

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

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**MEMORANDUM**

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

**From:** Honorable David G. Campbell, Chair  
Advisory Committee on Federal Rules of Civil Procedure

**Date:** May 8, 2013

**Re:** Report of the Advisory Committee on Civil Rules

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**I. Introduction**

The Civil Rules Advisory Committee met at the University of Oklahoma College of Law on April 11-12, 2013. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part IA of this Report presents for action a proposal recommending publication for comment of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations are little changed from the proposals that were presented for discussion, but not for action, at the January meeting of the Standing Committee. They form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending publication for comment of a revised Rule 37(e). Publication was

approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to this June meeting. The revisions provide both remedies and sanctions for failure to preserve discoverable information that should have been preserved. In addition, they describe factors to be considered both in determining whether information should have been preserved and also in determining whether a failure was willful or in bad faith. This report describes the outcome of deliberations by the Discovery Subcommittee and Advisory Committee in addressing the matters raised at the January meeting, and also lists the questions that will be specifically flagged in the request for public comment.

Part IC presents for action a recommendation to approve for publication a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part II presents information on several matters that were discussed at the April meeting. Several of these matters remain on the Committee agenda. Others have been put aside. The Committee is not now seeking guidance on these matters, but will welcome discussion on any of them.

The matters that remain on the agenda include some specific new questions: Should Rule 17(c)(2) be amended to address the circumstances that may require a court to inquire whether it need appoint a guardian for an unrepresented party who may be incompetent? Is it time to reexamine the procedures for stays pending appeal under Rule 62 in conjunction with possible consideration of the same questions by the Appellate Rules Committee?

Several new matters have been referred to the Committee by the Committee on Court Administration and Case Management, mostly in conjunction with development of the next generation CM/ECF program. These questions involve such issues as use of the Notice of Electronic Filing as a certificate of service and the acceptance of electronic signatures. The Committee anticipates that these and a number of other issues involving electronic filing and service will be addressed in a joint committee constituted by representatives from all of the advisory committees. Other of the CACM issues await further development in CACM's work.

Other matters have been on the agenda for some time but do not yet seem ripe for present development. These include the development of pleading standards in response to the Supreme Court's *Twombly* and *Iqbal* decisions, and emerging issues in class-action practice.

Two items have been removed from the agenda. The Committee concluded there is no need to reconsider the provision in Rule 41 that allows dismissal of an action without prejudice on stipulation by all parties. It also concluded that there is no need to adopt a rule recommending speedy trial and appellate action on a petition to return a child to its home country under the Hague Convention on the Civil Aspects of International Child Abduction.

Finally, the Committee benefited from a panel discussion of the use of Technology Assisted Review in discovery of electronically stored information.

**PART I: ACTION ITEMS**

**A. Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37: Action to Recommend Publication of Revised Rules ("Duke Rules" Package)**

The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation, including many that seem suitable subjects for incorporation in the rules. Advanced drafts were discussed at the January meeting of the Standing Committee. Suggestions made during the meeting and other refinements were explored in two conference calls of the Duke Conference Subcommittee. The Advisory Committee recommends publication for comment of the package presented to it by the Subcommittee.

Judge Koeltl, chair of the Duke Conference Subcommittee, recalled that three main themes were repeatedly stressed at the Duke Conference. Proportionality in discovery, cooperation among lawyers, and early and active judicial case management are highly valued and, at times, missing in action. The Subcommittee worked on various means of advancing these goals. The package of rules changes has evolved over a period of nearly three years through many drafts and meetings and discussions in Advisory Committee meetings. The Committee is unanimous in proposing that each part of the amendments be recommended for publication.

The rules proposals are grouped in three sets. One set looks to improve early and effective judicial case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third hopes to advance cooperation. The rules involved in these three sets overlap. The changes are described first, set-by-set. The rules texts showing the changes follow, along with Committee Notes. The final step is a clean set of the rules texts as they would appear after amending.

**Case-Management Proposals**

The case-management proposals reflect a perception that the early stages of litigation often take far too long. "Time is money." The longer it takes to litigate an action, the more it costs. And delay is itself undesirable. The most direct aim at early case management is reflected in Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, setting the time to respond to begin at the first Rule 26(f) conference.

Rule 4(m): Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. The effect will

40 be to get the action moving in half the time. The amendment  
41 responds to the commonly expressed view that four months to serve  
42 the summons and complaint is too long. Concerns that circumstances  
43 occasionally justify a longer time to effect service are met by the  
44 court's duty, already in Rule 4(m), to extend the time if the  
45 plaintiff shows good cause for the failure to serve within the  
46 specified time.

47 The Department of Justice has reacted to this proposal by  
48 suggesting that shortening the time to serve will exacerbate a  
49 problem it now encounters in condemnation actions. Rule  
50 71.1(d)(3)(A) directs that service of notice of the proceeding be  
51 made on defendant-owners "in accordance with Rule 4." This  
52 wholesale incorporation of Rule 4 may seem to include Rule 4(m).  
53 Invoking Rule 4(m) to dismiss a condemnation proceeding for failure  
54 to effect service within the required time, however, is  
55 inconsistent with Rule 71.1(i)(C), which directs that if the  
56 plaintiff "has already taken title, a lesser interest, or  
57 possession of" the property, the court must award compensation.  
58 This provision protects the interests of owners, who would be  
59 disserved if the proceeding is dismissed without awarding  
60 compensation but leaving title in the plaintiff. The Department  
61 regularly finds it necessary to explain to courts that dismissal  
62 under Rule 4(m) is inappropriate in these circumstances, and fears  
63 that this problem will arise more frequently because it is  
64 frequently difficult to identify and serve all owners even within  
65 120 days.

66 The need to better integrate Rule 4(m) with Rule 71.1 is met  
67 by amending Rule 4(m)'s last sentence: "This subdivision (m) does  
68 not apply to service in a foreign country under Rule 4(f) or  
69 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The  
70 Department of Justice believes that this amendment will resolve the  
71 problem. The Department does not believe that there is any further  
72 need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

73 Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) now  
74 provides that the judge must issue the scheduling order within the  
75 earlier of 120 days after any defendant has been served or 90 days  
76 after any defendant has appeared. Several Subcommittee drafts cut  
77 these times in half, to 60 days and 45 days. The recommended  
78 revision, however, cuts the times to 90 days after any defendant is  
79 served or 60 days after any defendant appears. The reduced  
80 reductions reflect concerns that in many cases it may not be  
81 possible to be prepared adequately for a productive scheduling  
82 conference in a shorter period. These concerns are further  
83 reflected in the addition of a new provision that allows the judge

84 to extend the time on finding good cause for delay. The Committee  
85 believes that even this modest reduction in the presumed time will  
86 do some good, while affording adequate time for most cases.

87 The Department of Justice, however, expressed some concerns  
88 about accelerating time lines at the onset of litigation. Many of  
89 the reasons are much the same as those that underlie the Rule 12  
90 provisions allowing it 60 days to answer. It is not just that the  
91 Department is a vast and intricate organization. Its clients often  
92 are other vast and intricate government agencies. The time required  
93 to designate the right attorneys in the Department is followed by  
94 the time required to identify the right people in the client agency  
95 to work with the attorneys and to begin gathering the information  
96 necessary to litigate. More generally, there is room to be  
97 skeptical that shortening the time to serve and the time to enter  
98 a scheduling order will do much to advance things. It is important  
99 that lawyers have time at the beginning of an action to think about  
100 the case, and to discuss it with each other. More time to prepare  
101 will make for a better scheduling conference, and for more  
102 effective discovery in the end. The Note should reflect that  
103 extensions should be liberally granted for the sake of better  
104 overall efficiency.

105 Other attorneys have expressed similar concerns that there are  
106 cases in which it is not feasible to prepare for a meaningful  
107 scheduling conference on an accelerated schedule. A defendant may  
108 take time to select its attorneys, compressing the apparent  
109 schedule. And some cases are inherently too complex to allow even  
110 a preliminary working grasp of likely litigation needs in the  
111 presumptive times allowed.

112 These concerns persuaded the Subcommittee to relax its initial  
113 proposal, which would have cut the present times in half, to 60  
114 days after service or 45 days after an appearance. They also were  
115 responsible for adding the new provision that authorizes the court  
116 to delay the scheduling order beyond the specified times. This  
117 provision would provide more time than the current rule, but only  
118 in appropriate cases, and seems protection enough, both for complex  
119 cases in general and for the special needs of the Department of  
120 Justice.

121 Rule 16(b): Actual Conference: Present Rule 16(b) (1) (B) authorizes  
122 issuance of a scheduling order after receiving the parties' Rule  
123 26(f) report or after consulting "at a scheduling conference by  
124 telephone, mail, or other means."

125 The Committee believes that an actual conference by direct

126 communication among the parties and court is very valuable. It  
127 considered a proposal that would require an actual conference in  
128 all actions, except those in exempted categories. This proposal was  
129 rejected in the end after hearing from several judges and lawyers  
130 at the miniconference hosted by the Subcommittee in Dallas that  
131 there are cases in which the judge is confident that a Rule 26(f)  
132 report prepared by able lawyers provides a sound basis for a  
133 scheduling order without further ado. But if there is to be a  
134 scheduling conference, the Committee believes it should be by  
135 direct communication; "mail, or other means" are not effective.  
136 This change is effected by requiring consultation "at a scheduling  
137 conference," striking "by telephone, mail, or other means." The  
138 Committee Note makes it clear that a conference can be held face-  
139 to-face, by telephone, or by other means of simultaneous  
140 communication.

141 A separate issue has been held in abeyance. Rule 16(b)(1)  
142 exempts "categories of actions exempted by local rule" from the  
143 scheduling order requirement. It may be attractive to substitute a  
144 uniform national set of exemptions, uniform not only for Rule 16(b)  
145 but integrated with the exemptions from initial disclosure. Actions  
146 exempt from initial disclosure also are exempt from the discovery  
147 moratorium in Rule 26(d) and the parties' conference required by  
148 Rule 26(f). Exempting the same categories of actions from the  
149 scheduling order requirement would simplify the rules and should  
150 respond to similar concerns. But it has seemed better to await  
151 further inquiry into the categories now exempted by local rules,  
152 and to explore the reasons for exemptions not now made in Rule  
153 26(a)(1)(B). This topic is being developed for possible future  
154 action.

155 Rules 16(b)(3), 26(f): Additional Subjects: Three subjects are  
156 proposed for addition to the Rule 16(b)(3) list of permitted  
157 contents of a scheduling order. Two of them are also proposed for  
158 the list of subjects in a Rule 26(f) discovery plan. Those two are  
159 described here; the third is noted separately below.

160 The proposals would permit a scheduling order and discovery  
161 plan to provide for the preservation of electronically stored  
162 information and to include agreements reached under Rule 502 of the  
163 Federal Rules of Evidence. Each is an attempt to remind litigants  
164 that these are useful subjects for discussion and agreement. The  
165 Evidence Rules Committee is concerned that Rule 502 remains  
166 underused; an express reference in Rule 16 may promote its more  
167 effective use.

168 Rule 16(b)(3): Conference Before Discovery Motion: This proposal

169 would add a new Rule 16(b) (3) (v), permitting a scheduling order to  
170 "direct that before moving for an order relating to discovery the  
171 movant must request a conference with the court."

172 Many courts, but less than a majority, now have local rules  
173 similar to this proposal. Experience with these rules shows that an  
174 informal pre-motion conference with the court often resolves a  
175 discovery dispute without the need for a motion, briefing, and  
176 order. The practice has proved highly effective in reducing cost  
177 and delay.

178 The Subcommittee considered an alternative that would have  
179 required a conference with the court before any discovery motion.  
180 In the end, it concluded that at present it is better simply to  
181 encourage this practice. Many judges do not require a pre-motion  
182 conference now. It is possible that local conditions and practices  
183 in some courts establish effective substitutes. Absent a stronger  
184 showing of need, it seems premature to adopt a mandate, but the  
185 consideration of this practice should encourage its use.

186 Rule 26(d) (1): Early Rule 34 Requests: The Subcommittee considered  
187 at length a variety of proposals that would allow discovery  
188 requests to be made before the parties' Rule 26(f) conference. The  
189 purpose of the early requests would not be to start the time to  
190 respond. Instead, the purpose is to facilitate the conference by  
191 allowing consideration of actual requests, providing a focus for  
192 specific discussion. In the end, the proposal has been limited to  
193 Rule 34 requests to produce.

194 The proposal adds a new Rule 26(d) (2), better set out in full  
195 than summarized:

196 (2) *Early Rule 34 Requests.*

197 (A) *Time to Deliver.* More than 21 days after the summons and  
198 complaint are served on any party, a request under Rule  
199 34 may be delivered:

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

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

203 (B) *When Considered Served.* The request is considered as  
204 served at the first Rule 26(f) conference.

205 A corresponding change would be made in Rule 34(b) (2) (A),

206 setting the time to respond to a request delivered under Rule  
207 26(d)(2) within 30 days after the parties' first Rule 26(f)  
208 conference.

209 Some participants in the miniconference – particularly those  
210 who typically represent plaintiffs – said they would take advantage  
211 of this procedure to advance the Rule 26(f) conference and early  
212 discovery planning. Concrete disputes as to the scope of discovery  
213 could then be brought to the attention of the court at a Rule 16  
214 conference. Others expressed skepticism, wondering why anyone would  
215 want to expose discovery strategy earlier than required and fearing  
216 that initial requests made before the conference are likely to be  
217 unreasonably broad and to generate an inertia that will resist  
218 change at the conference.

219 After considering these concerns, the Subcommittee concluded  
220 that the opportunity should be made available to advance the Rule  
221 26(f) conference by providing a specific focus for discussion of  
222 Rule 34 requests, which often involve heavy discovery burdens.  
223 Little harm will be done if parties fail to take advantage of the  
224 opportunity, and real benefit may be gained if they do.

#### 225 Proportionality: Discovery Proposals

226 Several proposals seek to promote responsible use of discovery  
227 proportional to the needs of the case. The most important address  
228 the scope of discovery directly by amending Rule 26(b)(1), and by  
229 promoting clearer responses to Rule 34 requests to produce. Others  
230 tighten the presumptive limits on the number and duration of  
231 depositions and the number of interrogatories, and for the first  
232 time add a presumptive limit of 25 to the number of requests for  
233 admission other than those that relate to the genuineness of  
234 documents. Yet another explicitly recognizes the present authority  
235 to issue a protective order specifying an allocation of expenses  
236 incurred by discovery.

237 Rule 26(b)(1): Proportionality By Adopting Rule 26(b)(2)(C)(iii)  
238 Cost-Benefit Analysis: In 1983 the Committee thought to have solved  
239 the problems of disproportionate discovery by adding the provision  
240 that has come to be lodged in present Rule 26(b)(2)(C)(iii). This  
241 rule directs that "on motion or on its own, the court must limit  
242 the frequency or extent of discovery otherwise allowed by these  
243 rules if it determines that \* \* \* (iii) the burden or expense of  
244 the proposed discovery outweighs its likely benefit, considering  
245 the needs of the case, the amount in controversy, the parties'  
246 resources, the importance of the issues at stake in the action, and  
247 the importance of the discovery in resolving the issues."

248           Although the rule now directs that the court "must" limit  
249 discovery, on its own and without motion, it cannot be said to have  
250 realized the hopes of its authors. In most cases discovery now, as  
251 it was then, is accomplished in reasonable proportion to the  
252 realistic needs of the case. This conclusion has been established  
253 by repeated empirical studies, including the large-scale closed-  
254 case study done by the Federal Judicial Center for the Duke  
255 Conference. But at the same time discovery runs out of proportion  
256 in a worrisome number of cases, particularly those that are  
257 complex, involve high stakes, and generate particularly contentious  
258 adversary behavior. The number of cases and the burdens imposed  
259 present serious problems. These problems have not yet been solved.

260           Several proposals were considered to limit the general scope  
261 of discovery provided by Rule 26(b)(1) by adding a requirement of  
262 "proportionality." Addition of this term without definition,  
263 however, generated concerns that it would be too open-ended to  
264 support uniform or even meaningful implementation. Limiting it to  
265 "reasonably proportional" did not allay those concerns. At the same  
266 time, many participants in the miniconference expressed respect for  
267 the principles embodied in Rule 26(b)(2)(C)(iii), finding it  
268 suitably nuanced and balanced. The problem is not with the rule  
269 text but with its implementation – it is not invoked often enough  
270 to dampen excessive discovery demands.

271           These considerations frame the proposal to revise the scope of  
272 discovery defined in Rule 26(b)(1) by transferring the analysis  
273 required by present Rule 26(b)(2)(C)(iii) to become a limit on the  
274 scope of discovery, so that discovery must be

275           proportional to the needs of the case considering the  
276 amount in controversy, the importance of the issues at  
277 stake in the action, the parties's resources, the  
278 importance of the discovery in resolving the issues, and  
279 whether the burden or expense of the proposed discovery  
280 outweighs its likely benefit.

281           A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to  
282 cross-refer to (b)(1): the court remains under a duty to limit the  
283 frequency or extent of discovery that exceeds these limits, on  
284 motion or on its own.

285           Other changes as well are made in Rule 26(b)(1). The rule was  
286 amended in 2000 to introduce a distinction between party-controlled  
287 discovery and court-controlled discovery. Party-controlled  
288 discovery is now limited to "matter that is relevant to any party's  
289 claim or defense." That provision is carried forward in proposed

290 Rule 26(b)(1). Court-controlled discovery is now authorized to  
291 extend, on court order for good cause, to "any matter relevant to  
292 the subject matter involved in the action." The Committee Note made  
293 it clear that the parties' claims or defenses are those identified  
294 in the pleadings. The proposed amendment deletes the "subject  
295 matter involved in the action" from the scope of discovery.  
296 Discovery should be limited to the parties' claims or defenses. If  
297 discovery of information relevant to the claims or defenses  
298 identified in the pleadings shows support for new claims or  
299 defenses, amendment of the pleadings may be allowed when  
300 appropriate.

301 Rule 26(b)(1) also would be amended by revising the  
302 penultimate sentence: "Relevant information need not be admissible  
303 at the trial if the discovery appears reasonably calculated to lead  
304 to the discovery of admissible evidence." This provision traces  
305 back to 1946, when it was added to overcome decisions that denied  
306 discovery solely on the ground that the requested information would  
307 not be admissible in evidence. A common example was hearsay.  
308 Although a witness often could not testify that someone told him  
309 the defendant ran through a red light, knowing who it was that told  
310 that to the witness could readily lead to admissible testimony.  
311 This sentence was amended in 2000 to add "Relevant" as the first  
312 word. The 2000 Committee Note reflects concern that the "reasonably  
313 calculated" standard "might swallow any other limitation on the  
314 scope of discovery." "Relevant" was added "to clarify that  
315 information must be relevant to be discoverable \* \* \*." Despite the  
316 2000 amendment, many cases continue to cite the "reasonably  
317 calculated" language as though it defines the scope of discovery,  
318 and judges often hear lawyers argue that this sentence sets a broad  
319 standard for appropriate discovery.

320 To offset the risk that the provision addressing admissibility  
321 may defeat the limits otherwise defining the scope of discovery,  
322 the proposal is to revise this sentence to read: "Information  
323 within this scope of discovery need not be admissible in evidence  
324 to be discoverable." The limits defining the scope of discovery are  
325 thus preserved. The purpose of the amendment is to carry through  
326 the purpose underlying the 2000 amendment, with the hope that this  
327 further change will at last overcome the inertia that has thwarted  
328 this purpose.

329 A portion of present Rule 26(b)(1) is omitted from the  
330 proposed revision. After allowing discovery of any matter relevant  
331 to any party's claim or defense, the present rule adds: "including  
332 the existence, description, nature, custody, condition, and  
333 location of any documents or other tangible things and the identity

334 and location of persons who know of any discoverable matter."  
335 Discovery of such matters is so deeply entrenched in practice that  
336 it is no longer necessary to clutter the rule text with these  
337 examples.

338 Several discovery rules cross-refer to Rule 26(b)(2) as a  
339 reminder that it applies to all methods of discovery. Transferring  
340 the restrictions of (b)(2)(C)(iii) to become part of (b)(1) makes  
341 it appropriate to revise the cross-references to include both  
342 (b)(1) and (b)(2). The revisions are shown throughout the proposed  
343 rules.

344 Proportionality: Rule 26(c): Allocation of Expenses: Another  
345 proposal adds to Rule 26(c)(1)(B) an explicit recognition of the  
346 authority to enter a protective order that allocates the expenses  
347 of discovery. This power is implicit in present Rule 26(c), and is  
348 being exercised with increasing frequency. The amendment will make  
349 the power explicit, avoiding arguments that it is not conferred by  
350 the present rule text. The Committee soon will begin to focus on  
351 proposals advanced by some groups that greater changes should be  
352 made in the general presumption that the responding party should  
353 bear the costs imposed by discovery requests. It will be some time,  
354 however, before the Committee determines whether any broader  
355 recommendations might be made.

356 Proportionality: Rules 30, 31, 33, and 36: Presumptive Numerical  
357 Limits: Rules 30 and 31 establish a presumptive limit of 10  
358 depositions by the plaintiffs, or by the defendants, or by third-  
359 party defendants. Rule 30(d)(1) establishes a presumptive time  
360 limit of 1 day of 7 hours for a deposition by oral examination.  
361 Rule 33(a)(1) sets a presumptive limit of "no more than 25 written  
362 interrogatories, including all discrete subparts." There are no  
363 presumptive numerical limits for Rule 34 requests to produce or for  
364 Rule 36 requests to admit. The proposals reduce the limits in  
365 Rules 30, 31, and 33. They add to Rule 36, for the first time,  
366 presumptive numerical limits. A presumptive limit of 25 Rule 34  
367 requests to produce was studied at length but ultimately abandoned.

368 The proposals would reduce the presumptive limit on the number  
369 of depositions from 10 to 5, and would reduce the presumptive  
370 duration to 1 day of 6 hours. Rules 30 and 31 continue to provide  
371 that the court must grant leave to take more depositions "to the  
372 extent consistent with Rule 26(b)(1) and (2)."

373 Reducing the presumptive limit on the number of depositions  
374 was considered at length. Some judges at the Duke Conference  
375 expressed the view that civil litigators over-use depositions,

376 apparently holding the view that every witness who testifies at  
377 trial must be deposed beforehand. These judges noted that they  
378 regularly see lawyers effectively cross-examine witnesses in  
379 criminal trials without the benefit of depositions, a practice  
380 widely viewed as sufficient to satisfy the demands of due process.  
381 The judges also observed that they rarely, if ever, see witnesses  
382 effectively impeached with deposition transcripts. At the same  
383 time, many parties are opting to resolve their disputes through  
384 private arbitration or mediation services that are less expensive  
385 than civil litigation because they do not involve depositions, and  
386 yet these alternatives are thought sufficient to reach resolution  
387 of important disagreements.

388 Research by the FJC further supports these concerns, and also  
389 suggests that a presumptive limit of 5 depositions will have no  
390 effect in most cases. Emery Lee returned to the data base compiled  
391 for the 2010 FJC study to measure the frequency of cases with more  
392 than 5 depositions by plaintiffs or by defendants. The data base  
393 itself was built by excluding several categories of actions that  
394 are not likely to have discovery. The data for numbers of  
395 depositions were further limited by counting only cases in which  
396 there was at least one deposition. Drawing from reports by  
397 plaintiffs of how many depositions the plaintiffs took and how many  
398 depositions the defendants took, and parallel reports by  
399 defendants, the numbers ranged from 14% to 23% of cases with more  
400 than 5 depositions by the plaintiff or by the defendant. With one  
401 exception, the estimates were that 78% or 79% of these cases had 10  
402 or fewer depositions. Other findings are that each additional  
403 deposition increases the cost of an action by about 5%, and that  
404 estimates that discovery costs were "too high" increase with the  
405 number of depositions.

406 On the other hand, many comments say that the present limit of  
407 10 depositions works well – that leave is readily granted when  
408 there is good reason to take more than 10, and that parties do not  
409 wantonly take more than 5 depositions simply because the  
410 presumptive limit is 10. More pointedly, some lawyers who represent  
411 individual plaintiffs in employment discrimination cases have urged  
412 that they commonly need more than 5 depositions to establish their  
413 claims.

414 In short, it appears that less than one-quarter of federal  
415 court civil cases result in more than five depositions, and even  
416 fewer in more than ten. The question is whether it will be useful  
417 to revise Rules 30 and 31 to establish a lower presumptive  
418 threshold for potential judicial management. Setting the limit at  
419 5 does not mean that motions and orders must be made in every case

420 that deserves more than 5 – the parties can be expected to agree,  
421 and should manage to agree, in most of these cases. But the lower  
422 limit can be useful in inducing reflection on the need for  
423 depositions, in prompting discussions among the parties, and – when  
424 those avenues fail – in securing court supervision. The Committee  
425 Note addresses the concerns expressed by those who oppose the new  
426 limit by stressing that leave to take more than 5 depositions must  
427 be granted when appropriate. The fear that lowering the threshold  
428 will raise judicial resistance seems ill-founded. Courts are  
429 willing now to grant leave to take more than 10 depositions per  
430 side in actions that warrant a greater number. The argument that  
431 they will become reluctant to grant leave to take more than 5, or  
432 more than 10, is not persuasive.

433           Considering judicial experience and the FJC findings, and  
434 aiming to decrease the cost of civil litigation, making it more  
435 accessible for average citizens, the Committee is persuaded that  
436 the presumptive number of depositions should be reduced. Hopefully,  
437 the change will result in an adjustment of expectations concerning  
438 the appropriate amount of civil discovery.

439           Shortening the presumptive length of a deposition from 7 hours  
440 to 6 hours reflects revision of earlier drafts that would have  
441 reduced the time to 4 hours. The 4-hour limit was prompted by  
442 experience in some state courts. Arizona, for example, adopted a 4-  
443 hour limit several years ago. Judges in Arizona federal courts  
444 often find that parties stipulate to 4-hour limits based on their  
445 favorable experience with the state rule. But several comments have  
446 suggested that for many depositions, 4 hours do not suffice. At the  
447 same time, several others have observed that squeezing 7 hours of  
448 deposition time into one day, after accounting for lunch time and  
449 other breaks, often means that the deposition extends well into the  
450 evening. Judges also have noted that 6 hours of trial time makes  
451 for a very full day when lunch and breaks are considered. The  
452 reduction to 6 hours is intended to reduce the burden of deposing  
453 a witness for 7 hours in one day, but without sacrificing the  
454 opportunity to conduct a complete examination.

455           The proposal to reduce the presumptive number of Rule 33  
456 interrogatories to 15 has not attracted much concern. There has  
457 been some concern that 15 interrogatories are not enough even for  
458 some relatively small-stakes cases. As with Rules 30 and 31, the  
459 Subcommittee has concluded that 15 will meet the needs of most  
460 cases, and that it is advantageous to provide for court supervision  
461 when the parties cannot reach agreement in the cases that may  
462 justify a greater number.

463 Rule 36 requests to admit are an established part of the  
464 rules, whether they be regarded as true "discovery" devices or as  
465 a device for framing the issues more directly than is accomplished  
466 even by contention interrogatories. The proposal to add a  
467 presumptive limit of 25 expressly exempts requests to admit the  
468 genuineness of documents, avoiding any risk that the limit might  
469 cause problems in document-heavy litigation. This proposal did not  
470 draw much criticism from those who commented on Subcommittee  
471 deliberations. (The Subcommittee also considered provisions that  
472 would generally defer the time for admissions to the completion of  
473 other discovery, but in the end decided that early requests can be  
474 useful.)

475 Proportionality: Rule 34 Objections and Responses: Discovery  
476 burdens can be pushed out of proportion to the reasonable needs of  
477 a case by those asked to respond, not only those who make requests.  
478 The Subcommittee considered adding to Rule 26(g) a provision that  
479 signing a discovery request, response, or objection certifies that  
480 it is "not evasive." That proposal was put aside in the face of  
481 concerns that "evasive" is a malleable concept, and that  
482 malleability will invite satellite litigation.

483 More specific concerns underlie Rule 34 proposals addressing  
484 objections and actual production. Objections are addressed in two  
485 ways. First, Rule 34(b)(2)(B) would require that the grounds for  
486 objecting to a request be stated with specificity. This language is  
487 borrowed from Rule 33(b)(4), where it has served well. Second, Rule  
488 34(b)(2)(C) would require that an objection "state whether any  
489 responsive materials are being withheld on the basis of that  
490 objection." This provision responds to the common lament that Rule  
491 34 responses often begin with a "laundry list" of objections, then  
492 produce volumes of materials, and finally conclude that the  
493 production is made subject to the objections. The requesting party  
494 is left uncertain whether anything actually has been withheld.  
495 Providing that information can aid the decision whether to contest  
496 the objections. The Committee Note also explains that it is proper  
497 to state limits on the extent of the search without further  
498 elaboration – for example, that the search was limited to documents  
499 created on or after a specified date, or maintained by identified  
500 sources.

501 Actual production is addressed by new language in Rule  
502 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv).  
503 Present Rule 34 recognizes a distinction between permitting  
504 inspection of documents, electronically stored information, or  
505 tangible things, and actually producing copies. The distinction,  
506 however, is not clearly developed in the rule. If a party elects to

507 produce materials rather than permit inspection, the current rule  
508 does not indicate when such production is required to be made. The  
509 new provision directs that a party electing to produce must state  
510 that copies will be produced, and directs that production be  
511 completed no later than the time for inspection stated in the  
512 request or a later reasonable time stated in the response. The  
513 Committee Note recognizes the value of "rolling production" that  
514 makes production in discrete batches. Rule 37 is amended by adding  
515 authority to move for an order to compel production if "a party  
516 fails to produce documents."

517 Cooperation

518 Reasonable cooperation among adversaries is vitally important  
519 to successful use of the resources provided by the Civil Rules.  
520 Participants at the Duke Conference regularly pointed to the costs  
521 imposed by hyperadversary behavior and wished for some rule that  
522 would enhance cooperation.

523 It would be possible to impose a duty of cooperation by direct  
524 rule provisions. The provisions might be limited to the discovery  
525 rules alone, because discovery behavior gives rise to many of the  
526 laments, or could apply generally to all litigation behavior.  
527 Consideration of drafts that would impose a direct and general duty  
528 of cooperation faced several concerns. Cooperation is an open-ended  
529 concept. It is difficult to identify a proper balance of  
530 cooperation with legitimate, even essential, adversary behavior. A  
531 general duty might easily generate excessive collateral litigation,  
532 similar to the experience with an abandoned and unlamented version  
533 of Rule 11. And there may be some risk that a general duty of  
534 cooperation could conflict with professional responsibilities of  
535 effective representation. These drafts were abandoned.

536 What is proposed is a modest addition to Rule 1. The parties  
537 are made to share responsibility for achieving the high aspirations  
538 expressed in Rule 1: "[T]hese rules should be construed,  
539 administered, and employed by the court and the parties to secure  
540 the just, speedy, and inexpensive determination of every action and  
541 proceeding." The Note observes that most lawyers and parties  
542 conform to this expectation, and notes that "[e]ffective advocacy  
543 is consistent with – and indeed depends upon – cooperative and  
544 proportional use of procedure."

545 As amended, Rule 1 will encourage cooperation by lawyers and  
546 parties directly, and will provide useful support for judicial  
547 efforts to elicit better cooperation when the lawyers and parties  
548 fall short. It cannot be expected to cure all adversary excesses,

549 but it will do some good.

550 Package

551 These proposals constitute a whole that is greater than the  
552 sum of its parts. Together, these proposals can do much to reduce  
553 cost and delay. Still, each part must be scrutinized and stand, be  
554 modified, or fall on its own. The proposals are not interdependent  
555 in the sense that all, or even most, must be adopted to achieve  
556 meaningful gains.

557 **Duke Rules Package**

558 **Rule 1 Scope and Purpose**

559 \* \* \* [These rules] should be construed, ~~and~~  
560 administered, and employed by the court and the parties  
561 to secure the just, speedy, and inexpensive determination  
562 of every action and proceeding.

563 Committee Note

564 Rule 1 is amended to emphasize that just as the court should  
565 construe and administer these rules to secure the just, speedy, and  
566 inexpensive determination of every action, so the parties share the  
567 responsibility to employ the rules in the same way. Most lawyers  
568 and parties cooperate to achieve these ends. But discussions of  
569 ways to improve the administration of civil justice regularly  
570 include pleas to discourage over-use, misuse, and abuse of  
571 procedural tools that increase cost and result in delay. Effective  
572 advocacy is consistent with – and indeed depends upon – cooperative  
573 and proportional use of procedure.

574 **Rule 4 Summons**

575 \* \* \*

576 (m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60  
577 days after the complaint is filed, the court \* \* \* must  
578 dismiss the action without prejudice against that defendant or  
579 order that service be made within a specified time. But if  
580 the plaintiff shows good cause for the failure, the court must  
581 extend the time for service for an appropriate period. This  
582 subdivision does not apply to service in a foreign country  
583 under Rule 4(f) or 4(j)(1) or to service of a notice under  
584 Rule 71.1(d)(3)(A).

585 Committee Note

586 The presumptive time for serving a defendant is reduced from  
587 120 days to 60 days. This change, together with the shortened times  
588 for issuing a scheduling order set by amended Rule 16(b)(2), will  
589 reduce delay at the beginning of litigation.

590           The final sentence is amended to make it clear that the  
591 reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule  
592 4(m). Dismissal under Rule 4(m) for failure to make timely service  
593 would be inconsistent with the limits on dismissal established by  
594 Rule 71.1(i)(C) when "the plaintiff has already taken title, a  
595 lesser interest, or possession as to any part of" the property.

596           **Rule 16 Pretrial Conferences; Scheduling; Management**

597           (b) SCHEDULING.

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

602           (A) after receiving the parties' report under Rule  
603 26(f); or

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

607           (2) *Time to Issue.* The judge must issue the scheduling order  
608 as soon as practicable, but ~~in any event~~ unless the judge  
609 finds good cause for delay the judge must issue it within  
610 the earlier of ~~120~~ 90 days after any defendant has been  
611 served with the complaint or ~~90~~ 60 days after any  
612 defendant has appeared.

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

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

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

618           (iv) include any agreements the parties reach for  
619 asserting claims of privilege or of protection  
620 as trial-preparation material after  
621 information is produced, including agreements  
622 reached under Federal Rule of Evidence 502;

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

626           [present (v) and (vi) would be renumbered] \* \* \*

627           Committee Note

628           The provision for consulting at a scheduling conference by

629 "telephone, mail, or other means" is deleted. A scheduling  
630 conference is more effective if the court and parties engage in  
631 direct simultaneous communication. The conference may be held in  
632 person, by telephone, or by more sophisticated electronic means.

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

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

650 The order may provide for preservation of electronically  
651 stored information, a topic also added to the provisions of a  
652 discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule  
653 37(e) recognize that a duty to preserve discoverable information  
654 may arise before an action is filed, and may be shaped by pre-filing  
655 requests to preserve and responses to them.

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

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

668 **Rule 26. Duty to Disclose; General Provisions; Governing**  
669 **Discovery**

670 (b) DISCOVERY SCOPE AND LIMITS.

671 (1) *Scope in General.* Unless otherwise limited by court order,

672 the scope of discovery is as follows: Parties may obtain  
673 discovery regarding any nonprivileged matter that is  
674 relevant to any party's claim or defense and proportional  
675 to the needs of the case considering the amount in  
676 controversy, the importance of the issues at stake in the  
677 action, the parties' resources, the importance of the  
678 discovery in resolving the issues, and whether the burden  
679 or expense of the proposed discovery outweighs its likely  
680 benefit. Information within this scope of discovery need  
681 not be admissible in evidence to be discoverable. -  
682 including the existence, description, nature, custody,  
683 condition, and location of any documents or other  
684 tangible things and the identity and location of persons  
685 who know of any discoverable matter. For good cause, the  
686 court may order discovery of any matter relevant to the  
687 subject matter involved in the action. Relevant  
688 information need not be admissible at the trial if the  
689 discovery appears reasonably calculated to lead to the  
690 discovery of admissible evidence. All discovery is  
691 subject to the limitations imposed by Rule 26(b)(2)(C).

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

693 (A) *When Permitted.* By order, the court may alter the  
694 limits in these rules on the number of depositions,  
695 and interrogatories, and requests for admissions,  
696 or on the length of depositions under Rule 30. By  
697 order or local rule, the court may also limit the  
698 number of requests under Rule 36.

699 \* \* \*

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

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

712 \* \* \*

713 (c) PROTECTIVE ORDERS.

714 (1) *In General.* \* \* \* The court may, for good cause, issue an

715 order to protect a party or person from annoyance,  
716 embarrassment, oppression, or undue burden or expense,  
717 including one or more of the following: \* \* \*

718 (B) specifying terms, including time and place or the  
719 allocation of expenses, for the disclosure or  
720 discovery; \* \* \*

721 (d) TIMING AND SEQUENCE OF DISCOVERY.

722 (1) *Timing*. A party may not seek discovery from any source  
723 before the parties have conferred as required by Rule  
724 26(f), except:

725 (A) in a proceeding exempted from initial disclosure  
726 under Rule 26(a)(1)(B); or

727 (B) when authorized by these rules, including Rule  
728 26(d)(2), by stipulation, or by court order.

729 (2) Early Rule 34 Requests.

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

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

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

736 (B) When Considered Served. The request is considered as  
737 served at the first Rule 26(f) conference.

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

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

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

745 \* \* \*

746 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

747 (1) *Conference Timing*. Except in a proceeding exempted from  
748 initial disclosure under Rule 26(a)(1)(B) or \* \* \*

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

751 (C) any issues about disclosure, ~~or~~ discovery, or

752                    preservation of electronically stored information,  
753                    including the form or forms in which it should be  
754                    produced;

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

761                    Committee Note

762                    The scope of discovery is changed in several ways. Rule  
763                    26(b)(1) is revised to limit the scope of discovery to what is  
764                    proportional to the needs of the case. The considerations that bear  
765                    on proportionality are moved from present Rule 26(b)(2)(C)(iii).  
766                    Although the considerations are familiar, and have measured the  
767                    court's duty to limit the frequency or extent of discovery, the  
768                    change incorporates them into the scope of discovery that must be  
769                    observed by the parties without court order.

770                    The amendment deletes the former provision authorizing the  
771                    court, for good cause, to order discovery of any matter relevant to  
772                    the subject matter involved in the action. Proportional discovery  
773                    relevant to any party's claim or defense suffices. Such discovery  
774                    may support amendment of the pleadings to add a new claim or  
775                    defense that affects the scope of discovery.

776                    The former provision for discovery of relevant but  
777                    inadmissible information that appears reasonably calculated to lead  
778                    to the discovery of admissible evidence is also amended. Discovery  
779                    of nonprivileged information not admissible in evidence remains  
780                    available so long as it is otherwise within the scope of discovery.  
781                    Hearsay is a common illustration. The qualifying phrase – "if the  
782                    discovery appears reasonably calculated to lead to the discovery of  
783                    admissible evidence" – is omitted. Discovery of inadmissible  
784                    information is limited to matter that is otherwise within the scope  
785                    of discovery, namely that which is relevant to a party's claim or  
786                    defense and proportional to the needs of the case. The discovery of  
787                    inadmissible evidence should not extend beyond the permissible  
788                    scope of discovery simply because it is "reasonably calculated" to  
789                    lead to the discovery of admissible evidence. Deleting the  
790                    "reasonably calculated" phrase will further the purpose of the 2000  
791                    amendment that revised this sentence out of concern that, as  
792                    expressed in the 2000 Committee Note, it "might swallow any other  
793                    limitation on the scope of discovery."

794                    Rule 26(b)(2)(A) is revised to reflect the addition of  
795                    presumptive limits on the number of requests for admission under

796 Rule 36. The court may alter these limits just as it may alter the  
797 presumptive limits set by Rules 30, 31, and 33.

798 Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of  
799 the considerations that bear on proportionality to Rule 26(b)(1).  
800 The court still must limit the frequency or extent of proposed  
801 discovery, on motion or on its own, if it is outside the scope  
802 permitted by Rule 26(b)(1). Rule 26(b)(2)(C) is further amended by  
803 deleting the reference to discovery "otherwise allowed by these  
804 rules or local rule." Neither these rules nor local rules can  
805 "otherwise allow" discovery that exceeds the scope defined by Rule  
806 26(b)(1) or that must be limited under Rule 26(b)(2)(C).

807 Rule 26(c)(1)(B) is amended to include an express recognition  
808 of protective orders that specify terms allocating expenses for  
809 disclosure or discovery. Authority to enter such orders is included  
810 in the present rule, and courts are coming to exercise this  
811 authority. Explicit recognition will forestall the temptation some  
812 parties may feel to contest this authority.

813 Rule 26(d)(1)(B) is amended to allow a party to deliver Rule  
814 34 requests to another party more than 21 days after that party has  
815 been served even though the parties have not yet had a required  
816 Rule 26(f) conference. Delivery may be made by any party to the  
817 party that has been served, and by that party to any plaintiff and  
818 any other party that has been served. Delivery does not count as  
819 service; the requests are considered to be served at the first Rule  
820 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs  
821 from service. This relaxation of the discovery moratorium is  
822 designed to facilitate focused discussion during the Rule 26(f)  
823 conference. Discussion at the conference may produce changes in the  
824 requests. The opportunity for advance scrutiny of requests  
825 delivered before the Rule 26(f) conference should not affect a  
826 decision whether to allow additional time to respond.

827 Former Rule 26(d)(2) is renumbered as (d)(3) and amended to  
828 recognize that the parties may stipulate to case-specific sequences  
829 of discovery.

830 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add  
831 two items to the discovery plan – issues about preserving  
832 electronically stored information and court orders on agreements to  
833 protect against waiver of privilege or work-product protection  
834 under Evidence Rule 502. Parallel amendments of Rule 37(e)  
835 recognize that a duty to preserve discoverable information may  
836 arise before an action is filed, and may be shaped by pre-filing  
837 requests to preserve and responses to them.

838 **Rule 30 Depositions by Oral Examination**

839 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

840 (2) *With Leave*. A party must obtain leave of court, and the  
841 court must grant leave to the extent consistent with Rule  
842 26(b) (1) and (2):

843 (A) if the parties have not stipulated to the deposition  
844 and:

845 (i) the deposition would result in more than ~~10~~ 5  
846 depositions being taken under this rule or  
847 Rule 31 by the plaintiffs, or by the  
848 defendants, or by the third-party defendants;  
849 \* \* \*

850 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

851 (1) *Duration*. Unless otherwise stipulated or ordered by the  
852 court, a deposition is limited to one day of 7 6 hours.  
853 The court must allow additional time consistent with Rule  
854 26(b) (1) and (2) if needed to fairly examine the deponent  
855 or if the deponent, another person, or any other  
856 circumstance impedes or delays the examination.

857 Committee Note

858 Rule 30 is amended to reduce the presumptive number of  
859 depositions to 5 by the plaintiffs, or by the defendants, or by the  
860 third-party defendants. Rule 30(a)(2), however, continues to direct  
861 that the court must grant leave to take more depositions to the  
862 extent consistent with Rule 26(b)(1) and (2). And Rule 30(a)(2)(A)  
863 continues to recognize that the parties may stipulate to a greater  
864 number. Just as cases frequently arise in which one or all sides  
865 reasonably need more than 10 depositions, so there will be still  
866 more cases that reasonably justify more than 5. First-line reliance  
867 continues to rest on the parties to recognize the cases in which  
868 more depositions are required, acting in accord with Rule 1. But if  
869 the parties fail to agree, the court is responsible for identifying  
870 the cases that need more, recognizing that the context of  
871 particular cases often will justify more. The court's determination  
872 is guided by the scope of discovery defined in Rule 26(b)(1) and  
873 the limiting principles stated in Rule 26(b)(2).

874 Rule 30(d) is amended to reduce the presumptive limit of a  
875 deposition to one day of 6 hours. Experience with the present 7-  
876 hour presumptive limit suggests that a deposition begun in the  
877 morning often runs into evening hours after accounting for breaks.  
878 Six hours should suffice for most depositions, and encourage  
879 efficient use of the time while providing a less arduous experience

880 for the deponent.

881 **Rule 31 Depositions by Written Questions**

882 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

883 (2) *With Leave.* A party must obtain leave of court, and the  
884 court must grant leave to the extent consistent with Rule  
885 26(b) (1) and (2):

886 (A) if the parties have not stipulated to the deposition  
887 and:

888 (i) the deposition would result in more than ~~10~~ 5  
889 depositions being taken under this rule or  
890 Rule 30 by the plaintiffs, or by the  
891 defendants, or by the third-party defendants;  
892 \* \* \*

893 Committee Note

894 Rule 31 is amended to adopt for depositions by written  
895 questions the same presumptive limit of 5 depositions by the  
896 plaintiffs, or by the defendants, or by the third-party defendants  
897 as is adopted for Rule 30 depositions by oral examination.

898 **Rule 33 Interrogatories to Parties**

899 (a) IN GENERAL.

900 (1) *Number.* Unless otherwise stipulated or ordered by the court, a  
901 party may serve on another party no more than ~~25~~ 15  
902 interrogatories, including all discrete subparts. Leave to  
903 serve additional interrogatories may be granted to the extent  
904 consistent with Rule 26(b) (1) and (2).

905 Committee Note

906 Rule 33 is amended to reduce from 25 to 15 the presumptive  
907 limit on the number of interrogatories to parties. As with the  
908 reduction in the presumptive number of depositions under Rules 30  
909 and 31, the purpose is to encourage the parties to think carefully  
910 about the most efficient and least burdensome use of discovery  
911 devices. There is no change in the authority to increase the number  
912 by stipulation or by court order. As with other numerical limits on  
913 discovery, the court should recognize that some cases will require  
914 a greater number of interrogatories, and set a limit consistent  
915 with Rule 26(b) (1) and (2).

916 **Rule 34 Producing Documents, Electronically Stored Information,**  
917 **and Tangible Things, or Entering onto Land, for Inspection and**  
918 **Other Purposes \* \* \***

919 (b) PROCEDURE. \* \* \*

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

921 (A) *Time to Respond.* The party to whom the request is  
922 directed must respond in writing within 30 days  
923 after being served or – if the request was  
924 delivered under Rule 26(d)(1)(B) – within 30 days  
925 after the parties' first Rule 26(f) conference. A  
926 shorter or longer time may be stipulated to under  
927 Rule 29 or be ordered by the court.

928 (B) *Responding to Each Item.* For each item or  
929 category, the response must either state that  
930 inspection and related activities will be  
931 permitted as requested or state the grounds  
932 for objecting to the request with specificity,  
933 including the reasons. If the responding party  
934 states that it will produce copies of  
935 documents or of electronically stored  
936 information instead of permitting inspection,  
937 the production must be completed no later than  
938 the time for inspection stated in the request  
939 or a later reasonable time stated in the  
940 response.

941 (C) *Objections.* An objection must state whether any  
942 responsive materials are being withheld on the  
943 basis of that objection. An objection to part of a  
944 request must specify the part and permit inspection  
945 of the rest. . \* \* \*

946 Committee Note

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

950 Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(1)(B).  
951 The time to respond to a Rule 34 request delivered before the  
952 parties' Rule 26(f) conference is 30 days after the first Rule  
953 26(f) conference.

954 Rule 34(b)(2)(B) is amended to make it clear that objections  
955 to Rule 34 requests must be stated with specificity. This provision  
956 adopts the language of Rule 33(b)(4), eliminating any doubt that  
957 less specific objections might be suitable under Rule 34.

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

967 Rule 34(b)(2)(C) is amended to provide that an objection to a  
968 Rule 34 request must state whether anything is being withheld on  
969 the basis of the objection. This amendment should end the confusion  
970 that frequently arises when a producing party states several  
971 objections and still produces information, leaving the requesting  
972 party uncertain whether any relevant and responsive information has  
973 been withheld on the basis of the objections. An objection that  
974 states the limits that have controlled the search for responsive  
975 and relevant materials qualifies as a statement that the materials  
976 have been "withheld." Examples would be a statement that the search  
977 was limited to materials created during a defined period, or  
978 maintained by identified sources.

979 **Rule 36 Requests for Admission**

980 (a) SCOPE AND PROCEDURE.

981 (1) *Scope.* A party may serve on any other party a written  
982 request to admit, for purposes of the pending action  
983 only, the truth of any matters within the scope of Rule  
984 26(b)(1) relating to:

985 (A) facts, the application of law to fact, or opinions  
986 about either; and

987 (B) the genuineness of any described document.

988 (2) *Number.* Unless otherwise stipulated or ordered by the  
989 court, a party may serve no more than 25 requests to  
990 admit under Rule 36(a)(1)(A) on any other party,  
991 including all discrete subparts. The court may grant  
992 leave to serve additional requests to the extent  
993 consistent with Rule 26(b)(1) and (2). \* \* \*

994 [Present (2), (3), (4), (5), and(6) would be renumbered]

995 Committee Note

996 For the first time, a presumptive limit of 25 is introduced  
997 for the number of Rule 36(a)(1)(A) requests to admit the truth of  
998 facts, the application of law to fact, or opinions about either.  
999 "[A]ll discrete subparts" are included in the count, to be

1000 determined in the same way as under Rule 33(a)(1). The limit does  
1001 not apply to requests to admit the genuineness of any described  
1002 document under Rule 36(a)(1)(B). As with other numerical limits on  
1003 discovery, the court should recognize that some cases will require  
1004 a greater number of requests, and set a limit consistent with the  
1005 limits of Rule 26(b)(1) and (2).

1006 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**  
1007 **Sanctions**

1008 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

1009 (3) *Specific Motions.* \* \* \*

1010 (B) *To Compel a Discovery Response.* A party seeking  
1011 discovery may move for an order compelling an  
1012 answer, designation, production, or inspection.  
1013 This motion may be made if: \* \* \*

1014 (iv) a party fails to produce documents or fails  
1015 to respond that inspection will be permitted –  
1016 or fails to permit inspection – as requested  
1017 under Rule 34.

1018 Committee Note

1019 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice  
1020 of producing copies of documents or electronically stored  
1021 information rather than simply permitting inspection. This change  
1022 brings item (iv) into line with paragraph (B), which provides a  
1023 motion for an order compelling "production, or inspection."

1024 Rules Text

1025 **Rule 1 Scope and Purpose**

1026 \* \* \* [These rules] should be construed, administered,  
1027 and employed by the court and the parties to secure the  
1028 just, speedy, and inexpensive determination of every  
1029 action and proceeding.

1030 **Rule 4 Summons**

1031 \* \* \*

1032 (m) TIME LIMIT FOR SERVICE. If a defendant is not served within 60 days  
1033 after the complaint is filed, the court \* \* \* must dismiss the  
1034 action without prejudice against that defendant or order that  
1035 service be made within a specified time. But if the plaintiff  
1036 shows good cause for the failure, the court must extend the  
1037 time for service for an appropriate period. This subdivision  
1038 (m) does not apply to service in a foreign country under Rule  
1039 4(f) or 4(j)(1) or to service of a notice under Rule  
1040 71.1(d)(3)(A).

1041 **Rule 16 Pretrial Conferences; Scheduling; Management**

1042 (b) SCHEDULING.

1043 (1) *Scheduling Order*. Except in categories of actions  
1044 exempted by local rule, the district judge – or a  
1045 magistrate judge when authorized by local rule – must  
1046 issue a scheduling order:

1047 (A) after receiving the parties' report under Rule  
1048 26(f); or

1049 (B) after consulting with the parties' attorneys and  
1050 any unrepresented parties at a scheduling  
1051 conference.

1052 (2) *Time to Issue*. The judge must issue the scheduling order  
1053 as soon as practicable, but unless the judge finds good  
1054 cause for delay the judge must issue it within the  
1055 earlier of 90 days after any defendant has been served  
1056 with the complaint or 60 days after any defendant has  
1057 appeared.

1058 (3) *Contents of the Order*. \* \* \*

1059 (B) *Permitted Contents*. The scheduling order may: \* \* \*

1060 (iii) provide for disclosure, discovery, or  
1061 preservation of electronically stored  
1062 information;

1063 (iv) include any agreements the parties reach for  
1064 asserting claims of privilege or of protection  
1065 as trial-preparation material after  
1066 information is produced, including agreements  
1067 reached under Federal Rule 502 of Evidence  
1068 502;

1069 (v) direct that before moving for an order relating  
1070 to discovery the movant must request a  
1071 conference with the court;

1072 [present (v) and (vi) would be renumbered] \* \* \*

1073 **Rule 26. Duty to Disclose; General Provisions; Governing**  
1074 **Discovery**

1075 (b) DISCOVERY SCOPE AND LIMITS.

1076 (1) *Scope in General.* Unless otherwise limited by court order,  
1077 the scope of discovery is as follows: Parties may obtain  
1078 discovery regarding any nonprivileged matter that is  
1079 relevant to any party's claim or defense and proportional  
1080 to the needs of the case considering the amount in  
1081 controversy, the importance of the issues at stake in the  
1082 action, the parties' resources, the importance of the  
1083 discovery in resolving the issues, and whether the burden  
1084 or expense of the proposed discovery outweighs its likely  
1085 benefit. Information within this scope of discovery need  
1086 not be admissible in evidence to be discoverable.

1087 (2) *Limitations on Frequency and Extent.*

1088 (A) *When Permitted.* By order, the court may alter the  
1089 limits in these rules on the number of depositions,  
1090 interrogatories, and requests for admissions, or on  
1091 the length of depositions under Rule 30.

1092 \* \* \*

1093 (C) *When Required.* On motion or on its own, the court  
1094 must limit the frequency or extent of discovery if  
1095 it determines that: \* \* \*

1096 (iii) the proposed discovery is outside the scope  
1097 permitted by Rule 26(b)(1).

1098 \* \* \*

1099 (c) PROTECTIVE ORDERS.

1100 (1) *In General.* \* \* \* The court may, for good cause, issue an  
1101 order to protect a party or person from annoyance,  
1102 embarrassment, oppression, or undue burden or expense,

- 1103 including one or more of the following: \* \* \*
- 1104 (B) specifying terms, including time and place or the  
1105 allocation of expenses, for the disclosure or  
1106 discovery; \* \* \*
- 1107 (d) TIMING AND SEQUENCE OF DISCOVERY.
- 1108 (1) *Timing*. A party may not seek discovery from any source  
1109 before the parties have conferred as required by Rule  
1110 26(f), except:
- 1111 (A) in a proceeding exempted from initial disclosure  
1112 under Rule 26(a)(1)(B); or
- 1113 (B) when authorized by these rules, including Rule  
1114 26(d)(2), by stipulation, or by court order.
- 1115 (2) *Early Rule 34 Requests*.
- 1116 (A) *Time to Deliver*. More than 21 days after the summons  
1117 and complaint are served on a party, a request  
1118 under Rule 34 may be delivered:
- 1119 (i) to that party by any other party, and
- 1120 (ii) by that party to any plaintiff or to any other  
1121 party that has been served.
- 1122 (B) *When Considered Served*. The request is considered as  
1123 served at the first Rule 26(f) conference.
- 1124 (3) *Sequence*. Unless the parties stipulate or the court  
1125 orders otherwise for the parties' and witnesses'  
1126 convenience and in the interests of justice:
- 1127 (A) methods of discovery may be used in any sequence;  
1128 and
- 1129 (B) discovery by one party does not require any other  
1130 party to delay its discovery.
- 1131 \* \* \*
- 1132 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.
- 1133 (1) *Conference Timing*. Except in a proceeding exempted from  
1134 initial disclosure under Rule 26(a)(1)(B) or \* \* \*
- 1135 (3) *Discovery Plan*. A discovery plan must state the parties'  
1136 views and proposals on: \* \* \*
- 1137 (C) any issues about disclosure, discovery, or  
1138 preservation of electronically stored information,  
1139 including the form or forms in which it should be

1140 produced;

1141 (D) any issues about claims of privilege or of  
1142 protection as trial-preparation materials,  
1143 including – if the parties agree on a procedure to  
1144 assert these claims after production – whether to  
1145 ask the court to include their agreement in an  
1146 order under Federal Rule of Evidence 502;

1147 **Rule 30 Depositions by Oral Examination**

1148 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

1149 (2) *With Leave*. A party must obtain leave of court, and the  
1150 court must grant leave to the extent consistent with Rule  
1151 26(b) (1) and (2):

1152 (A) if the parties have not stipulated to the deposition  
1153 and:

1154 (i) the deposition would result in more than 5  
1155 depositions being taken under this rule or  
1156 Rule 31 by the plaintiffs, or by the  
1157 defendants, or by the third-party defendants;  
1158 \* \* \*

1159 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

1160 (1) *Duration*. Unless otherwise stipulated or ordered by the  
1161 court, a deposition is limited to one day of 6 hours. The  
1162 court must allow additional time consistent with Rule  
1163 26(b) (1) and (2) if needed to fairly examine the deponent  
1164 or if the deponent, another person, or any other  
1165 circumstance impedes or delays the examination.

1166 **Rule 31 Depositions by Written Questions**

1167 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

1168 (2) *With Leave*. A party must obtain leave of court, and the  
1169 court must grant leave to the extent consistent with Rule  
1170 26(b) (1) and (2):

1171 (A) if the parties have not stipulated to the deposition  
1172 and:

1173 (i) the deposition would result in more than 5  
1174 depositions being taken under this rule or  
1175 Rule 30 by the plaintiffs, or by the  
1176 defendants, or by the third-party defendants;  
1177 \* \* \*

1178 **Rule 33 Interrogatories to Parties**

1179 (a) IN GENERAL.

1180 (1) *Number*. Unless otherwise stipulated or ordered by the court, a  
1181 party may serve on another party no more than 15  
1182 interrogatories, including all discrete subparts. Leave to  
1183 serve additional interrogatories may be granted to the extent  
1184 consistent with Rule 26(b) (1) and (2).

1185 **Rule 34 Producing Documents, Electronically Stored Information,**  
1186 **and Tangible Things, or Entering onto Land, for Inspection and**  
1187 **Other Purposes \* \* \***

1188 (b) PROCEDURE. \* \* \*

1189 (2) *Responses and Objections*. \* \* \*

1190 (A) *Time to Respond*. The party to whom the request is  
1191 directed must respond in writing within 30 days  
1192 after being served or – if the request was  
1193 delivered under Rule 26(d) (1) (B) – within 30 days  
1194 after the parties' first Rule 26(f) conference. A  
1195 shorter or longer time may be stipulated to under  
1196 Rule 29 or be ordered by the court.

1197 (B) *Responding to Each Item*. For each item or  
1198 category, the response must either state that  
1199 inspection and related activities will be  
1200 permitted as requested or state the grounds  
1201 for objecting to the request with specificity,  
1202 including the reasons. If the responding party  
1203 states that it will produce copies of  
1204 documents or of electronically stored  
1205 information instead of permitting inspection,  
1206 the production must be completed no later than  
1207 the time for inspection stated in the request  
1208 or a later reasonable time stated in the  
1209 response.

1210 (C) *Objections*. An objection must state whether any  
1211 responsive materials are being withheld on the  
1212 basis of that objection. An objection to part of a  
1213 request must specify the part and permit inspection  
1214 of the rest. . \* \* \*

1215 **Rule 36 Requests for Admission**

1216 (a) SCOPE AND PROCEDURE.

1217 (1) *Scope*. A party may serve on any other party a written  
1218 request to admit, for purposes of the pending action

1219 only, the truth of any matters within the scope of Rule  
1220 26(b)(1) relating to:

1221 (A) facts, the application of law to fact, or opinions  
1222 about either; and

1223 (B) the genuineness of any described document.

1224 (2) *Number.* Unless otherwise stipulated or ordered by the  
1225 court, a party may serve no more than 25 requests to  
1226 admit under Rule 36(a)(1)(A) on any other party,  
1227 including all discrete subparts. The court may grant  
1228 leave to serve additional requests to the extent  
1229 consistent with Rule 26(b)(1) and (2). \* \* \*

1230 [Present (2), (3), (4), (5), and(6) would be renumbered]

1231 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**  
1232 **Sanctions**

1233 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

1234 (3) *Specific Motions.* \* \* \*

1235 (B) *To Compel a Discovery Response.* A party seeking  
1236 discovery may move for an order compelling an  
1237 answer, designation, production, or inspection.  
1238 This motion may be made if: \* \* \*

1239 (iv) a party fails to produce documents or fails  
1240 to respond that inspection will be permitted –  
1241 or fails to permit inspection – as requested  
1242 under Rule 34.

1243           **B. Rule 37(e): Action to Recommend Publication of Revised**  
1244 **Rule 37(e)**

1245           In January, the Standing Committee preliminarily approved  
1246 proposed amendments to Rule 37(e) for publication in August, 2013,  
1247 on condition that the Advisory Committee consider the issues raised  
1248 during the January meeting and make appropriate revisions in the  
1249 draft rule and Note, returning for approval by the Standing  
1250 Committee during the June meeting. The Advisory Committee's  
1251 Discovery Subcommittee has carefully considered possible revisions  
1252 responsive to the concerns raised by the Standing Committee. The  
1253 Subcommittee's revisions were submitted to the Advisory Committee  
1254 during its Spring meeting and -- with further revisions --  
1255 unanimously approved by the Advisory Committee.

1256           The fundamental thrust of the proposal is as presented during  
1257 the Standing Committee's January meeting -- to amend the rule to  
1258 address the overbroad preservation many litigants and potential  
1259 litigants felt they had to undertake to ensure they would not later  
1260 face sanctions. Rule amendments for this purpose were unanimously  
1261 proposed by the E-Discovery Panel at the May, 2010, Duke  
1262 Conference, and the Discovery Subcommittee set to work on  
1263 developing amendments soon thereafter. A mini-conference was  
1264 convened in September, 2011, to evaluate the various proposed  
1265 approaches the Subcommittee had identified. From that point, the  
1266 Subcommittee refined the approach that was presented in January.

1267           The proposed amendment focuses on sanctions rather than  
1268 attempting directly to regulate the details of preservation. But  
1269 it provides guidance for a court by recognizing that a party that  
1270 adopts reasonable and proportionate preservation measures should  
1271 not be subject to sanctions. In addition, the amendment provides  
1272 a uniform national standard for culpability findings to support  
1273 imposition of sanctions. Except in exceptional cases in which a  
1274 party's actions irreparably deprive another party of any meaningful  
1275 opportunity to present or defend against the claims in the  
1276 litigation, sanctions may be imposed only on a finding that the  
1277 party acted willfully or in bad faith. So the amendment rejects  
1278 the view adopted in some cases, such as Residential Funding Corp.  
1279 v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), that would  
1280 permit sanctions for negligence.

1281           Below is the revised rule and Note, along with a list of  
1282 questions that the Advisory Committee feels should be published  
1283 with the draft of the rule amendment, in order to focus public  
1284 comment on issues that have been raised, including those raised by  
1285 members of the Standing Committee. There follows an

1286 overstrike/double underline version of the rule (and similar  
1287 version of the Note) showing changes to the restyled rule since the  
1288 Standing Committee's January meeting.

1289 It seems simplest to address separately the various issues  
1290 raised during the January meeting.

1291 Displacement of Other Laws

1292 Concern was expressed in January about draft Note language  
1293 saying that amended Rule 37(e) "displaces any other law that would  
1294 authorize imposing litigation sanctions in the absence of a finding  
1295 of willfulness or bad faith, including state law in diversity  
1296 cases."

1297 The Note language concerning the origin of the obligation to  
1298 preserve has been revised as follows:

1299 This preservation obligation was not created by Rule 37(e),  
1300 but has been recognized by many court decisions. arises from  
1301 the common law, and It may in some instances be triggered or  
1302 clarified by a court order in the case.

1303 In addition, further revisions removed "displacement" from the  
1304 Note:

1305 The amended rule therefore forecloses reliance on  
1306 inherent authority or state law to impose litigation sanctions  
1307 in the absence of the findings required under Rule  
1308 37(e) (1) (B). displaces any other law that would authorize  
1309 imposing litigation sanctions in the absence of a finding of  
1310 wilfulness or bad faith, including state law in diversity  
1311 cases.

1312 Use of the Term "Sanction"

1313 Concern was expressed about use of the word "sanction," which  
1314 might have adverse significance when applied to the conduct of a  
1315 lawyer, such as requiring that the attorney report the imposition  
1316 of this "sanction" to the state bar.

1317 The following additional sentence was added to the Note:

1318 It [the new rule] borrows the term "sanctions" from Rule  
1319 37(b) (2), and does not attempt to prescribe whether such  
1320 measures would be so regarded for other purposes, such as an  
1321 attorney's professional responsibility.

1322 "Irreparable Prejudice" provision

1323 Standing Committee members expressed concern that the proposed  
1324 rule language would permit imposition of litigation sanctions  
1325 whenever the loss of information prevented a party from presenting  
1326 "a claim or defense" even when the claim or defense is of minor  
1327 significance in the litigation. In addition, as a matter of style  
1328 some members urged that the Advisory Committee reconsider using the  
1329 word "meaningful" in the rule.

1330 Rule 37(e) (1) (B) (ii) has been revised to authorize imposition  
1331 of sanctions in the absence of a finding of willfulness or bad  
1332 faith only when the court finds that the party's actions:

1333 irreparably deprived a party of any meaningful opportunity to  
1334 present or defend against the ~~a~~ claims or defense in the  
1335 litigation.

1336 A party seeking sanctions under this revised provision must show  
1337 that it was disabled from presenting its side in the litigation.  
1338 The word "meaningful" has been retained because the committee  
1339 concluded that it most accurately reflects the narrow nature of  
1340 this exception.

1341 In order to make clearer the narrowness of this authorization  
1342 for sanctions, the Note has been substantially revised as follows:

1343 This subdivision ~~Rule 37(e) (2) (B)~~ permits the court to  
1344 impose sanctions in narrowly limited circumstances without  
1345 making a finding of either bad faith or willfulness. The need  
1346 to show bad faith or willfulness is excused only by finding an  
1347 impact more severe than the substantial prejudice required to  
1348 support sanctions under Rule 37(e) (1) (B) (i). It still must be  
1349 shown that a party failed to preserve discoverable information  
1350 that should have been preserved. In addition, it must be  
1351 shown that the failure irreparably deprived a party of any  
1352 meaningful opportunity to present or defend against the claims  
1353 in the litigation. As under Rule 37(e) (2) (A), the threshold  
1354 for sanctions is that the court find that lost information  
1355 reasonably should have been preserved by the party to be  
1356 sanctioned.

1357 The first step in determining whether a party's failure  
1358 to preserve discoverable information that should have been  
1359 preserved has irreparably deprived another party of any  
1360 meaningful opportunity to present or defend against the claims  
1361 in the litigation is to examine carefully the apparent

1362 importance of the lost information. Particularly with  
1363 electronically stored information, alternative sources may  
1364 often exist. The next step is to explore the possibility that  
1365 curative measures under subdivision (e)(1)(A) can reduce the  
1366 adverse impact. If a party loses readily accessible  
1367 electronically stored information, for example, the court may  
1368 direct the party to attempt to retrieve the information by  
1369 alternative means. If such measures are not possible or fail  
1370 to restore important information, the court must determine  
1371 whether the loss has irreparably deprived a party of any  
1372 meaningful opportunity to present or defend against the claims  
1373 in the litigation.

1374 The "irreparably deprived" test is more demanding than  
1375 the "substantial prejudice" that permits sanctions under Rule  
1376 37(e)(1)(B)(i) on a showing of bad faith or willfulness.  
1377 Examples might include cases in which the alleged injury-  
1378 causing instrumentality has been lost. A plaintiff's failure  
1379 to preserve an automobile claimed to have defects that caused  
1380 injury without affording the defendant manufacturer an  
1381 opportunity to inspect the damaged vehicle may be an example.  
1382 Such a situation led to affirmance of dismissal, as not an  
1383 abuse of discretion, in *Silvestri v. General Motors Corp.*, 271  
1384 F.3d 583 (4th Cir. 2001). Or a party may lose the only  
1385 evidence of a critically important event. But even such losses  
1386 may not irreparably deprive another party of any meaningful  
1387 opportunity to litigate. Remaining sources of evidence and  
1388 the opportunity to challenge the evidence presented by the  
1389 party who lost discoverable information that should have been  
1390 preserved, along with possible presentation of evidence and  
1391 argument about the significance of the lost information,  
1392 should often afford a meaningful opportunity to litigate.

1393 The requirement that a party be irreparably deprived of  
1394 any meaningful opportunity to present or defend against the  
1395 claims in the litigation is further narrowed by looking to all  
1396 the claims in the action. Lost information may appear critical  
1397 to litigating a particular claim or defense, but sanctions  
1398 should not be imposed – or should be limited to the affected  
1399 claims or defenses – if those claims or defenses are not  
1400 central to the litigation.

1401 It should also be noted that the first two questions in the  
1402 list of questions for public comment invite input on issues related  
1403 to those raised by the Standing Committee discussion:

1404 1. Should the rule be limited to sanctions for loss of

1405 electronically stored information? Current Rule 37(e) is so  
1406 limited, and much commentary focuses on the preservation  
1407 problems resulting from the proliferation of such information.  
1408 But the dividing line between "electronically stored  
1409 information" and other discoverable matter may be uncertain,  
1410 and may become more uncertain in the future, and loss of  
1411 tangible things or documents important in litigation is a  
1412 recurrent concern in litigation today.

1413 2. Should Rule 37(b)(1)(B)(ii) be retained in the rule?  
1414 This provision is focused on the possibility that one side's  
1415 failure to preserve evidence may catastrophically deprive the  
1416 other side of any meaningful opportunity to litigate, and  
1417 permits imposition of sanctions even absent a finding of  
1418 willfulness or bad faith. It has been suggested that limiting  
1419 the rule to loss of electronically stored information would  
1420 make (B)(ii) unnecessary. Does this provision add important  
1421 flexibility to the rule?

1422 Acts of God

1423 Standing Committee members raised concerns about whether  
1424 proposed (B)(ii) was meant to authorize imposition of sanctions  
1425 when information was lost without any fault by the party that lost  
1426 it.

1427 The Discovery Subcommittee spent considerable time evaluating  
1428 this issue. It even considered proposing that an alternative  
1429 amendment be published as an appendix to the main proposal,  
1430 eliminating (B)(ii) and limiting the rule to loss of electronically  
1431 stored information, on the theory that loss of that sort of  
1432 evidence would rarely, if ever, have the cataclysmic consequences  
1433 that (B)(ii) addresses.

1434 Eventually, the Advisory Committee decided that changing  
1435 proposed Rule 37(e)(1)(B) to focus on "the party's actions" rather  
1436 than "the party's failure" afforded a solution to this problem.  
1437 The proposed version of the rule therefore will permit sanctions in  
1438 the absence of willfulness or bad faith only if "the party's  
1439 actions" irreparably deprive the opponent of any meaningful  
1440 opportunity to litigate the case. This will preclude sanctions  
1441 when information is lost through causes other than the party's  
1442 actions, such as a natural disaster. This point is made by the  
1443 following new Note language:

1444 A special situation arises when discoverable information  
1445 is lost because of events outside a party's control. A party

1446 may take the steps that should have been taken to preserve the  
1447 information, but lose it to such unforeseeable circumstances  
1448 as flood, earthquake, fire, or malicious computer attacks.  
1449 Curative measures may be appropriate in such circumstances –  
1450 this is information that should have been preserved – but  
1451 sanctions are not. The loss is not caused by "the party's  
1452 actions" as required by (e) (1) (B).

1453 Preservation of current Rule 37(e) Language

1454 During the January meeting, concern was expressed about the  
1455 absence of any explanation in the Note for the abrogation of Rule  
1456 37(e). The Discovery Subcommittee had obtained a thorough research  
1457 memo from Andrea Kuperman showing that current Rule 37(e) has been  
1458 used only very rarely. It concluded that there was no circumstance  
1459 that would be covered by current Rule 37(e) but would not be  
1460 protected under the proposed revision.

1461 The Note has been amended to provide this explanation:

1462 Amended Rule 37(e) supersedes the current rule because it  
1463 provides protection for any conduct that would be protected  
1464 under the current rule. The current rule provides: "Absent  
1465 exceptional circumstances, a court may not impose sanctions  
1466 under these rules on a party for failing to provide  
1467 electronically stored information lost as a result of the  
1468 routine, good-faith operation of an electronic information  
1469 system." The routine good faith operation of an electronic  
1470 information system should be respected under the amended rule.  
1471 As under the current rule, the prospect of litigation may call  
1472 for altering that routine operation. And the prohibition of  
1473 sanctions in the amended rule means that any loss of data that  
1474 would be insulated against sanctions under the current rule  
1475 would also be protected under the amended rule.

1476 In addition, the Advisory Committee proposes that the  
1477 invitation for public comment highlight this issue:

1478 3. Should the provisions of current Rule 37(e) be  
1479 retained in the rule? As stated in the Committee Note, the  
1480 amended rule appears to provide protection in any situation in  
1481 which current Rule 37(e) would apply.

1482 This treatment is intended both to make a suitable record  
1483 showing that abrogation of current Rule 37(e) is not intended in  
1484 any way to remove protection it provided, and to permit the public  
1485 comment period to illuminate whether there is reason for worry

1486 about abrogating the current rule.

1487 Expanded definition of "Substantial Prejudice"

1488 In January, it was suggested that the term "substantial  
1489 prejudice in the litigation" in Rule 37(e)(1)(B)(i) might  
1490 profitably be given further definition, and the Advisory Committee  
1491 was urged to invite public comment on this topic. The Note to Rule  
1492 37(e)(1)(B)(i) already provides:

1493 [T]he court must find that the loss of information caused  
1494 substantial prejudice in the litigation. Because digital data  
1495 often duplicate other data, substitute evidence is often  
1496 available. Although it is impossible to demonstrate with  
1497 certainty what lost information would prove, the party seeking  
1498 sanctions must show that it has been substantially prejudiced  
1499 by the loss. Among other things, the court may consider the  
1500 measures identified in Rule 37(e)(1)(A) in making this  
1501 determination; if these measures can sufficiently reduce the  
1502 prejudice, sanctions would be inappropriate even when the  
1503 court finds willfulness or bad faith. Rule 37(e)(1)(B)(i)  
1504 authorizes imposition of Rule 37(b)(2) sanctions in the  
1505 expectation that the court will employ the least severe  
1506 sanction needed to repair the prejudice resulting from loss of  
1507 the information.

1508 In addition, the Advisory Committee proposes to raise this  
1509 issue during the public comment period with the following  
1510 invitation to comment:

1511 4. Should there be an additional definition of  
1512 "substantial prejudice" under Rule 37(e)(1)(B)(i)? One  
1513 possibility is that the rule could be augmented by directing  
1514 that the court should consider all factors, including the  
1515 availability of reliable alternative sources of the lost or  
1516 destroyed information, and the importance of the lost  
1517 information to the claims or defenses in the case.

1518 Added flexibility on Curative Measures

1519 Another topic raised by some members of the Standing Committee  
1520 in January was that the rule might unduly limit curative measures  
1521 the court might deem desirable. Reflecting on this concern, the  
1522 Discovery Subcommittee concluded that the rule could be improved by  
1523 removing the phrase "the party to undertake" from Rule 37(e)(1)(A):

1524 permit additional discovery, order the party to undertake  
1525 curative measures, or order the party to pay the reasonable  
1526 expenses, including attorney's fees, caused by the failure;  
1527 and

1528 The removal of this phrase means that curative measures are not  
1529 limited to orders directed to the party that failed to preserve  
1530 information. Additional Note material addresses this possibility:

1531 Additional curative measures might include permitting  
1532 introduction at trial of evidence about the loss of  
1533 information or allowing argument to the jury about the  
1534 possible significance of lost information.

#### 1535 Role of Other Preservation Duties

1536 Another concern raised during the January meeting was the role  
1537 of preservation duties imposed by other bodies of law, such as  
1538 statutes or regulations. Note language has been added addressing  
1539 this issue:

1540 Although the rule focuses on the common law obligation to  
1541 preserve in the anticipation or conduct of litigation, courts  
1542 may sometimes consider whether there was an independent  
1543 requirement that the lost information be preserved. The court  
1544 should be sensitive, however, to the fact that such  
1545 independent preservation requirements may be addressed to a  
1546 wide variety of concerns unrelated to the current litigation.

#### 1547 Removal of "reasonably" from Rule 37(e) (1)

1548 Rule 37(e) (2) focuses on the reasonableness and  
1549 proportionality of parties' conduct in preserving information in  
1550 the anticipation or conduct of litigation. A redundant invocation  
1551 of "reasonably" also appeared in Rule 37(e) (1) and has been  
1552 removed.

1553 "Clean" version of Rule 37(e) amendment

1554 **Rule 37. Failure to Make Disclosures or to Cooperate in**  
1555 **Discovery; Sanctions**

1556 \* \* \* \* \*

1557 ~~(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.~~ Absent  
1558 exceptional circumstances, a court may not impose sanctions  
1559 under these rules on a party for failing to provide  
1560 electronically stored information lost as a result of the  
1561 routine, good-faith operation of an electronic information  
1562 system.  
1563

1564 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**

1565 **(1) Curative measures; sanctions.** If a party failed to  
1566 preserve discoverable information that should have been  
1567 preserved in the anticipation or conduct of litigation,  
1568 the court may

1569 **(A) permit additional discovery, order curative**  
1570 **measures, or order the party to pay the reasonable**  
1571 **expenses, including attorney's fees, caused by the**  
1572 **failure; and**

1573 **(B) impose any sanction listed in Rule 37(b)(2)(A) or**  
1574 **give an adverse-inference jury instruction, but**  
1575 **only if the court finds that the party's actions:**

1576 **(i) caused substantial prejudice in the litigation**  
1577 **and were willful or in bad faith; or**

1578 **(ii) irreparably deprived a party of any meaningful**  
1579 **opportunity to present or defend against the**  
1580 **claims in the litigation.**

1581 **(2) Factors to be considered in assessing a party's conduct.**  
1582 **The court should consider all relevant factors in**  
1583 **determining whether a party failed to preserve**  
1584 **discoverable information that should have been preserved**  
1585 **in the anticipation or conduct of litigation, and whether**  
1586 **the failure was willful or in bad faith. The factors**  
1587 **include:**

1588 **(A) the extent to which the party was on notice that**  
1589 **litigation was likely and that the information**  
1590 **would be discoverable;**

- 1591                    (B) the reasonableness of the party's efforts to  
1592                    preserve the information;
- 1593                    (C) whether the party received a request to preserve  
1594                    information, whether the request was clear and  
1595                    reasonable, and whether the person who made it and  
1596                    the party consulted in good faith about the scope  
1597                    of preservation;
- 1598                    (D) the proportionality of the preservation efforts to  
1599                    any anticipated or ongoing litigation; and
- 1600                    (E) whether the party timely sought the court's  
1601                    guidance on any unresolved disputes about  
1602                    preserving discoverable information.

1603                    COMMITTEE NOTE

1604                    In 2006, Rule 37(e) was added to provide protection against  
1605                    sanctions for loss of electronically stored information under  
1606                    certain limited circumstances, but preservation problems have  
1607                    nonetheless increased. The Committee has been repeatedly informed  
1608                    of growing concern about the increasing burden of preserving  
1609                    information for litigation, particularly with regard to  
1610                    electronically stored information. Many litigants and prospective  
1611                    litigants have emphasized their uncertainty about the obligation to  
1612                    preserve information, particularly before litigation has actually  
1613                    begun. The remarkable growth in the amount of information that  
1614                    might be preserved has heightened these concerns. Significant  
1615                    divergences among federal courts across the country have meant that  
1616                    potential parties cannot determine what preservation standards they  
1617                    will have to satisfy to avoid sanctions. Extremely expensive  
1618                    overpreservation may seem necessary due to the risk that very  
1619                    serious sanctions could be imposed even for merely negligent,  
1620                    inadvertent failure to preserve some information later sought in  
1621                    discovery.

1622                    This amendment to Rule 37(e) addresses these concerns by  
1623                    adopting a uniform set of guidelines for federal courts, and  
1624                    applying them to all discoverable information, not just  
1625                    electronically stored information. The amended rule is not  
1626                    limited, as is the current rule, to information lost due to "the  
1627                    routine, good-faith operation of an electronic information system."  
1628                    The amended rule is designed to ensure that potential litigants who  
1629                    make reasonable efforts to satisfy their preservation  
1630                    responsibilities may do so with confidence that they will not be  
1631                    subjected to serious sanctions should information be lost despite  
1632                    those efforts. It does not provide "bright line" preservation  
1633                    directives because bright lines seem unsuited to a set of problems  
1634                    that is intensely context-specific. Instead, the rule focuses on

1635 a variety of considerations that the court should weigh in  
1636 calibrating its response to the loss of information.

1637 Amended Rule 37(e) supersedes the current rule because it  
1638 provides protection for any conduct that would be protected under  
1639 the current rule. The current rule provides: "Absent exceptional  
1640 circumstances, a court may not impose sanctions under these rules  
1641 on a party for failing to provide electronically stored information  
1642 lost as a result of the routine, good-faith operation of an  
1643 electronic information system." The routine good faith operation  
1644 of an electronic information system should be respected under the  
1645 amended rule. As under the current rule, the prospect of  
1646 litigation may call for altering that routine operation. And the  
1647 prohibition of sanctions in the amended rule means that any loss of  
1648 data that would be insulated against sanctions under the current  
1649 rule would also be protected under the amended rule.

1650 Amended Rule 37(e) applies to loss of discoverable information  
1651 "that should have been preserved in the anticipation or conduct of  
1652 litigation." This preservation obligation was not created by Rule  
1653 37(e), but has been recognized by many court decisions. It may in  
1654 some instances be triggered or clarified by a court order in the  
1655 case. Rule 37(e)(2) identifies many of the factors that should be  
1656 considered in determining, in the circumstances of a particular  
1657 case, when a duty to preserve arose and what information should  
1658 have been preserved.

1659 Except in very rare cases in which a party's actions cause the  
1660 loss of information that irreparably deprives another party of any  
1661 meaningful opportunity to present or defend against the claims in  
1662 the litigation, sanctions for loss of discoverable information may  
1663 only be imposed on a finding of willfulness or bad faith, combined  
1664 with substantial prejudice.

1665 The amended rule therefore forecloses reliance on inherent  
1666 authority or state law to impose litigation sanctions in the  
1667 absence of the findings required under Rule 37(e)(1)(B). But the  
1668 rule does not affect the validity of an independent tort claim for  
1669 relief for spoliation if created by the applicable law. The law of  
1670 some states authorizes a tort claim for spoliation. The  
1671 cognizability of such a claim in federal court is governed by the  
1672 applicable substantive law, not Rule 37(e).

1673 An amendment to Rule 26(f)(3) directs the parties to address  
1674 preservation issues in their discovery plan, and an amendment to  
1675 Rule 16(b)(3) recognizes that the court's scheduling order may  
1676 address preservation. These amendments may prompt early attention  
1677 to matters also addressed by Rule 37(e).

1678           **Subdivision (e) (1) (A)**. When the court concludes that a party  
1679 failed to preserve information that should have been preserved in  
1680 the anticipation or conduct of litigation, it may adopt a variety  
1681 of measures that are not sanctions. One is to permit additional  
1682 discovery that would not have been allowed had the party preserved  
1683 information as it should have. For example, discovery might be  
1684 ordered under Rule 26(b)(2)(B) from sources of electronically  
1685 stored information that are not reasonably accessible. More  
1686 generally, the fact that a party has failed to preserve information  
1687 may justify discovery that otherwise would be precluded under the  
1688 proportionality analysis of Rule 26(b)(1) and (2)(C).

1689           In addition to, or instead of, ordering further discovery, the  
1690 court may order curative measures, such as requiring the party that  
1691 failed to preserve information to restore or obtain the lost  
1692 information, or to develop substitute information that the court  
1693 would not have ordered the party to create but for the failure to  
1694 preserve. The court may also require the party that failed to  
1695 preserve information to pay another party's reasonable expenses,  
1696 including attorney fees, caused by the failure to preserve. Such  
1697 expenses might include, for example, discovery efforts caused by  
1698 the failure to preserve information. Additional curative measures  
1699 might include permitting introduction at trial of evidence about  
1700 the loss of information or allowing argument to the jury about the  
1701 possible significance of lost information.

1702           **Subdivision (e) (1) (B) (i)**. This subdivision authorizes  
1703 imposition of the sanctions listed in Rule 37(b)(2)(A) for willful  
1704 or bad-faith failure to preserve information, whether or not there  
1705 was a court order requiring such preservation. Rule 37(e)(1)(B)(i)  
1706 is designed to provide a uniform standard in federal court for  
1707 sanctions for failure to preserve. It rejects decisions that have  
1708 authorized the imposition of sanctions -- as opposed to measures  
1709 authorized by Rule 37(e)(1)(A) -- for negligence or gross  
1710 negligence. It borrows the term "sanctions" from Rule 37(b)(2),  
1711 and does not attempt to prescribe whether such measures would be so  
1712 regarded for other purposes, such as an attorney's professional  
1713 responsibility.

1714           This subdivision protects a party that has made reasonable  
1715 preservation decisions in light of the factors identified in Rule  
1716 37(e)(2), which emphasize both reasonableness and proportionality.  
1717 Despite reasonable efforts to preserve, some discoverable  
1718 information may be lost. Although loss of information may affect  
1719 other decisions about discovery, such as those under Rule 26(b)(1),  
1720 (b)(2)(B) and (b)(2)(C), sanctions may be imposed only for willful  
1721 or bad faith actions, unless the exceptional circumstances  
1722 described in Rule 37(e)(2)(B) are shown.

1723           The threshold under Rule 37(e)(1)(B)(i) is that the court find  
1724 that lost information should have been preserved; if so, the court  
1725 may impose sanctions only if it can make two further findings.  
1726 First, the court must find that the loss of information caused  
1727 substantial prejudice in the litigation. Because digital data  
1728 often duplicate other data, substitute evidence is often available.  
1729 Although it is impossible to demonstrate with certainty what lost  
1730 information would prove, the party seeking sanctions must show that  
1731 it has been substantially prejudiced by the loss. Among other  
1732 things, the court may consider the measures identified in Rule  
1733 37(e)(1)(A) in making this determination; if these measures can  
1734 sufficiently reduce the prejudice, sanctions would be inappropriate  
1735 even when the court finds willfulness or bad faith. Rule  
1736 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in  
1737 the expectation that the court will employ the least severe  
1738 sanction needed to repair the prejudice resulting from loss of the  
1739 information.

1740           Second, it must be established that the party that failed to  
1741 preserve did so willfully or in bad faith. This determination  
1742 should be made with reference to the factors identified in Rule  
1743 37(e)(2).

1744           **Subdivision (e)(1)(B)(ii).** This subdivision permits the court  
1745 to impose sanctions in narrowly limited circumstances without  
1746 making a finding of either bad faith or willfulness. The need to  
1747 show bad faith or willfulness is excused only by finding an impact  
1748 more severe than the substantial prejudice required to support  
1749 sanctions under Rule 37(e)(1)(B)(i). It still must be shown that  
1750 a party failed to preserve discoverable information that should  
1751 have been preserved. In addition, it must be shown that the  
1752 failure irreparably deprived a party of any meaningful opportunity  
1753 to present or defend against the claims in the litigation.

1754           The first step in determining whether a party's failure to  
1755 preserve discoverable information that should have been preserved  
1756 has irreparably deprived another party of any meaningful  
1757 opportunity to present or defend against the claims in the  
1758 litigation is to examine carefully the apparent importance of the  
1759 lost information. Particularly with electronically stored  
1760 information, alternative sources may often exist. The next step is  
1761 to explore the possibility that curative measures under subdivision  
1762 (e)(1)(A) can reduce the adverse impact. If a party loses readily  
1763 accessible electronically stored information, for example, the  
1764 court may direct the party to attempt to retrieve the information  
1765 by alternative means. If such measures are not possible or fail to  
1766 restore important information, the court must determine whether the  
1767 loss has irreparably deprived a party of any meaningful opportunity  
1768 to present or defend against the claims in the litigation.

1769           The "irreparably deprived" test is more demanding than the  
1770 "substantial prejudice" that permits sanctions under Rule  
1771 37(e) (1) (B) (i) on a showing of bad faith or willfulness. Examples  
1772 might include cases in which the alleged injury-causing  
1773 instrumentality has been lost. A plaintiff's failure to preserve  
1774 an automobile claimed to have defects that caused injury without  
1775 affording the defendant manufacturer an opportunity to inspect the  
1776 damaged vehicle may be an example. Such a situation led to  
1777 affirmance of dismissal, as not an abuse of discretion, in  
1778 *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).  
1779 Or a party may lose the only evidence of a critically important  
1780 event. But even such losses may not irreparably deprive another  
1781 party of any meaningful opportunity to litigate. Remaining sources  
1782 of evidence and the opportunity to challenge the evidence presented  
1783 by the party who lost discoverable information that should have  
1784 been preserved, along with possible presentation of evidence and  
1785 argument about the significance of the lost information, should  
1786 often afford a meaningful opportunity to litigate.

1787           The requirement that a party be irreparably deprived of any  
1788 meaningful opportunity to present or defend against the claims in  
1789 the litigation is further narrowed by looking to all the claims in  
1790 the action. Lost information may appear critical to litigating a  
1791 particular claim or defense, but sanctions should not be imposed –  
1792 or should be limited to the affected claims or defenses – if those  
1793 claims or defenses are not central to the litigation.

1794           A special situation arises when discoverable information is  
1795 lost because of events outside a party's control. A party may take  
1796 the steps that should have been taken to preserve the information,  
1797 but lose it to such unforeseeable circumstances as flood,  
1798 earthquake, fire, or malicious computer attacks. Curative measures  
1799 may be appropriate in such circumstances – this is information that  
1800 should have been preserved – but sanctions are not. The loss is not  
1801 caused by "the party's actions" as required by (e) (1) (B).

1802           **Subdivision (e) (2).** These factors guide the court when asked  
1803 to adopt measures under Rule 37(e) (1) (A) due to loss of information  
1804 or to impose sanctions under Rule 37(e) (1) (B). The listing of  
1805 factors is not exclusive; other considerations may bear on these  
1806 decisions, such as whether the information not retained reasonably  
1807 appeared to be cumulative with materials that were retained. With  
1808 regard to all these matters, the court's focus should be on the  
1809 reasonableness of the parties' conduct.

1810           The first factor is the extent to which the party was on  
1811 notice that litigation was likely and that the information lost  
1812 would be discoverable in that litigation. A variety of events may  
1813 alert a party to the prospect of litigation. But often these

1814 events provide only limited information about that prospective  
1815 litigation, so that the scope of discoverable information may  
1816 remain uncertain.

1817         The second factor focuses on what the party did to preserve  
1818 information after the prospect of litigation arose. The party's  
1819 issuance of a litigation hold is often important on this point.  
1820 But it is only one consideration, and no specific feature of the  
1821 litigation hold -- for example, a written rather than an oral hold  
1822 notice -- is dispositive. Instead, the scope and content of the  
1823 party's overall preservation efforts should be scrutinized. One  
1824 focus would be on the extent to which a party should appreciate  
1825 that certain types of information might be discoverable in the  
1826 litigation, and also what it knew, or should have known, about the  
1827 likelihood of losing information if it did not take steps to  
1828 preserve. The court should be sensitive to the party's  
1829 sophistication with regard to litigation in evaluating preservation  
1830 efforts; some litigants, particularly individual litigants, may be  
1831 less familiar with preservation obligations than other litigants  
1832 who have considerable experience in litigation. Although the rule  
1833 focuses on the common law obligation to preserve in the  
1834 anticipation or conduct of litigation, courts may sometimes  
1835 consider whether there was an independent requirement that the lost  
1836 information be preserved. The court should be sensitive, however,  
1837 to the fact that such independent preservation requirements may be  
1838 addressed to a wide variety of concerns unrelated to the current  
1839 litigation. The fact that some information was lost does not  
1840 itself prove that the efforts to preserve were not reasonable.

1841         The third factor looks to whether the party received a request  
1842 to preserve information. Although such a request may bring home  
1843 the need to preserve information, this factor is not meant to  
1844 compel compliance with all such demands. To the contrary,  
1845 reasonableness and good faith may not require any special  
1846 preservation efforts despite the request. In addition, the  
1847 proportionality concern means that a party need not honor an  
1848 unreasonably broad preservation demand, but instead should make its  
1849 own determination about what is appropriate preservation in light  
1850 of what it knows about the litigation. The request itself, or  
1851 communication with the person who made the request, may provide  
1852 insights about what information should be preserved. One important  
1853 matter may be whether the person making the preservation request is  
1854 willing to engage in good faith consultation about the scope of the  
1855 desired preservation.

1856         The fourth factor emphasizes a central concern --  
1857 proportionality. The focus should be on the information needs of  
1858 the litigation at hand. That may be only a single case, or  
1859 multiple cases. Rule 26(b)(1) is amended to make proportionality

1860 a central factor in determining the scope of discovery. Rule  
1861 37(e)(2)(D) explains that this calculation should be made with  
1862 regard to "any anticipated or ongoing litigation." Prospective  
1863 litigants who call for preservation efforts by others (the third  
1864 factor) should keep those proportionality principles in mind.

1865 Making a proportionality determination often depends in part  
1866 on specifics about various types of information involved, and the  
1867 costs of various forms of preservation. The court should be  
1868 sensitive to party resources; aggressive preservation efforts can  
1869 be extremely costly, and parties (including governmental parties)  
1870 may have limited resources to devote to those efforts. A party may  
1871 act reasonably by choosing the least costly form of information  
1872 preservation, if it is substantially as effective as more costly  
1873 forms. It is important that counsel become familiar with their  
1874 clients' information systems and digital data -- including social  
1875 media -- to address these issues. A party urging that preservation  
1876 requests are disproportionate may need to provide specifics about  
1877 these matters in order to enable meaningful discussion of the  
1878 appropriate preservation regime.

1879 Finally, the fifth factor looks to whether the party alleged  
1880 to have failed to preserve as required sought guidance from the  
1881 court if agreement could not be reached with the other parties.  
1882 Until litigation commences, reference to the court may not be  
1883 possible. In any event, this is not meant to encourage premature  
1884 resort to the court; amendments to Rule 26(f)(3) direct the parties  
1885 to address preservation in their discovery plan, and amendments to  
1886 Rule 16(c)(3) invite provisions on this subject in the scheduling  
1887 order. Ordinarily the parties' arrangements are to be preferred to  
1888 those imposed by the court. But if the parties cannot reach  
1889 agreement, they should not forgo available opportunities to obtain  
1890 prompt resolution of the differences from the court.

1891 Questions for invitation to comment

1892 1. Should the rule be limited to sanctions for loss of  
1893 electronically stored information? Current Rule 37(e) is so  
1894 limited, and much commentary focuses on the preservation problems  
1895 resulting from the proliferation of such information. But the  
1896 dividing line between "electronically stored information" and other  
1897 discoverable matter may be uncertain, and may become more uncertain  
1898 in the future, and loss of tangible things or documents important  
1899 in litigation is a recurrent concern in litigation today.

1900 2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This  
1901 provision is focused on the possibility that one side's failure to  
1902 preserve evidence may catastrophically deprive the other side of  
1903 any meaningful opportunity to litigate, and permits imposition of  
1904 sanctions even absent a finding of willfulness or bad faith. It

1905 has been suggested that limiting the rule to loss of electronically  
1906 stored information would make (B)(ii) unnecessary. Does this  
1907 provision add important flexibility to the rule?

1908 3. Should the provisions of current Rule 37(e) be retained in  
1909 the rule? As stated in the Committee Note, the amended rule  
1910 appears to provide protection in any situation in which current  
1911 Rule 37(e) would apply.

1912 4. Should there be an additional definition of "substantial  
1913 prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the  
1914 rule could be augmented by directing that the court should consider  
1915 all factors, including the availability of reliable alternative  
1916 sources of the lost or destroyed information, and the importance of  
1917 the lost information to the claims or defenses in the case.

1918 5. Should there be an additional definition of willfulness or  
1919 bad faith under Rule 37(e)(1)(B)(i)? If so, what should be  
1920 included in that definition?

1921 "Dirty" version of 37(e) amendment  
1922 (Showing changes since January Standing Committee meeting)

1923

1924 **Rule 37. Failure to Make Disclosures or to Cooperate in**  
1925 **Discovery; Sanctions**

1926 \* \* \* \* \*

1927 ~~(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent~~  
1928 ~~exceptional circumstances, a court may not impose sanctions~~  
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1932 ~~system.~~

1933 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**

1934 **(1) Curative measures; sanctions.** If a party failed to  
1935 preserve discoverable information that reasonably should  
1936 have been preserved in the anticipation or conduct of  
1937 litigation, the court may

1938 **(A) permit additional discovery, order the party to**  
1939 **undertake curative measures, or order the party to**  
1940 **pay the reasonable expenses, including attorney's**  
1941 **fees, caused by the failure; and**

1942 **(B) impose any sanction listed in Rule 37(b)(2)(A) or**  
1943 **give an adverse-inference jury instruction, but**  
1944 **only if the court finds that the party's actions**

- 1945                    failure:
- 1946                    (i) caused substantial prejudice in the litigation
- 1947                    and ~~were was~~ willful or in bad faith; or
- 1948                    (ii) irreparably deprived a party of any meaningful
- 1949                    opportunity to present or defend against the a
- 1950                    claims in the litigation or defense.
- 1951                    (2) *Factors to be considered in assessing a party's conduct*
- 1952                    *Determining reasonableness and willfulness or bad faith.*
- 1953                    The court should consider all relevant factors in
- 1954                    determining whether a party failed to preserve
- 1955                    discoverable information that reasonably should have been
- 1956                    preserved in the anticipation or conduct of litigation,
- 1957                    and whether the failure was willful or in bad faith. The
- 1958                    , the court should consider all relevant factors,
- 1959                    including:
- 1960                    (A) the extent to which the party was on notice that
- 1961                    litigation was likely and that the information
- 1962                    would be discoverable;
- 1963                    (B) the reasonableness of the party's efforts to
- 1964                    preserve the information;
- 1965                    (C) whether the party received a request to preserve
- 1966                    information, whether the request was clear and
- 1967                    reasonable, and whether the person who made it and
- 1968                    the party consulted in good faith engaged in good-
- 1969                    faith consultation about the scope of preservation;
- 1970                    (D) the proportionality of the preservation efforts to
- 1971                    any anticipated or ongoing litigation; and
- 1972                    (E) whether the party timely sought the court's
- 1973                    guidance on any unresolved disputes about
- 1974                    preserving discoverable information.

1975                    DRAFT COMMITTEE NOTE

1976                    In 2006, Rule 37(e) was added to provide protection against

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1987 divergences among federal courts across the country have meant that  
1988 potential parties cannot determine what preservation standards they  
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1993 discovery.

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1995 adopting a uniform set of guidelines for federal courts, and  
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1998 limited, as is the current rule, to information lost due to "the  
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2010 provides protection for any conduct that would be protected under  
2011 the current rule. The current rule provides: "Absent exceptional  
2012 circumstances, a court may not impose sanctions under these rules  
2013 on a party for failing to provide electronically stored information  
2014 lost as a result of the routine, good-faith operation of an  
2015 electronic information system." The routine good faith operation  
2016 of an electronic information system should be respected under the  
2017 amended rule. As under the current rule, the prospect of  
2018 litigation may call for altering that routine operation. And the  
2019 prohibition of sanctions in the amended rule means that any loss of  
2020 data that would be insulated against sanctions under the current  
2021 rule would also be protected under the amended rule.

2022 Amended Rule 37(e) applies to loss of discoverable information  
2023 "that ~~reasonably~~ should have been preserved in the anticipation or  
2024 conduct of litigation." This preservation obligation was not  
2025 created by Rule 37(e), but has been recognized by many court  
2026 decisions. arises from the common law, and It may in some  
2027 instances be triggered or clarified by a court order in the case.  
2028 Rule 37(e)(2) identifies many of the factors that should be  
2029 considered in determining, in the circumstances of a particular  
2030 case, when a duty to preserve arose and what information should  
2031 have been ~~be~~ preserved.

2032           Except in very rare cases in which a party's actions cause the  
2033 loss of information that irreparably deprives ~~another~~ party of any  
2034 meaningful opportunity to present or defend against the ~~a~~ claims in  
2035 the litigation, or defense, sanctions for loss of discoverable  
2036 information may only be imposed on a finding of willfulness or bad  
2037 faith, combined with substantial prejudice.

2038           The amended rule therefore forecloses reliance on inherent  
2039 authority or state law to impose litigation sanctions in the  
2040 absence of the findings required under Rule 37(e) (1) (B). ~~displaces~~  
2041 ~~any other law that would authorize imposing litigation sanctions in~~  
2042 ~~the absence of a finding of willfulness or bad faith, including~~  
2043 ~~state law in diversity cases.~~ But the rule does not affect the  
2044 validity of an independent tort claim for relief for spoliation if  
2045 created by the applicable law. The law of some states authorizes  
2046 a tort claim for spoliation. The cognizability of such a claim in  
2047 federal court is governed by the applicable substantive law, not  
2048 Rule 37(e).

2049           An amendment to Rule 26(f) (3) directs the parties to address  
2050 preservation issues in their discovery plan, and an amendment to  
2051 Rule 16(b) (3) recognizes that the court's scheduling order may  
2052 address preservation. These amendments may prompt early attention  
2053 to matters also addressed by Rule 37(e).

2054           ~~Unlike the 2006 version of the rule, amended Rule 37(e) is not~~  
2055 ~~limited to "sanctions under these rules." It provides rule based~~  
2056 ~~authority for sanctions for loss of all kinds of discoverable~~  
2057 ~~information, and therefore makes unnecessary resort to inherent~~  
2058 ~~authority.~~

2059           **Subdivision (e) (1) (A).** When the court concludes that a party  
2060 failed to preserve information that should have been preserved in  
2061 the anticipation or conduct of litigation, ~~it reasonably should~~  
2062 ~~have preserved,~~ it may adopt a variety of measures that are not  
2063 sanctions. One is to permit additional discovery that would not  
2064 have been allowed had the party preserved information as it should  
2065 have. For example, discovery might be ordered under Rule  
2066 26(b) (2) (B) from sources of electronically stored information that  
2067 are not reasonably accessible. More generally, the fact that a  
2068 party has failed to preserve information may justify discovery that  
2069 otherwise would be precluded under the proportionality analysis of  
2070 Rule 26(b) (1) and (2) (C).

2071           In addition to, or instead of, ordering further discovery, the  
2072 court may order ~~the party that failed to preserve information to~~  
2073 ~~take~~ curative measures, such as requiring the party that failed to  
2074 preserve information to restore or obtain the lost information, or  
2075 to develop substitute information that the court would not have

2076 ordered the party to create but for the failure to preserve. The  
2077 court may also require the party that failed to preserve  
2078 information to pay another party's reasonable expenses, including  
2079 attorney fees, caused by the failure to preserve. Such expenses  
2080 might include, for example, discovery efforts caused by the failure  
2081 to preserve information. Additional curative measures might  
2082 include permitting introduction at trial of evidence about the loss  
2083 of information or allowing argument to the jury about the possible  
2084 significance of lost information.

2085 **Subdivision (e) (1) (B) (i).** This subdivision authorizes  
2086 imposition of the sanctions listed in Rule 37(b) (2) (A) for willful  
2087 or bad-faith failure to preserve information, whether or not there  
2088 was a court order requiring such preservation. Rule 37(e) (1) (B) (i)  
2089 is designed to provide a uniform standard in federal court for  
2090 sanctions for failure to preserve. It rejects decisions that have  
2091 authorized the imposition of sanctions -- as opposed to measures  
2092 authorized by Rule 37(e) (1) (A) -- for negligence or gross  
2093 negligence. It borrows the term "sanctions" from Rule 37(b) (2),  
2094 and does not attempt to prescribe whether such measures would be so  
2095 regarded for other purposes, such as an attorney's professional  
2096 responsibility.

2097 This subdivision protects a party that has made reasonable  
2098 preservation decisions in light of the factors identified in Rule  
2099 37(e) (2), which emphasize both reasonableness and proportionality.  
2100 Despite reasonable efforts to preserve, some discoverable  
2101 information may be lost. Although loss of information may affect  
2102 other decisions about discovery, such as those under Rule 26(b) (1),  
2103 (b) (2) (B) and 26(b) (2) (C), sanctions may be imposed only for  
2104 willful or bad faith actions, unless the exceptional circumstances  
2105 described in Rule 37(e) (2) (B) are shown.

2106 The threshold under Rule 37(e) (1) (B) (i) is that the court find  
2107 that lost information ~~reasonably~~ should have been preserved; if so,  
2108 the court may impose sanctions only if it can make two further  
2109 findings. ~~First, it must be established that the party that failed~~  
2110 ~~to preserve did so willfully or in bad faith. This determination~~  
2111 ~~should be made with reference to the factors identified in Rule~~  
2112 ~~37(e) (3).~~

2113 ~~Second,~~ the court must ~~also~~ find that the loss of information  
2114 caused substantial prejudice in the litigation. Because digital  
2115 data often duplicate other data, substitute evidence is often  
2116 available. Although it is impossible to demonstrate with certainty  
2117 what lost information would prove, the party seeking sanctions must  
2118 show that it has been substantially prejudiced by the loss. Among  
2119 other things, the court may consider the measures identified in  
2120 Rule 37(e) (1) (A) in making this determination; if these measures

2121 can sufficiently reduce the prejudice, sanctions would be  
2122 inappropriate even when the court finds willfulness or bad faith.  
2123 Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2)  
2124 sanctions in the expectation that the court will employ the least  
2125 severe sanction needed to repair the prejudice resulting from loss  
2126 of the information.

2127 Second, it must be established that the party that failed to  
2128 preserve did so willfully or in bad faith. This determination  
2129 should be made with reference to the factors identified in Rule  
2130 37(e)(2).

2131 **Subdivision (e)(1)(B)(ii).** This subdivision Rule  
2132 37(e)(1)(B)(ii) permits the court to impose sanctions in narrowly  
2133 limited circumstances without making a finding of either bad faith  
2134 or willfulness. The need to show bad faith or willfulness is  
2135 excused only by finding an impact more severe than the substantial  
2136 prejudice required to support sanctions under Rule 37(e)(1)(B)(i).  
2137 It still must be shown that a party failed to preserve discoverable  
2138 information that should have been preserved. In addition, it must  
2139 be shown that the failure irreparably deprived a party of any  
2140 meaningful opportunity to present or defend against the claims in  
2141 the litigation. As under Rule 37(e)(2)(A), the threshold for  
2142 sanctions is that the court find that lost information reasonably  
2143 should have been preserved by the party to be sanctioned.

2144 The first step in determining whether a party's failure to  
2145 preserve discoverable information that should have been preserved  
2146 has irreparably deprived another party of any meaningful  
2147 opportunity to present or defend against the claims in the  
2148 litigation is to examine carefully the apparent importance of the  
2149 lost information. Particularly with electronically stored  
2150 information, alternative sources may often exist. The next step is  
2151 to explore the possibility that curative measures under subdivision  
2152 (e)(1)(A) can reduce the adverse impact. If a party loses readily  
2153 accessible electronically stored information, for example, the  
2154 court may direct the party to attempt to retrieve the information  
2155 by alternative means. If such measures are not possible or fail to  
2156 restore important information, the court must determine whether the  
2157 loss has irreparably deprived a party of any meaningful opportunity  
2158 to present or defend against the claims in the litigation.

2159 The "irreparably deprived" test is more demanding than the  
2160 "substantial prejudice" that permits sanctions under Rule  
2161 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples  
2162 might include cases in which the alleged injury-causing  
2163 instrumentality has been lost. A plaintiff's failure to preserve  
2164 an automobile claimed to have defects that caused injury without  
2165 affording the defendant manufacturer an opportunity to inspect the

2166 damaged vehicle may be an example. Such a situation led to  
2167 affirmance of dismissal, as not an abuse of discretion, in  
2168 Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001).  
2169 Or a party may lose the only evidence of a critically important  
2170 event. But even such losses may not irreparably deprive another  
2171 party of any meaningful opportunity to litigate. Remaining sources  
2172 of evidence and the opportunity to challenge the evidence presented  
2173 by the party who lost discoverable information that should have  
2174 been preserved, along with possible presentation of evidence and  
2175 argument about the significance of the lost information, should  
2176 often afford a meaningful opportunity to litigate.

2177 The requirement that a party be irreparably deprived of any  
2178 meaningful opportunity to present or defend against the claims in  
2179 the litigation is further narrowed by looking to all the claims in  
2180 the action. Lost information may appear critical to litigating a  
2181 particular claim or defense, but sanctions should not be imposed –  
2182 or should be limited to the affected claims or defenses – if those  
2183 claims or defenses are not central to the litigation.

2184 A special situation arises when discoverable information is  
2185 lost because of events outside a party's control. A party may take  
2186 the steps that should have been taken to preserve the information,  
2187 but lose it to such unforeseeable circumstances as flood,  
2188 earthquake, fire, or malicious computer attacks. Curative measures  
2189 may be appropriate in such circumstances – this is information that  
2190 should have been preserved – but sanctions are not. The loss is not  
2191 caused by "the party's actions" as required by (e) (1) (B).

2192 Even if bad faith or willfulness is shown, sanctions may only  
2193 be imposed under Rule 37(e) (2) (A) when the loss of information  
2194 caused substantial prejudice in the litigation. Rule 37(e) (2) (B)  
2195 permits sanctions in the absence of a showing of bad faith or  
2196 willfulness only if that loss of information deprived a party of  
2197 any meaningful opportunity to present a claim or defense. Examples  
2198 might include cases in which the alleged injury-causing  
2199 instrumentality has been lost before the parties may inspect it, or  
2200 cases in which the only evidence of a critically important event  
2201 has been lost. Such situations are extremely rare.

2202 — Before resorting to sanctions, a court would ordinarily  
2203 consider lesser measures, including those listed in Rule 37(e) (1),  
2204 to avoid or minimize the prejudice. If such measures substantially  
2205 cure the prejudice, Rule 37(e) (2) (B) does not apply. Even if such  
2206 prejudice persists, the court should employ the least severe  
2207 sanction.

2208 **Subdivision (e) (2).** These factors guide the court when asked  
2209 to adopt measures under Rule 37(e) (1) (A) due to loss of information

2210 or to impose sanctions under Rule 37(e)(1)(B). The listing of  
2211 factors is not exclusive; other considerations may bear on these  
2212 decisions, such as whether the information not retained reasonably  
2213 appeared to be cumulative with materials that were retained. With  
2214 regard to all these matters, the court's focus should be on the  
2215 reasonableness of the parties' conduct.

2216 The first factor is the extent to which the party was on  
2217 notice that litigation was likely and that the information lost  
2218 would be discoverable in that litigation. A variety of events may  
2219 alert a party to the prospect of litigation. But often these  
2220 events provide only limited information about that prospective  
2221 litigation, so that the scope of discoverable information may  
2222 remain uncertain.

2223 The second factor focuses on what the party did to preserve  
2224 information after the prospect of litigation arose. The party's  
2225 issuance of a litigation hold is often important on this point.  
2226 But it is only one consideration, and no specific feature of the  
2227 litigation hold -- for example, a written rather than an oral hold  
2228 notice -- is dispositive. Instead, the scope and content of the  
2229 party's overall preservation efforts should be scrutinized. One  
2230 focus would be on the extent to which a party should appreciate  
2231 that certain types of information might be discoverable in the  
2232 litigation, and also what it knew, or should have known, about the  
2233 likelihood of losing information if it did not take steps to  
2234 preserve. The court should be sensitive to the party's  
2235 sophistication with regard to litigation in evaluating preservation  
2236 efforts; some litigants, particularly individual litigants, may be  
2237 less familiar with preservation obligations than other litigants  
2238 who have considerable experience in litigation. Although the rule  
2239 focuses on the common law obligation to preserve in the  
2240 anticipation or conduct of litigation, courts may sometimes  
2241 consider whether there was an independent requirement that the lost  
2242 information be preserved. The court should be sensitive, however,  
2243 to the fact that such independent preservation requirements may be  
2244 addressed to a wide variety of concerns unrelated to the current  
2245 litigation. The fact that some information was lost does not  
2246 itself prove that the efforts to preserve were not reasonable.

2247 The third factor looks to whether the party received a request  
2248 to preserve information. Although such a request may bring home  
2249 the need to preserve information, this factor is not meant to  
2250 compel compliance with all such demands. To the contrary,  
2251 reasonableness and good faith may not require any special  
2252 preservation efforts despite the request. In addition, the  
2253 proportionality concern means that a party need not honor an  
2254 unreasonably broad preservation demand, but instead should make its  
2255 own determination about what is appropriate preservation in light

2256 of what it knows about the litigation. The request itself, or  
2257 communication with the person who made the request, may provide  
2258 insights about what information should be preserved. One important  
2259 matter may be whether the person making the preservation request is  
2260 willing to engage in good faith consultation about the scope of the  
2261 desired preservation.

2262 The fourth factor emphasizes a central concern --  
2263 proportionality. The focus should be on the information needs of  
2264 the litigation at hand. That may be only a single case, or  
2265 multiple cases. Rule 26(b)(1) is amended to make proportionality  
2266 a central factor in determining the scope of discovery. ~~Rule~~  
2267 ~~26(b)(2)(C) provides guidance particularly applicable to~~  
2268 ~~calibrating a reasonable preservation regime.~~ Rule 37(e)(2)(D)  
2269 explains that this calculation should be made with regard to "any  
2270 anticipated or ongoing litigation." Prospective litigants who call  
2271 for preservation efforts by others (the third factor) should keep  
2272 those proportionality principles in mind.

2273 Making a proportionality determination often depends in part  
2274 on specifics about various types of information involved, and the  
2275 costs of various forms of preservation. The court should be  
2276 sensitive to party resources; aggressive preservation efforts can  
2277 be extremely costly, and parties (including governmental parties)  
2278 may have limited resources to devote to those efforts. A party may  
2279 act reasonably by choosing the least costly form of information  
2280 preservation, if it is substantially as effective as more costly  
2281 forms. It is important that counsel become familiar with their  
2282 clients' information systems and digital data -- including social  
2283 media -- to address these issues. A party urging that preservation  
2284 requests are disproportionate may need to provide specifics about  
2285 these matters in order to enable meaningful discussion of the  
2286 appropriate preservation regime.

2287 Finally, the fifth factor looks to whether the party alleged  
2288 to have failed to preserve as required sought guidance from the  
2289 court if agreement could not be reached with the other parties.  
2290 Until litigation commences, reference to the court may not be  
2291 possible. In any event, this is not meant to encourage premature  
2292 resort to the court; amendments to Rule 26(f)(3) directs the  
2293 parties to address preservation in their discovery plan, and  
2294 amendments to Rule 16(c)(3) invite provisions on this subject in  
2295 the scheduling order. ~~discuss and to attempt to resolve issues~~  
2296 ~~concerning preservation before presenting them to the court.~~  
2297 Ordinarily the parties' arrangements are to be preferred to those  
2298 imposed by the court. But if the parties cannot reach agreement,  
2299 they should not forgo available opportunities to obtain prompt  
2300 resolution of the differences from the court.

2301 **C. Rule 84: Action to Recommend Abrogation, Amending Rule**  
2302 **4(d)(1)(D)**

2303 The Committee recommends approval to publish for comment  
2304 proposals that would abrogate Rule 84 and the Official Forms,  
2305 amending Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as  
2306 official Rule 4 Forms.

2307 Uncertainties about the impact of the Supreme Court's still  
2308 recent decisions on pleading standards on the Rule 84 official  
2309 pleading forms led the Committee to broader questions about Rule 84  
2310 and the Rule 84 Forms. These questions led to comparisons with the  
2311 other bodies of rules. Official forms are attached to the  
2312 Appellate, Bankruptcy, and Civil Rules. The Appellate and Civil  
2313 Forms have been generated through the full Enabling Act Process.  
2314 Bankruptcy Rule 9009 distinguishes two types of forms. "Official  
2315 Forms prescribed by the Judicial Conference of the United States  
2316 shall be observed and used with alterations as may be appropriate."  
2317 These Forms are developed through the Enabling Act committees, but  
2318 the final step is approval by the Judicial Conference without going  
2319 on to the Supreme Court or Congress. Rule 9009 further recognizes  
2320 that the Director of the Administrative Office "may issue  
2321 additional forms for use under the Code. The forms shall be  
2322 construed to be consistent with these rules and the Code." The  
2323 Administrative Office produces forms for use in criminal  
2324 prosecutions, but these forms are not "official." (Former Criminal  
2325 Rule 58 and the official forms were abrogated in 1983; the  
2326 Committee Note explained that they were unnecessary.) A  
2327 subcommittee formed of representatives of the advisory committees  
2328 examined these differences. It reported that forms play different  
2329 roles in the different forms of litigation, and that there is no  
2330 apparent reason to adopt a uniform approach across the different  
2331 sets of rules and advisory committees.

2332 With this reassurance of independence, the Rule 84  
2333 Subcommittee was formed to study Rule 84 and Rule 84 forms. It  
2334 gathered information about the general use of the forms by informal  
2335 inquiries that confirmed the initial impressions of Subcommittee  
2336 members. Lawyers do not much use these forms, and there is little  
2337 indication that they often provide meaningful help to pro se  
2338 litigants. And as discussed further below, the pleading forms live  
2339 in tension with recently developing approaches to general pleading  
2340 standards.

2341 From this beginning, the Subcommittee considered several  
2342 alternative approaches. The simplest would be to leave Rule 84 and  
2343 the Rule 84 forms where they lie. The most burdensome would be to  
2344 take on full responsibility for maintaining the forms in a way that  
2345 ensures a good fit with contemporary practice and needs, and

2346 perhaps developing additional forms to address many of the subjects  
2347 that are not now illustrated by the forms. The work required to  
2348 maintain the forms through the full Enabling Act process would  
2349 divert the energies of all actors in the process from other work  
2350 that, over the years, has seemed more important. Other approaches  
2351 also were considered.

2352         The Subcommittee came to believe that the best approach is to  
2353 abrogate Rule 84 and the Rule 84 forms. Several considerations  
2354 support this conclusion. One important consideration is the amount  
2355 of work that would be required to assume full responsibility for  
2356 maintaining the forms. Another consideration is that many  
2357 alternative sources provide excellent forms. One source is the  
2358 Administrative Office.

2359         A further reason to abrogate Rule 84 is the tension between  
2360 the pleading forms and emerging pleading standards. The pleading  
2361 forms were adopted in 1938 as an important means of educating bench  
2362 and bar on the dramatic change in pleading standards effected by  
2363 Rule 8(a)(2). They – and all the other forms – were elevated in  
2364 1948 from illustrations to a status that "suffice[s] under these  
2365 rules." Whatever else may be said, the ranges of topics covered by  
2366 the pleading forms omit many of the categories of actions that  
2367 comprise the bulk of today's federal docket. And some of the forms  
2368 have come to seem inadequate, particularly the Form 18 complaint  
2369 for patent infringement. Attempting to modernize the existing  
2370 forms, and perhaps to create new forms to address such claims as  
2371 those arising under the antitrust laws (*Twombly*) or implicating  
2372 official immunity (*Iqbal*), would be an imposing and precarious  
2373 undertaking. Such an undertaking might be worthwhile if in recent  
2374 years the pleading reforms had provided meaningful guidance to the  
2375 bar in formulating complaints, but they have not. The Committee's  
2376 work has suggested that few if any lawyers consult the forms when  
2377 drafting complaints.

2378         Abrogation need not remove the Enabling Act committees  
2379 entirely from forms work. The Administrative Office has a working  
2380 group on forms that includes six judges and six court clerks. They  
2381 have produced a number of civil forms that are quite good. The  
2382 forms are available on the Administrative Office web site, some of  
2383 them in a format that can be filled in, and others in a format that  
2384 can be downloaded for completion by standard word-processing  
2385 programs. The working group is willing to work in conjunction with  
2386 the Advisory Committee. If Rule 84 is abrogated, a conservative  
2387 initial approach would be to appoint a liaison from the Advisory  
2388 Committee to work with the working group. New and revised forms  
2389 could be reviewed, perhaps by a Forms Subcommittee. Experience with  
2390 this process would shape the longer-term relationships. The forms  
2391 for criminal prosecutions have been developed successfully with

2392 only occasional review by the Criminal Rules Committee. Similar  
2393 success may be hoped for with the Civil Rules. The Administrative  
2394 Office forms, moreover, would have to win their way by intrinsic  
2395 merit, unaided by official status. A court dissatisfied with a  
2396 particular form would not be obliged to accept it.

2397 Two forms require special consideration. Rule 4(d)(1)(D)  
2398 requires that a request to waive service of process be made by Form  
2399 5. The Form 6 waiver is not required, but is closely tied to Form  
2400 5. It would be possible simply to remove this requirement, perhaps  
2401 substituting a recital in the rule of the elements that must be  
2402 included in the request and in the waiver. The corresponding  
2403 Administrative Office forms are identical to Form 5 and virtually  
2404 identical to Form 6. But without something in Rule 4(d) to mandate  
2405 their use, the Administrative Office forms might not be uniformly  
2406 employed. An alternative would be to adopt a request form and a  
2407 waiver form, as part of Rule 4. These forms were carefully  
2408 developed as part of creating Rule 4(d), and might be carried  
2409 forward into Rule 4 without change.

2410 These questions were discussed with the Standing Committee  
2411 last January. With the support provided by that discussion, the  
2412 Advisory Committee has concluded that the best course is to  
2413 abrogate Rule 84. Forms 5 and 6 should be preserved by amending  
2414 Rule 4(d)(1)(D) to incorporate them, recast as Rule 4 Forms and  
2415 attached directly to Rule 4. These changes are accomplished by the  
2416 rule texts, Committee Notes, and Forms set out below. The Committee  
2417 recommends that they be approved for publication this summer.

2418 **Rule 84. Forms**

2419 **Rule 84. [Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015).]** ~~The forms~~  
2420 ~~in the Appendix suffice under these rules and illustrate the~~  
2421 ~~simplicity and brevity that these rules contemplate.~~

2422 **Committee Note**

2423 Rule 84 was adopted when the Civil Rules were established in  
2424 1938 "to indicate, subject to the provisions of these rules, the  
2425 simplicity and brevity of statement which the rules contemplate."  
2426 The purpose of providing illustrations for the rules, although  
2427 useful when the rules were adopted, has been fulfilled.  
2428 Accordingly, recognizing that there are many excellent alternative  
2429 sources for forms, including the Administrative Office of the  
2430 United States Courts, Rule 84 and the Appendix of Forms are no  
2431 longer necessary and have been abrogated.

2432

2433

**APPENDIX OF FORMS**

2434

**Abrogated [(Apr. \_\_, 2015, eff. Dec. 1, 2015).]**

2435

**Rule 4. Summons**

2436

\* \* \*

2437

(d) WAIVING SERVICE.

2438

(1) *Requesting a Waiver.* \* \* \* The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: \* \* \*

2439

2440

2441

2442

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

2443

2444

2445

2446

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

2447

2448

2449

2450

Committee Note

2451

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

2452

2453

~~Form 5.~~ Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

2454

2455

(Caption ~~— See Form 1.~~)

2456

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

2457

2458

2459

**Why are you getting this?**

2460

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

2461

2462

2463

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may

2464

2465

2466

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2468

2469

2470

2471

2472 keep the other copy.

2473 **What happens next?**

2474 If you return the signed waiver, I will file it with the  
2475 court. The action will then proceed as if you had been served on  
2476 the date the waiver is filed, but no summons will be served on you  
2477 and you will have 60 days from the date this notice is sent (see  
2478 the date below) to answer the complaint (or 90 days if this notice  
2479 is sent to you outside any judicial district of the United States).

2480 If you do not return the signed waiver within the time  
2481 indicated, I will arrange to have the summons and complaint served  
2482 on you. And I will ask the court to require you, or the entity you  
2483 represent, to pay the expenses of making service.

2484 Please read the enclosed statement about the duty to avoid  
2485 unnecessary expenses.

2486 I certify that this request is being sent to you on the date  
2487 below.

2488  
2489 Date: (Date) (Signature of the attorney or unrepresented party)

2490  
2491 \_\_\_\_\_

2492 (Printed name)

2493 (Address)

2494 (E-mail address)

2495 (Telephone number)

2496

2497

2498 Form 6. Rule 4 Waiver of the Service of Summons.

2499

2500 To (name the plaintiff's attorney or the unrepresented plaintiff):

2501 I have received your request to waive service of a summons in  
2502 this action along with a copy of the complaint, two copies of this  
2503 waiver form, and a prepaid means of returning one signed copy of  
2504 the form to you.

2505 I, or the entity I represent, agree to save the expense of  
2506 -serving a summons and complaint in this case.

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2508 I understand that I, or the entity I represent, will keep all  
2509 defenses or objections to the lawsuit, the court's jurisdiction,  
2510 and the venue of the action, but that I waive any objections to the  
2511 absence of a summons or of service.

2512 I also understand that I, or the entity I represent, must file  
2513 and serve an answer or a motion under Rule 12 within 60 days from  
2514 \_\_\_\_\_ , the date when this request was sent (or 90  
2515 days if it was sent outside the United States). If I fail to do  
2516 so, a default judgment will be entered against me or the entity I  
2517 represent.

2518

2519 Date: (Date)

2520

2521 (Signature of the attorney or unrepresented party)

2522

2523

2524 (Printed name)

2525 (Address)

2526 (E-mail address) (Telephone number)

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2528 **Duty to Avoid Unnecessary Expenses of Serving a Summons**

2529 Rule 4 of the Federal Rules of Civil Procedure requires  
2530 certain defendants to cooperate in saving unnecessary expenses of  
2531 servicing a summons and complaint. A defendant who is located in the  
2532 United States and who fails to return a signed waiver of service  
2533 requested by a plaintiff located in the United States will be  
2534 required to pay the expenses of service, unless the defendant shows  
2535 good cause for the failure.

2536 "Good cause" does not include a belief that the lawsuit is  
2537 groundless, or that it has been brought in an improper venue, or  
2538 that the court has no jurisdiction over this matter or over the  
2539 defendant or the defendant's property.

2540 If the waiver is signed and returned, you can still make these  
2541 and all other defenses and objections, but you cannot object to the  
2542 absence of a summons or of service.

2543 If you waive service, then you must, within the time specified  
2544 on the waiver form, serve an answer or a motion under Rule 12 on  
2545 the plaintiff and file a copy with the court. By signing and

2546 returning the waiver form, you are allowed more time to respond  
2547 than if a summons had been served.

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**PART II: INFORMATION ITEMS**

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**A. Rule 17(c)(2): Information – Duty of Inquiry**

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Rule 17(c)(2) directs that "The court must appoint a guardian ad litem – or issue another appropriate order – to protect a minor or incompetent person who is unrepresented in an action."

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In *Powell v. Symons*, 680 F.3d 301 (3d Cir.2012), the court struggled to identify the circumstances that might oblige a judge to initiate an inquiry into the competence of an unrepresented litigant. It concluded that the duty of inquiry arises only if there is "verifiable evidence of incompetence," and that the duty is not triggered simply by bizarre behavior. At the same time, it lamented "the paucity of comments on Rule 17" and observed that "We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call its attention to" the question.

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Preliminary discussion emphasized the difficulty of this question. Rule 17(c)(2) could be read to direct that a court must inquire into the competence of an unrepresented party whenever there is any sign that competence may be in doubt. It could be read to say that a court need act only when informed of an existing adjudication of incompetence. It can be read to create a duty of inquiry at some indeterminate point in between these alternatives. An expansive duty of inquiry could impose onerous burdens, not only in making the inquiry but also in finding representatives.

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A set of empirical questions underlies these abstract questions. The most fundamental is also the most obvious: how often do pro se litigants who are "incompetent" within the meaning of Rule 17(c)(2) go through litigation without appointment of a guardian or entry of another "appropriate order"? How many of them are competent to function as clients if an attorney is appointed as representative? How many need a guardian who can function as the client – with or without appointment of counsel? What resources are available to support the inquiry into competence, and to support appointment of a guardian or other protective action? It seems likely that it will be difficult to obtain reliable answers to these questions.

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The Committee has concluded that the next step should be a careful survey of current decisions that address whatever duty of inquiry into competence is recognized. A Committee member volunteered to supervise the research over the course of the summer.

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2588           **B.     Rule 62: Information**

2589           The Appellate Rules Committee may undertake a study of the  
2590 Appellate and Civil Rules provisions governing stays pending  
2591 appeal, including the provisions for security. The Civil Rules  
2592 Committee stands ready to work with the Appellate Rules Committee  
2593 on such projects as the Appellate Rules Committee decides to take  
2594 up.

2595           **C.     Court Administration and Case Management Projects:**  
2596 **Information**

2597           The Court Administration and Case Management Committee has  
2598 raised a number of topics that may lead to Civil Rules amendments.  
2599 Action on all of these topics has been deferred pending further  
2600 development by CACM.

2601           Judge Sentelle, Chair of the Judicial Conference Executive  
2602 Committee, referred one of these questions to the Civil Rules  
2603 Committee and to CACM simultaneously. The question comes from a  
2604 district judge who volunteers to manage cases in other districts by  
2605 videoconference from his own district. There is substantial  
2606 experience with pretrial management in this mode; there may not be  
2607 any need for rules amendments to guide or direct what is already  
2608 going on. But there may be more difficult questions if a judge in  
2609 one district undertakes to use videoconferencing to conduct a trial  
2610 physically held in a courthouse in another district. The question  
2611 put to the committees assumes that only a bench trial would be  
2612 conducted in this manner. Even then, Rule 43(a) illustrates the  
2613 questions that must be addressed. Rule 43(a) now allows testimony  
2614 in open court by "contemporaneous transmission from a different  
2615 location" only "for good cause in compelling circumstances and with  
2616 appropriate safeguards." It is a fair question whether Rule 43(a)  
2617 is automatically satisfied by the advantages of allowing  
2618 interdistrict assignments without travelling to the actual trial.  
2619 It also is a fair question whether Rule 43(a) should be amended to  
2620 ensure that videoconferencing across district lines is a generally  
2621 proper means of conducting even a bench trial.

2622           Two issues relating to e-filing have been raised in the  
2623 process of developing the next generation CM/ECF system. One is  
2624 whether the Notice of Electronic Filing can automatically be  
2625 treated as a certificate of service. The other is whether an  
2626 electronic signature in the CM/ECF system can be prima facie  
2627 evidence of a valid signature. The Committee recommends appointment  
2628 of a joint committee of all the advisory committees to study these  
2629 issues and a number of other issues relating to electronic filing  
2630 and service.

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2632 Another issue also grows out of the next generation CM/ECF  
2633 system. The system will include a national database, available only  
2634 to "designated court users," that identifies "restricted filers."  
2635 Two examples of restricted filers are prisoners subject to  
2636 restrictions under the Prisoner Litigation Reform Act and disbarred  
2637 attorneys. The concern is that restricted filers are identified by  
2638 name and address, thwarting identification when – as often happens  
2639 with pro se litigants – a litigant changes addresses. CACM  
2640 recommends that this problem be addressed by amending Rule  
2641 4(a)(1)(C) to require that a summons "state the name and address of  
2642 the plaintiff's attorney or – if unrepresented – the plaintiff's  
2643 name, address, and last four digits of the social-security number  
2644 of the plaintiff." In this day of rampant identity theft,  
2645 discussion in the Committee raised substantial doubts about  
2646 requiring pro se plaintiffs to provide even the last four digits of  
2647 their social security numbers. This topic will be pursued further  
2648 with CACM.

2649 **D. Pleading; Class Actions: Information**

2650 The Rule 23 Subcommittee deferred further work pending  
2651 decisions in a substantial number of class-action cases on the  
2652 Supreme Court docket this Term. It plans to resume work when they  
2653 have been decided, aiming first to sort through an intimidating  
2654 list of possible questions to produce an agenda identifying the  
2655 most important. It seems likely that it will be important to hold  
2656 a miniconference with experienced lawyers, judges, and academics to  
2657 inform this process. There is no firm sense yet whether the result  
2658 will be an agenda of issues that seem ripe for proposing Rule 23  
2659 amendments.

2660 Pleading standards have held a constant place on the agenda  
2661 for the last twenty years without yet generating any closely  
2662 focused proposals for reform. The Committee does not sense any  
2663 circumstances that point toward immediate consideration of the  
2664 practices that continue to evolve in the aftermath of the *Twombly*  
2665 and *Iqbal* decisions. The Federal Judicial Center is conducting a  
2666 study of dispositions by all forms of dispositive motions. The  
2667 completion of that study will prompt a renewed inquiry whether  
2668 rules proposals should be developed.

2669 **E. Dismissal by Parties' Stipulation: Information**

2670 Rule 41(a)(1)(A)(ii) allows a plaintiff to "dismiss an action  
2671 without a court order by filing \* \* \* a stipulation of dismissal  
2672 signed by all parties who have appeared." Rule 41(a)(1)(B) provides  
2673 that unless the stipulation states otherwise, the dismissal is  
2674 without prejudice.

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2676           A question about this provision was raised by a judge who,  
2677 after twice refusing a request by all parties to defer a firm trial  
2678 date so that the parties might seek to settle some 500 related  
2679 cases, most of them pending before other judges, was confronted by  
2680 a joint stipulation dismissing the action without prejudice. The  
2681 concern is that allowing the parties to do this will frustrate  
2682 effective case management and dissipate the value of the investment  
2683 in managing the case up to the dismissal.

2684           The Committee concluded that there is no need to amend Rule 41  
2685 on this account. There can be compelling circumstances that prevent  
2686 parties bent on settlement from settling within a tight time frame,  
2687 yet hold real promise of eventual settlement. That is what happened  
2688 with these cases – the parties were in fact able to reach a  
2689 comprehensive settlement.

2690           Beyond the specifics of this particular case, the Committee  
2691 believes that private litigation does not generate such strong  
2692 public interests as to require the parties to continue to litigate  
2693 after an action is once filed. Settlement moots an action,  
2694 depriving the court of jurisdiction to proceed further. The wish of  
2695 all parties to conclude an action without yet being able to settle  
2696 deserves equal respect.

2697           Concerns about frustrating effective case management and  
2698 squandering the investment of scarce judicial resources up to the  
2699 point of dismissal also seem overstated. Committee members do not  
2700 believe that there is any general problem of joint dismissals  
2701 followed by revival in a new action.

2702           **F. Hague Convention: Prompt Return of Children: Information**

2703           *Chafin v. Chafin*, 133 S.Ct. 1017 (2013), ruled that return of  
2704 mother and child to the habitual residence determined by the  
2705 district court under the Hague Convention on the Civil Aspects of  
2706 International Child Abduction did not moot the father's appeal. The  
2707 Court emphasized the need for prompt decision in the trial court  
2708 and on appeal, pointing to the express terms of the Convention,  
2709 common judicial practice, and a Federal Judicial Center guide for  
2710 handling Convention cases. Justice Ginsburg repeated these themes  
2711 in a concurring opinion, including a footnote suggesting that the  
2712 Appellate and Civil Rules Advisory Committees might consider  
2713 "whether uniform rules for expediting [Convention] proceedings are  
2714 in order." 133 S.Ct. at 1029 n. 3.

2715           The Committee has concluded that there is no real need to  
2716 adopt a civil rule specific to Hague Convention cases. Courts  
2717 already recognize the need for resolving matters affecting child  
2718 custody as promptly as possible. The Court's opinions in the *Chafin*  
2719 case will reinforce this understanding.

2720           Not only is there no need for a rule. The Judicial Conference  
2721 has an entrenched policy opposing statutes or court rules that give  
2722 docket priority to specific categories of litigation. One priority  
2723 can interfere with wise management of a particular docket. A small  
2724 number of competing priorities can cause serious interference. And  
2725 a welter of conflicting priorities can lead to chaos.

2726           In a real sense, the very importance of achieving expeditious  
2727 disposition of international child abduction disputes undermines  
2728 the need for a specific court rule. The importance is manifest.  
2729 Courts recognize the need and rise to meet it.