials are being withheld on the basis of that objection.

Most of the amendments can trace their origin to the conference held at the Duke University School of Law on May 10-11, 2010, sponsored by the Advisory Committee on the Federal Rules of Civil Procedure. The Duke Conference examined problems in federal civil litigation—particularly excessive costs and delay—and the adequacy of the Federal Rules of Civil Procedure to address them.

To aid the reader in understanding these important rule changes, including their evolution and significance, this publication includes the entire Duke Conference Report, excerpts from the September 2014 Report of the Standing Committee on Rules of Practice and Procedure, and the June 2014 Report of the Advisory Committee on the Federal Rules of Civil Procedure.

The Publisher
April 2015

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REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION

Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure.

INTRODUCTION[1]

The Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law on May 10 and 11. The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation. More than seventy judges, lawyers, and academics presented and discussed empirical information, analytical papers, pilot projects, and various approaches used by both federal and state judges, in considering ways to address the problems of costs and delays in the federal civil justice system. Over 200 invited participants selected to ensure diverse views, expertise, and experience filled all the space available at the Law School and engaged in two days of panel presentations followed by extensive audience discussion. The result is a large amount of empirical information and a rich array of possible approaches to improving how the federal courts serve civil litigants.

I. THE BACKGROUND AND PURPOSE OF THE CONFERENCE

For many years, the Judicial Conference Rules Committees have heard complaints about the costs, delays, and burdens of civil litigation in the federal courts. And for many years, the Rules Committees have worked to address these complaints. That work is reflected in the fact that the Civil Rules, particularly the discovery rules, have been amended more frequently than any others. The more recent changes have been preceded by efforts to obtain reliable empirical information to identify how the rules are operating and the likely effect of proposed changes. Despite these recent rule

1 There are many people and entities to thank and acknowledge for their support of, and work on, the Conference. A complete list is beyond this report. Particular thanks, however, must be extended to the Duke University School of Law and Dean David F. Levi; the Federal Judicial Center and Judge Barbara Rothstein and Dr. Emery Lee; the Administrative Office and Director James Duff; the Judicial Conference of the United States; and each of the Conference panel moderators.

changes, complaints about costs, delays, and burdens in civil litigation have persisted. Many of the complaints are inconsistent and conflicting. The Rules Committees concluded that a more comprehensive and holistic approach was called for in its empirical work. The 2010 Conference was built on an unprecedented array of empirical studies and data, surveys of thousands of lawyers, data from corporations on the actual costs spent on discovery, and white papers issued by national organizations and groups and by prominent lawyers. In addition, the Conference relied on data gathered in earlier rules-related work.

In 1997, the Civil Rules Committee hosted a conference at the Boston College Law School to explore whether the persistent complaints should be the basis for changes to the Federal Rules of Civil Procedure governing discovery. That conference was also preceded by empirical studies conducted by the Federal Judicial Center (FJC). After that conference, changes were proposed to the discovery rules, including a narrowing of the definition of the scope of discovery in Rule 26(b)(1). That change was enacted in 2000. Since then, however, the litigation landscape has changed with astonishing rapidity, largely reflecting the revolution in information technology. The advent and wide use of electronic discovery renewed and amplified the complaints that the existing rules and practices are inadequate to achieve the promise of Rule 1: a just, speedy, and inexpensive resolution to every civil action in the federal courts.

The discovery rules were amended again in 2006 to recognize distinct features of electronic discovery and provide better tools for managing it. The 2007 style project simplified and clarified all the rules, the 2008 enactment of Federal Rule of Evidence 502 reduced the risks of inadvertent privilege waiver in discovery, and the 2009 time-computation project made the calculation of deadlines easier. With these internal changes in place, and with external changes continuing to occur, the Advisory Committee determined that it was time again to step back, to take a hard look at how well the Civil Rules are working, and to analyze feasible and effective ways to reduce costs and delays.

Some of the same information-technology changes that gave rise to electronic discovery also provided the promise of improved access to empirical information about the costs and bur-

dens imposed in civil lawsuits in federal courts. A great amount of empirical data was assembled in preparation for the 2010 Conference. The Rules Committees asked the FJC to study federal civil cases that terminated in the last quarter of 2008, the most recent quarter that could be studied in time for the Conference. The study included detailed surveys of the lawyers about their experience in the cases. The FJC also administered surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA). The Institute for the Advancement of the American Legal System (IAALS) conducted a detailed study of the members of the American College of Trial Lawyers (American College). The Searle Institute at Northwestern Law School and a consortium of large corporations also provided empirical information designed to measure in ways not previously available the actual costs of conducting electronic and other discovery. The rich and detailed data generated by all this work provided an important anchor for the Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.

The many judges, lawyers with diverse practices, consumers of legal services, and academic critics of legal institutions and processes provided an important range of perspectives. Lawyers representing plaintiffs, defendants, or both, and from big and small firms as well as public interest practice, were recruited. Clients were represented by corporate counsel for businesses ranging from very large multinational entities to much smaller companies, as well as by government lawyers. Empirical work was presented by FJC staff, private and public interest research entities, bar associations, and academics. The academic participants also provided historical and jurisprudential grounding. Experience with state-court practices was explored to show the range of possibilities working within the framework of the American adversary system. Different litigation bar groups were represented. The mix of these participants in the organized panels and in the subsequent discussions resulted in consensus on some issues and divergence on others. The diversity of views and experience helped identify the areas in which disagreements tracked the familiar plaintiff-defendant divide and areas in which both disagreements and consensus transcended that line.

Assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers occupied the planning committee, and particularly its chair, Judge John Koeltl, for a year. The empirical information, papers, and reports from the Conference are available at the following website: http://civilconference.uscourts.gov, and the Duke Law Review will publish many of the papers. The Conference was streamed live by the FJC. Attachments to this report include the agenda, which lists the panel topics and panelists; a separate list of the panelists, sorted by panel; and a list of the titles and authors of the papers, sorted by panel. While many of the empirical studies, pilot projects, and proposals for rule changes will continue and may be expanded, the materials presented and discussed at the Conference will provide the inspiration and foundation for years of future work.

II. PRELIMINARY RESULTS OF THE EMPIRICAL AND OTHER STUDIES

A full accounting of the empirical studies and findings is beyond the scope of this report. But a brief summary of some of the preliminary results demonstrates the important role they will play in determining the most promising avenues for improving federal civil litigation.

The FJC conducted a closed-case study of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. The sample was constructed to eliminate categories of cases in which discovery is seldom used and to insure the inclusion of cases likely to encounter the range of litigation issues. The study included every case that had lasted for at least four years and every case that was actually tried, a design likely to capture the cases involving significant discovery. The study showed that plaintiffs reported $15,000 as the median total costs in cases that had at least some discovery. The figure for defendants was $20,000. In the top 5% of this sample, however, the reported costs were much higher. The most expensive cases were those in which both the plaintiff and the defendant requested discovery of electronic information; the 95th percentile was $850,000 for plaintiffs and $991,900 for defendants.

The results closely parallel the findings of the 1997 closed-case survey the FJC did for the Advisory Committee in connection

with the work that led to the Boston College Law School Discovery Conference. Both FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts, but the numbers and the nature of these cases deserve close attention. It would be a mistake to equate the relatively small percentage of such cases with a lack of importance. The most costly cases tend to be the ones that are more complicated and difficult, in which the stakes for the parties, financial or otherwise, are large. One set of issues is whether the cases with the higher costs in the FJC studies are problematic, that is, whether the costs are disproportionate to the stakes. Higher costs may not be problematic if they are justified by the amounts or issues at stake in the litigation; lower costs may still be problematic if they are burdensome because they are the result of excessive discovery that is not justified by what is at stake in the litigation or if the costs are low only because, for example, a defendant agreed to settle a meritless case to avoid high discovery costs.

Several other surveys supplemented the FJC work. The IAALS worked with the American College on a survey that was sent to every Fellow of the American College. With some modifications, that survey was also administered by the FJC for the Litigation Section of the ABA and for NELA. The responses varied considerably among the different groups.[2] The American College respondents—who have more years of experience in the profession and are selected from a small fraction of the bar—reflected greater general dissatisfaction with current civil procedure than the other groups. The ABA Section of Litigation survey responses did not indicate the same degree of dissatisfaction with the rules' ability to meet the goals of Rule 1 as the American College responses, but still reflected a greater degree of dissatisfaction with the operation of the Civil Rules than the FJC survey results.

2 The 1997 and the 2009 FJC surveys asked lawyers about their actual experiences in litigating specific cases and followed up with additional questions for a sample of those cases. This study design has an important advantage over surveys asking for general impressions about how the system is working. Responses to such questions about general impressions tend to be less grounded in actual case experience. Indeed, there was sometimes a striking difference between lawyers' responses about the proportionality of discovery that they experienced in specific cases and general statements about excessive discovery.

Duke Conference Report

The survey responses by the members of the plaintiff-oriented NELA were generally that the Civil Rules are not conducive to securing a "just, speedy, and inexpensive determination of every action," but most remained hopeful that current problems could be remedied by minimal reforms. Among the concerns raised by NELA respondents were that the rules are not applied as written and are applied inconsistently; that local rules often conflict with the Federal Rules; that initial disclosures are not useful in reducing discovery or saving money; that discovery is often abused but sanctions are rarely used (although more than half of the respondents found that in the majority of cases, counsel agree on the scope and timing of discovery); that litigation is too costly; that discovery is too expensive; and that delays increase costs.

On the defense-oriented side, the Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform surveyed corporate counsel of Fortune 200 companies and reported that the survey respondents viewed litigation costs as too high. The participating corporations reported that outside litigation costs account for about 1 in every 300 dollars of U.S. revenue for corporations not in insurance or health care. The respondents also reported that the average discovery costs per major case represent about 30% of the average outside legal fees. The report drafted by the groups conducting the survey concluded that litigation costs continue to rise and are consuming an increasing percentage of corporate revenue; that the U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States; that inefficient and expensive discovery does not aid the fact finder; that companies spend a significant amount every year on litigation transaction costs; and that large organizations often face disproportionately burdensome discovery costs, particularly with respect to e-discovery.

The surveys showed as major perceived difficulties on the defense side that contested issues are not identified early enough to forestall needlessly extensive and expensive discovery; that discovery may impose disproportionate burdens on the parties and at times on nonparties, made worse by the difficulties of discovering electronically stored information; and that adversaries with little information to be discovered have the ability to impose enormous expense on large data producers—not only in legal fees but also in

disruption of ongoing business—with no responsibility under the American Rule to reimburse the costs. The surveys showed as major perceived difficulties on the plaintiffs' side that much of the cost of discovery arises from efforts to evade and "stonewall" clear and legitimate requests, that motions are filed to impose costs rather than to advance the litigation, and that the existing rules are not as effective as they should be in controlling such tactics. One area of consensus in the various surveys, however, was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case. The challenge is to achieve this on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.

Another area of consensus was that making changes to the Federal Rules of Civil Procedure is not sufficient to make meaningful improvements. While there was disagreement over whether and to what extent specific rules should be changed, there was agreement that there is a limit to what rule changes alone can accomplish. Rule changes will be ineffective if they are not accompanied by judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures. What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management. These goals can be advanced by several means, including improved formal ongoing education programs for lawyers and judges, the development and use of "best practices" guides and protocols, and other means of encouraging cost-effective litigation practices consistent with vigorous advocacy.

The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions fall into the categories identified above: changes to the rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts.

III. RULEMAKING

Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.

One recurring question is the extent to which new or amended rules are needed as opposed to more frequent and effective use of the existing rules. Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively. It is important to understand the reasons that existing rules are not invoked or enforced more reliably and the extent to which changes in judicial and lawyer education can respond to those reasons. It is also important to understand the extent to which the problems of costs, delays, and unfairness can be addressed by enforcing the procedural rules. Economic and other incentives that drive how lawyers and litigants conduct litigation are certainly important. One judge with many years of experience both in the district court and on the court of appeals put it succinctly: "what we're seeing is the limits of rules." And it is important to distinguish between costs, delays, and burdens created by such causes as strains placed on federal judges by competing demands on their time on the one hand, and difficulties that arise from any weakness of the existing Civil Rules on the other.

Although rule amendments are not the only answer, the Conference did identify some candidates for amendment that attracted strong support and others that deserve close analysis. Some of these suggestions are already the subject of the Advisory Committee's work. Others draw on existing best practices, case law direction, state-court experience, or the results of pilot projects. Yet other ideas are less well-developed but may prove promising.

A general question is whether a basic premise of the existing rules, that each rule applies to all the cases in the federal system, should continue to govern. Over the years, there have been specific,

well-identified departures from the so-called transubstantivity principle. Examples within the rules include Rule 9(b) and the categories of cases excluded from Rule 26(a)'s initial disclosure requirements. Although no one suggested a wholesale departure from transubstantivity, several Conference papers and participants raised the possibility of increasing the rule-based exceptions to it. Two general categories of exceptions were raised: exceptions by subject matter, such as a case raising official immunity issues; and exceptions by complexity or amount at issue in a case, such as a system that would channel cases into specific tracks.

Pleading and discovery dominated Conference suggestions for rule amendments. Some longstanding topics were conspicuous for lack of attention. Although there was substantial interest in exploring the phenomena of settlement and the "vanishing trial," the Rule 68 provisions on offer of judgment received no more than a collateral glance. And the protective-order provisions of Rule 26(c) drew no comment or attention at all, other than suggestions for standardizing protective orders for categories of litigation, such as employment cases, to expedite their use.

A. Pleading

The 1938 Civil Rules diminished the role of pleadings and greatly expanded the role of discovery. Discovery has been continually on the Advisory Committee's docket since the substantial revisions accomplished by the 1970 amendments. Pleading has been considered at intervals since 1993, when the decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), suggested that adoption of "heightened" pleading is a subject for the Enabling Act process, not judicial decision. At that time, however, the Advisory Committee found no broad support or need for amendments to pleading rules.

The decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), brought pleading to the forefront of attention and debate. The academy in particular reacted in force to these decisions. A speaker at the Association of American Law Schools Civil Procedure Workshop in June 2010 counted eighty-seven law review articles on these cases, a count that continues to grow. Some members of Congress have proposed variations of bills intended to "roll back" the pleading standard, seeming

to assume a fixed status quo of practice that did not exist. The lower courts have, over time, begun to provide the detail and nuance necessary to understand the specific impacts of these most recent Supreme Court interpretations of the familiar words of Rule 8. Well before the 2010 Conference, the Advisory Committee had begun a detailed study of the effects of *Twombly* and *Iqbal* on practice, to determine whether any rule amendments should be proposed and, if so, what direction they should take. That work continues, now informed by the addition of the materials and discussion presented at the Conference. As part of that work, the FJC was asked to provide data on the number and disposition of motions to dismiss in the wake of *Twombly* and *Iqbal*. That study is ongoing, but initial results are expected to be released this fall.

The Conference covered a full spectrum of pleading amendment possibilities, with disagreements that largely corresponded to the plaintiff-defendant divide over whether the current pleading standard provides timely and adequate identification of the issues to be decided and of those cases that cannot succeed and should be dismissed without further expenditure of time and resources. Some speakers presented the view that although the final answer should be adopted through the Enabling Act process, there is an emergency in pleading practice that should be cured by legislation enacted by Congress that would establish a rule that should endure until the Enabling Act process can work through its always deliberate procedures. Others expressed the view that the common-law process of case-law interpretation has smoothed out some of the statements in, and responded to the concerns raised by, *Twombly* and *Iqbal*, and will continue to do so. Yet others argued that although the Court only interpreted the language of Rule 8(a)(2), that rule should be amended to express more clearly the guidance provided by the *Twombly* and *Iqbal* opinions. Some recommended moving still further in the direction of "fact" pleading; these recommendations ranged from less factual detail than Code pleading, to "facts constituting the cause of action," to "notice plus pleading" that explicitly requires a court to consider not only factual allegations but also reasonable inferences from those allegations.

Another set of possibilities, apart from the general Rule 8(a) pleading standard, is to expand on the categories of claims flagged for "heightened pleading" by Rule 9(b). Two of the cat-

egories often mentioned for distinctively demanding pleading standards are claims of conspiracy and actions that involve official immunity.

Yet another set of possibilities is to focus on the Rule 12(b)6) motion to dismiss rather than on the Rule 8(a) standard for sufficient pleading. Much of the debate about pleading standards focuses on cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation. "Information asymmetry" has become the descriptive phrase for cases in which only formal discovery is able to provide plaintiffs with information necessary to plead adequately. The Conference participants provided substantial encouragement for rule amendments that would explicitly integrate pleading with limited initial discovery in such cases. Various forms will be considered. A plaintiff might identify in the complaint fact matters as to which discovery is needed to support an amended complaint and seek focused discovery under judicial supervision. Or one response to a motion to dismiss under Rule 12(b)(6) might be for the plaintiff to make a preliminary showing of "information asymmetry" and to seek focused, supervised discovery before a response to the motion is required. Another approach might be to require the court asked to decide a motion to dismiss to consider the need for discovery in light of probable differences in access to information. Alternatively, there might be some opportunity for prefiling discovery in aid of framing a complaint, drawing from models adopted in several states.

Yet other approaches to pleading have been explored in the past and continue to be open for further work. One would expand the Rule 12(e) motion for a more definite statement to focus on an order to plead in a way that will facilitate case management by the court and parties. Another would expand the use of replies, drawing on approaches used in official-immunity cases as one example.

Pleading problems are of course not limited to complaints. Plaintiffs' attorneys assert that defendants frequently fail to adhere to the response requirements built into Rule 8(b). The Conference, however, did not produce suggestions for revising this rule. The difficulty here seems to lie not in the rule but in its observance, another illustration of the limited capacity of rulemaking to achieve desirable

ends. By contrast, a number of Conference participants did make the specific suggestion that the standard for pleading an affirmative defense should parallel the standard for pleading a claim. That question can be addressed by new rule text, and that possibility will be considered by the Advisory Committee.

B. Discovery

Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases. But examining the cases in which discovery has been problematic because, for example, it was disproportionate or abusive, requires continuing work. Discovery disputes, the burdens discovery imposes, the time discovery consumes, and the costs associated with discovery increase with the stakes in the litigation, both financial and legal; with the complexity of the issues; and with the volume of materials involved in discovery. The Conference produced some specific areas of agreement on the need for some additional rule changes and better enforcement of existing rules, along with areas of disagreement on whether a more significant overhaul of the discovery rules is needed. This was also the area in which the recognition that rule changes alone are inadequate to produce meaningful improvements in litigation behavior or significantly reduce the costs and delays of discovery had the greatest force. Rules alone cannot educate lawyers (or their clients) in the distinction between zealous advocacy and hyper-advocacy.

The Conference discussions of discovery problems extended beyond the costs, delays, and abuses imposed by overbroad discovery demands to include those imposed by discovery responses that do not comply with reasonable obligations. While the defense-side lawyers reported routine use of overbroad and excessive discovery demands, plaintiff-side lawyers reported practices such as “stonewalling” and the paper and electronic versions of “document dumps,” accompanied by long delays, overly narrow interpretations of discovery requests, and motions that require expensive responses from opposing parties and that create delay while the court rules.

Privilege logs were identified as both a cause of unnecessary expense and delay and a symptom of the dysfunction that can produce these problems. Privilege logs are expensive and time-consuming to generate, more so since electronic discovery increased the volume of

materials that must be reviewed. Defense-side lawyers reported that after all the work and expense, the logs are rarely important in many cases. Plaintiff-side lawyers reported that many logs are designed to hide helpful documents behind privilege claims that, if tested, are shown to be implausible. While Rule 26(g) already addresses this abuse of privilege logs, it may be that Rule 26(g) is too obscure in its location or insufficiently forceful in its expression and should be improved. Or it may be that Rule 26(g) is an example of an existing rule that judges and lawyers can be shown ways to use more effectively. Others suggested that the Civil Rules should explicitly permit more flexible approaches to presenting privilege logs and to testing their validity, combined with judicial and legal education about useful approaches. An example of such an approach would be to have a judge supervise sampling techniques that select log documents for a determination of whether the privilege claims are valid. Federal Rule of Evidence Rule 502, enacted in 2008, provides helpful support for further work in this area.

In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended to require a court order finding good cause for discovery going beyond the parties' claims or defenses to include the subject matter involved in the action. The extent of the actual change effected by this amendment continues to be debated. But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform. There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather, the discussion focused on proposals to make the proportionality limit more effective and at the same time to address the need to control both over-demanding discovery requests and under-inclusive discovery responses.

There was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so. Large data producers, whether public or private, for profit or otherwise, made clear a sense of bewilderment about the scope of their obligations to preserve information for litigation and the importance of clear rules that will give assurance that compliance will avert severe sanctions for what in an electronic world are inevitable losses

of information. The uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. Clear guidance should be provided if it can be.

A Conference panel produced a proposal for "Elements of a Preservation Rule" that achieved a consensus on the panel. The proposal exemplifies many of the complexities that led the Advisory and Standing Rules Committees in developing the 2006 electronic discovery rules to at least defer enacting a rule to address them. One question is whether a rule can helpfully define the event that triggers a duty to preserve. Many cases find a duty to preserve before a lawsuit is filed, triggered by events that give "reasonable notice" that litigation is likely. It is unclear that a rule drafted in such general terms would provide the guidance asked for. Careful consideration must be given to whether it is proper to frame a rule addressing preservation before any federal action is filed. Careful consideration must also be given to whether a rule can specify the topics on which information must be preserved in terms more helpful than the open-ended scope of discovery allowed by Rule 26(b)(1), or can helpfully specify the categories of persons or data sources subject to preservation duties. While all acknowledge the challenge, preservation obligations are so important that the Advisory Committee is committed to exploring the possibilities for rulemaking. The Discovery Subcommittee is already at work on these issues.

Spoliation sanctions are directly related to preservation obligations, but the sanctions questions raised at the Conference are more easily defined. Sanctions cover a wide range, from those that directly terminate a case to those that simply award the costs of providing proof by alternative means. An instruction that adverse inferences may be drawn from the destruction of evidence is somewhere in the middle as a matter of formal description, but many lawyers view it as close to the "case-terminating" pole. The circuits divide on the degrees of culpability required for various sanctions. Some allow the most severe sanctions only on finding deliberate intent to suppress evidence. Others allow an adverse inference instruction on finding simple negligence. Conference participants asked for a rule establishing uniform standards of culpability for different sanctions. These issues are also important and will be explored. Depending on the direction taken, it may prove desirable to enlist the Evidence Rules

Advisory Committee in the effort. The Discovery Subcommittee is already at work on possible solutions to the lack of uniformity in sanctions decisions.

The initial disclosure obligations imposed by Rule 26(a)(1) were also the subject of Conference attention. The 1993 version of the initial disclosure rule required identification of witnesses and documents with favorable and unfavorable information relevant to disputed facts alleged with particularity in the pleadings. It also expressly allowed districts to opt out of the initial disclosure requirement by local rule. Many courts opted out. The rule was amended in 2000 to require national uniformity, but reduced the information that had to be disclosed to what was helpful to the disclosing party. A number of Conference participants argued that the result is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents. Some responded that a more robust disclosure obligation is the proper approach, pointing to the experience in the Arizona state courts. Others argued for entirely or largely abandoning the initial disclosure requirement.

Another category of discovery rule proposals continued the strategy of setting presumptive limits on the number of discovery events. This strategy has proven successful in limiting the length of depositions and the number of interrogatories. Many suggested limiting the number of document requests and the number of requests for admission. Other suggestions were to limit the use of requests for admission to authenticating documents, and to prohibit or defer contention interrogatories. Some of these suggestions build on state-court experience and should be studied carefully.

Other discovery proposals are more ambitious. One, building on the model of the Private Securities Litigation Reform Act, would require that discovery be suspended when a motion to dismiss is filed. Another, more sweeping still, would impose the costs of responding to discovery on the requesting party. More limited versions of a requester-pays rule would result in cost sharing at least when discovery demands prove overbroad and disproportionate or the requesting party loses on the merits. Such proposals are

a greater departure from the existing system and would require careful study of their likely impact beyond the discovery process itself. An assessment of the need for such departures depends in part on whether the types of rule changes sketched above, together with other changes to provide more effective enforcement of the rules, will produce the desired improvements, or whether a more thorough shift is required.

C. Case Management

The empirical findings that the current rules work well in most cases bear on the question of whether "simplified rules" should be adopted to facilitate disposition of the many actions that involve relatively small amounts of money. A draft set of "simplified rules" designed to produce a shorter time to trial, with less discovery and fewer motions, for simpler cases with smaller stakes, was prepared several years ago. It was put aside for lack of support. One reason was the response—supported by the experience in federal courts that adopted "case-tracking" by local rule, and in some state courts using "case-tracking"—that few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it. Another reason was that the existing case-management rules, including Rule 16, allow a court to tailor the extent of discovery and motions to the stakes and needs of each case. There was widespread support at the Conference for reinvigorating the case-management tools that already exist in the rules. The question is whether there should be changes in those rules or whether what is needed are changes in how judges and lawyers are educated and trained to invoke, implement, and enforce those rules.

Pleas for universalized and invigorated case management achieved strong consensus at the Conference. Many participants agreed that each case should be managed by a single judge. Others championed the use of magistrate judges to handle pretrial work. There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set, at least for all events other than trial; there was some disagreement over the plausibility of setting firm trial dates at the beginning of an action. Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. Discovery

management is often critical to achieving the proportionality limits of Rule 26. A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.

Several suggestions were made for rule changes that would make ongoing and detailed judicial case-management more often sought and more consistently provided. One suggestion was to require judges to hold in-person Rule 16 conferences in cases involving represented parties, to enable a meaningful and detailed discussion about tailoring discovery and motions to the specific cases. Other suggestions sought to reduce the delays encountered in judicial rulings on discovery disputes, which add to costs and overall delays, by making it easier and more efficient for judges to understand the substance of the dispute and to resolve it. One example would be having a rule-based system for a prompt hearing on a dispute—a pre-motion conference—before a district or magistrate judge, before the parties begin exchanging rounds of discovery motions and briefs, to try to avoid the need for such motions or at least narrow the issues they address.

Other Conference suggestions expressed wide frustration in overall delays by judges in ruling on motions. This problem extends to the amount and distribution of judicial resources, which are well beyond the scope of rule amendments. But some of these problems may be susceptible to improvement by changes in judicial and lawyer training.

IV. THE NEED FOR STRATEGIES IN ADDITION TO RULE AMENDMENTS

A. Judicial and Legal Education

The many possibilities for improving the administration of the present rules can be summarized in shorthand terms: cooperation; proportionality; and sustained, active, hands-on judicial case management. Many of the strategies for pursuing these possibilities lie outside the rulemaking process. The Rules Committees do not train judges or lawyers, write manuals, draft practice pointers, or develop "best practices" guides. But the Rules Committees are eager to work with those responsible for such efforts and to ensure that the

Standing Committee Report

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

September 2014

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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 com-

ment 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.

The proposed amendments to the Federal Rules of Civil Procedure are set forth in Appendix B, along with a report from the chair of the advisory committee.

MEMORANDUM

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

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

RE: Proposed Amendments to the Federal Rules of Civil Procedure

DATE: June 14, 2014

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

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

I. THE DUKE CONFERENCE.

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

and academics made presentations to the conference, followed by a broad-ranging discussion among all participants. The Conference was streamed live by the FJC.

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

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

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

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

II. THE DUKE PROPOSALS.

In a report to the Chief Justice following the Duke Conference, the Committee provided this summary of key conference conclusions: "What is needed can be described in two words—cooperation

and proportionality—and one phrase—sustained, active, hands-on judicial case management." Since the conference, the Committee and others have sought to promote cooperation, proportionality, and active judicial case management through several means.

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

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

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

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

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

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

A. Discovery Proposals.

1. Withdrawn Proposals.

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

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

now required to justify an 11th or 12th deposition would be needed to justify a 6th or 7th deposition, reducing the overall number of depositions permitted under the rules.

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

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

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

a. Scope of Discovery: Proportionality.

There was widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case, but subsequent discussions at the mini-conference sponsored by the Subcommittee revealed significant discomfort with simply adding the word "proportional" to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To provide clearer guidance, the Subcommittee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which cur-

rently are incorporated by cross-reference in Rule 26(b)(1), be relocated to Rule 26(b)(1) and included in the scope of discovery. Under this amendment, the first sentence of Rule 26(b)(1) would read as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[1]

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

Many others saw proportionality as a new limit that would favor defendants. They criticized the factors from Rule 26(b)(2)

1 The current version of this language in Rule 26(b)(2)(C)(iii) reads as follows: "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

(C)(iii) as subjective and so flexible as to defy uniform application. They asserted that "proportionality" will become a new blanket objection to all discovery requests. They were particularly concerned that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Some argued that the proposed change is a solution in search of a problem—that discovery in civil litigation already is proportional to the needs of cases.

After considering these public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery, with some modifications as described below, will improve the rules governing discovery. The Committee reaches this conclusion for three primary reasons.

Findings from the Duke Conference.

As already noted, a principal conclusion of the Duke Conference was that discovery in civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality. This conclusion was expressed often by speakers and panels at the conference and was supported by a number of surveys. In its report to the Chief Justice, the Committee observed that "[o]ne area of consensus in the various surveys . . . was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case."

The FJC prepared a closed-case survey for the Duke Conference. The survey questioned lawyers in 3,550 cases terminated in federal district courts for the last quarter of 2008. Although the survey found that a majority of lawyers thought the discovery in their case generated the "right amount" of information, and more than half reported that the costs of discovery were the "right amount" in proportion to their clients' stakes in the case, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients' stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5% of plaintiff attorneys and 39.9% of defendant attorneys in cases that actually settled. On the question of whether the cost of

litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs and defendants that the rules should be revised to enforce discovery obligations more effectively.

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

Surveys of ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of Litigation, 78% percent [sic] of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, with 33% of plaintiffs' lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreeing that litigation costs are not proportional in large cases. In the NELA survey, which included primarily plaintiffs' lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the

proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce the rules' existing proportionality limitations on their own.

The History of Proportionality in Rule 26.

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

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

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

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

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

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

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

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

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

b. Discovery of Information in Aid of Discovery.

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

Some public comments expressed doubt that discovery of these matters is so well entrenched that the language is no longer

needed. They urged the Committee to make clear in the Committee Note that this kind of discovery remains available. The Note has been revised to make this point.

c. Subject-Matter Discovery.

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

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

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

d. "Reasonably calculated to lead."

The final proposed change in Rule 26(b)(1) deletes the sentence which reads: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The proposed amendment would

replace this sentence with the following language: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

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

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

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

Most of the comments opposing this change complained that it would eliminate a "bedrock" definition of the scope of discovery,

V. RULE 55.

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[2]

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 overuse, 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.

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

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

Rule 4

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; [sic] 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 non-privileged 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 depo-

sition 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

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.

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

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(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:

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(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