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February 12, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

**Re: Proposed Amendments to Federal Rules of Civil Procedure**

Dear Sir or Madam:

Attached please find the Report and Recommendations of the Philadelphia Bar Association on the Proposed Amendments to the Federal Rules of Civil Procedure Promulgated for Public Comment in August, 2013.

We appreciate the opportunity to provide these comments, which we hope will prove useful in your review of the proposed amendments.

Sincerely,

William P. Fedullo
Chancellor, Philadelphia Bar Association

# REPORT AND RECOMMENDATIONS OF THE PHILADELPHIA BAR ASSOCIATION ON THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE PROMULGATED FOR PUBLIC COMMENT IN AUGUST 2013

Adopted on January 27, 2014

## EXECUTIVE SUMMARY

The Philadelphia Bar Association (the "Association") issues this Report and Recommendations on the proposed amendments to the Federal Rules of Civil Procedure ("Proposed Amendments") promulgated for public comment on August 15, 2013 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Standing Committee").

The Proposed Amendments are intended to reduce expense and delay in federal litigation by promoting cooperation among attorneys, proportionality in discovery, and judicial case management.

The Honorable Gene E.K. Pratter, a member of the Civil Rules Advisory Committee ("Advisory Committee") that submitted the Proposed Amendments to the Standing Committee, participated in a presentation about the Proposed Amendments at a meeting held on May 15, 2013 by the Association's Federal Courts Committee (the "Committee"). Judge Pratter encouraged the Committee to prepare a report commenting on the Proposed Amendments and submit it to the Advisory Committee.

The Committee formed the Subcommittee on Proposed Rules Amendments (the "Subcommittee") and solicited all of its members to participate. The twenty-four Committee members volunteered. The Subcommittee's members represent a diverse range of attorneys. Almost half exclusively represent plaintiffs, a few exclusively represent defendants, and the remainder represents both plaintiffs and defendants. The Subcommittee members' diverse backgrounds ensured that all interests in the Philadelphia litigation community are well represented.

The Subcommittee strived to evaluate the Proposed Amendments from the perspective of what is best for all stakeholders in federal litigation: litigants, courts, and attorneys. Every Recommendation by the Subcommittee was the subject of lively oral and written debate before being finalized.

The Committee adopted the Subcommittee's Report on December 18, 2013 by unanimous vote. The Committee's Report, as amended, was adopted by the Association's Board of Governors on January 27, 2014 by unanimous vote.

The Report endorses many of the Proposed Amendments, which the Association views as relatively modest and representing positive steps towards improving the efficiency and fairness of litigation in the federal courts.

More significant is the Association's decision to withhold endorsing six Proposed Amendments. The Association opposes the following four Proposed Amendments:

(1) the Proposed Amendment to Rule 26(b) that moves proportionality considerations from 26(b)(2)(C)(iii) to 26(b)(1);

(2) the Proposed Amendment to Rule 30(a)(2)(A)(i) reducing the presumptive deposition limit per side from 10 depositions to five depositions;

(3) the Proposed Amendment to Rule 33(a)(1) reducing the presumptive number of interrogatories from 25 to 15; and

(4) the Proposed Amendment to Rule 36(a)(2) establishing a new presumptive limit of 25 for requests for admissions.

The Association takes no position on the following two Proposed Amendments, because it is unable to conclude that they are beneficial, with a substantial number of strongly held views opposing them:

(5) the Proposed Amendment to Rule 30(d)(1) reducing the presumptive duration of a deposition from seven hours to six hours; and

(6) the Proposed Amendment abrogating Rule 84 and the Appendix of Forms.

The Association endorses the following other Proposed Amendments:

- Rule 1. Addition of language stating that "the court and the parties" will employ the Rules to secure a just, speedy and inexpensive determination.

- Rule 4(m). Reduction of the time allowed for service of the summons and complaint from 120 days to 60 days.

- Rule 16(b)(1)(B). Deletion of language stating that a scheduling conference may be "by telephone, mail, or other means," to ensure that conferences involve direct simultaneous communications in person, by telephone, or more sophisticated electronic means.

- Rule 16(b)(2). Reduction of time for the court to issue a scheduling order from 120 days to 90 days after complaint is served, and from 90 days to 60 days after a defendant has entered its appearance.

- Rule 26(b)(1). The substitution of language stating that "[i]nformation need not be admissible in evidence to be discoverable," for language stating that "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

- Rule 26(b)(1). The deletion of language stating "For good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the action," in light of other language in the Rule allowing "discovery of any nonprivileged matter that is relevant to any party's claim or defense."

- Rule 26(b)(1). The deletion of language "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."

- Rule 26(c)(1)(B). The addition of language stating that the court may specify in a protective order "the allocation of expenses."

- Rule 26(d)(2). The addition of language permitting a document request to be delivered before a Rule 26(f) conference with service deemed to occur at the first Rule 26(f) conference, and language permitting parties to stipulate to a specific sequence for discovery.

- Rules 26(f)(3) and 16(b)(3)(B)(iv). The addition of language requiring a discovery plan to address the preservation of electronically-stored information ("ESI") and agreements under Federal Rule of Evidence 502 ("FRE 502") regarding information protected by the attorney-client privilege and work product doctrine, and permitting a scheduling order to do the same.

- Rule 34(b)(2)(A). The addition of language permitting a document request to be delivered at the first Rule 26(f) conference, with service deemed to occur at the conference.

- Rule 34(b)(2)(B) & (C). The addition of language requiring grounds for objections to be stated with specificity, the production of documents within a reasonable time, and a statement regarding whether documents are being withheld based on an objection.

- Rule 37(e). Replacing the safe harbor for failing to produce ESI lost as a result of the good faith operation of an electronic information system with a new rule governing the failure to preserve any information that provides for curative measures independent of fault as a remedy for the failure to preserve discoverable information, and permitting the imposition of sanctions where a party's actions "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."

## PROPOSED AMENDMENTS TO RULE 1

### Proposed Amendments and Their Purpose

The proposed amendment to Rule 1 adds the phrase "and employed by the court and the parties." The red-lined rule and advisory committee's note explaining the amendment's rationale are set forth below.

**Rule 1. Scope and Purpose**

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

**Committee Note**

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

**Recommendations of the Association**

The Association endorses this proposed amendment.

**Explanation for Recommendations**

The minor amendment to Rule 1 makes explicit what is already implicit: that both the courts and the parties have the aspirational goal of employing the rules to secure a just, speedy and inexpensive determination of cases. "There is probably no provision in the federal rules that is more important than this philosophical mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be, and by and large have been interpreted . . . ." 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1029 (3d ed. 2002).

All lawyers should always view the principles articulated in Rule 1 as goals. The Association endorses this added language as it should be viewed as an attempt by the Advisory Committee to refocus lawyers (and courts) on these foundational principles.

**PROPOSED AMENDMENTS TO RULE 4(m)**

**Proposed Amendments and Their Purpose**

The proposed amendment to Rule 4(m) reduces the time for service from 120 days to 60 days. The red-lined rule and advisory committee's note explaining the amendment's rationale are set forth below.

**Rule 4. Summons**

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**(m) Time Limit for Service**. If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time. . . .

**Committee Note**

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

**Recommendations of the Association**

The Association endorses this proposed amendment.

**Explanation for Recommendations**

A 120-day period for serving the summons and complaint is unnecessary since service, in most cases, can be accomplished within 60 days. The Association concludes that the amendment would not impose an undue burden on plaintiffs because the proposed amendment expressly allows for an extension upon a showing of good cause.

Some consideration was also given to the impact the reduction of time for service would have on a plaintiff's ability to secure a waiver of service under Rule 4(d)(1)(F). Rule 4(d)(1) sets forth the procedure by which a plaintiff may notify a defendant and request a waiver of service of process. Rule 4(d)(1)(F) requires the plaintiff to give the defendant reasonable time -- at least 30 days -- to return the waiver. The proposed amendment to Rule 4(m) will require plaintiffs to be more diligent in order to avail themselves of the benefits of waiver of service under Rule 4(d). On balance, the Association does not view waiver of service as a reason to reject the proposed amendment.

The Association also considered the impact of the proposed amendment on Rule 15(c)(1)(C), which incorporates Rule 4(m) in its test for relation back of an amendment that "changes the party or the naming of the party against whom a claim is asserted." The reduction of time for service under Rule 4(m) necessarily reduces the period for an amendment adding or re-naming a party that relates back to the filing of the complaint and summons. The recognition that the amendment to Rule 4(m) will have this effect did not alter the Association's position on the proposed amendment.

The Association also considered the impact of the proposed amendment on the small number of actions where it is necessary to file a complaint before the statute of limitations runs and defer service until a reasonable investigation can be conducted. This post-filing investigation allows a plaintiff's counsel to determine, before service, whether the initial complaint complies with Rule 11 and, if not, cure any violation by filing and serving an amended complaint, which supersedes the initial complaint and, thereby, moots the initial complaint's Rule 11 violation. Accordingly, the Association concludes that reducing the time period for service from 120 days to 60 days will not substantially impair a plaintiff's ability to file an initial complaint within the statute of limitations and then conduct an appropriate post-filing investigation before service.

## PROPOSED AMENDMENTS TO RULE 16(b)(1)(B)

### Proposed Amendments and Their Purpose

The proposed amendment to Rule 16(b)(1)(B) deletes language authorizing a court to consult with parties by telephone, mail or other means. The red-lined rule and advisory committee's note explaining the amendment's rationale are set forth below.

**(b) Scheduling**.

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

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

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

**Committee Note**

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

### Recommendations of the Association

The Association endorses this proposed amendment.

### Explanation for Recommendations

The amendment does not affect the court's authority to issue a scheduling order after receiving a Rule 26(f) report from the parties, or in those cases exempted by local rules. However, in those cases where the court conducts a scheduling conference, the conference should be conducted by direct communication, since this promotes superior dialogue. Removal of the word "telephone" from the proposed rule does not preclude conducting the scheduling conference by telephone, since it still involves "simultaneous communication." Its removal from the rule does, however, serve to suggest preference be given to holding a scheduling conference in person, as set forth in the Committee Note.

## PROPOSED AMENDMENTS TO RULE 16(b)(2)

### Proposed Amendments and Their Purpose

The proposed amendment to Rule 16(b)(2) reduces by 30 days the time when the Court must issue a scheduling order. The red-lined rule and advisory committee's note explaining the amendment's rationale are set forth below.

> **(2)** ***Time to Issue***. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless the judge finds good cause for delay the judge must issue it within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.
>
> **Committee Note**
>
> The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

### Recommendations of the Association

The Association endorses this proposed amendment.

### Explanation for Recommendations

Although concerns were raised that this reduction in time puts pressure on parties, particularly defendants, to retain counsel, intelligently analyze a complaint, develop a litigation strategy and discovery plan, and prepare for and participate in a Rule 26(f) conference, the Association concludes that the shorter periods are not unduly onerous. Moreover, the amendment provides for additional time upon a showing of good cause.

## PROPOSED AMENDMENTS TO RULE 26(b)(1)

### Proposed Amendments and Their Purpose

The proposed amendments effect several changes to Federal Rule of Civil Procedure 26(b)(1), which defines the scope of all discovery. The red-lined rule, advisory committee's note explaining the amendment's rationale, and summary of the proposed changes are set forth below.

~~Unless otherwise limited by court order, the scope of discovery is as follows:~~ Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit~~ including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action~~. ~~Relevant information~~ Information need not be admissible in evidence to be discoverable~~ at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

### Committee Note

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

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

The former provision for discovery of relevant but inadmissible information that appears reasonably calculated to lead to the discovery of admissible evidence is also amended. Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery. Hearsay is a common illustration. The qualifying phrase -- "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" -- is omitted. Discovery of inadmissible information is

limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case. The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is "reasonably calculated" to lead to the discovery of admissible evidence.

**Summary of Proposed Amendments**

The Association perceives that the proposed amendments to Rule 26(b)(1) effect the following four changes:

1st Change: The language -- "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit" -- is added to the first sentence. Much of this language presently exists in Rule 26(b)(2)(C)(iii), albeit in a different order.[1]

2nd Change: The sentence -- "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." -- is replaced by the sentence, "Information need not be admissible in evidence to be discoverable."

3rd Change: The sentence -- "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." -- is deleted.

4th Change: The phrase -- "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter" -- is deleted.

**Recommendations of the Association**

The Association opposes the proposed amendment's first change and endorses the proposed amendment's second, third, and fourth changes.

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[1] Rule 26(b)(2)(C) provides:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

**Explanation for Recommendation Regarding the Proposed Amendment's First Change (Adding Proportionality Language)**

The Association considered whether the proposed amendment is consistent with the purpose of the Rules as set forth in Rule 1, *i.e.*, "to secure the just, speedy, and inexpensive determination of every action and proceeding." The Association agrees with the need for change in the discovery process in the most general sense of eliminating unnecessary delay and expense. The Association does not believe that the proposed amendment is the appropriate tool for effecting such change.[2] The proposed amendment would, in the majority of cases, deny the discovery of relevant information to parties and counsel who would consciously avoid overreaching under the existing Rule.

The proposed amendment is an excessive response to an undocumented issue and would prejudice plaintiffs with valid claims and cooperative counsel.

Earlier this year, the Federal Judicial Center reported that "[d]iscovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases."[3] Conversely, no neutral source has reported wide-ranging empirical evidence reflecting that excessive discovery prevails in anything other than a small percentage of cases.

This is because the existing law is sufficient to ensure efficient discovery in all cases.[4] Indeed, discovery has repeatedly proceeded absent disproportionate cost and effort in exceptionally large cases -- but only those cases in which counsel have acted in good faith, and the courts involved have diligently wielded their oversight and authority to ensure ongoing cooperation.[5] *See also* American Bar Association, Section of Litigation, *ABA Section of*

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[2] Courts and attorneys differ greatly in their appraisal of the value of proportionality, at least as it relates to electronic discovery. *See* FINAL REPORT OF THE SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM 56-57 & n.3, http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

[3] Report to the Standing Committee, Presentation by FJC Research Division, Emery G. Lee III, at slides 2-3 (Jan. 2013), available on request to the Federal Courts Committee of the Philadelphia Bar Association.

[4] *See generally* Hon. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed To Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within Existing Rules?*, 12 SEDONA CONF. J. 47 (2011); *cf.* Institute for the Advancement of the American Legal System, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, 11 (2009) (claiming absent authority that current law allows for parties to "to discover all facts, without limit, unless and until courts call a halt"), http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

[5] *See, e.g.*, Decl. of K. Craig Wildfang, Esq. in Supp. of Class Pls.' Mot. for Final Approval of Settlement and Class Pls.' Joint Mot. for Award of Att'ys' Fees, Expenses and Class Pls.' Awards, at 20-21, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 1:05-md-1720 (E.D.N.Y. Apr. 11, 2013) (parties and non-parties produced over 75 million pages of documents, and held 370 depositions); Prelim. Approval Order, at 3, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the*

*Litigation Member Survey on Civil Practice: Detailed Report*, 3 (Dec. 11, 2009), http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf ("78% of respondents believe that early intervention by judges helps to narrow the issues, and 72% believe that early intervention helps to limit discovery . . . . 73% of all respondents believe that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients."); FED. R. CIV. P. 26(g) advisory committee's note (1983) ("Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision.").

Even if any change in any Rules were necessary, courts could achieve the same ends as would result from the proposed amendment by any number of other means that would affect only the uncooperative minority, rather than the cooperative majority. First, the legal and judicial communities are well aware of many of the most common means employed by uncooperative counsel to prolong and complicate discovery. Amendments to other rules might be addressed to those particular issues. Rule 30 might be amended to encourage stricter enforcement of the prohibition against speaking objections. Rules 33 and 34 might be amended to require greater clarity in written responses to interrogatories and document requests. And Rule 37 apparently will be amended to clarify the parties' duties as to the preservation of evidence. All of those amendments would serve "to secure the just, speedy, and inexpensive determination of every action and proceeding," without unduly limiting discovery as to parties who would be inclined to cooperate absent the proposed amendment to Rule 26(b)(1).

Second, support for the proposed amendment is driven largely by the proliferation of ESI.[6] But the proposed amendment sweeps within its purview all forms of discovery. Admittedly, the ever-changing nature of information technology makes it impossible for the Rules to be specific as to issues relating to ESI. But case law in that area is in its infancy, and is certain to develop in a rational way, particularly as courts inevitably become better-versed in the unique issues raised by ESI. And to the extent that discovery disputes regarding ESI arise from a lack of trust between requesting and producing parties, the Rules might be amended so as to ensure greater transparency. In particular, certain producing parties have been unduly resistant to disclosing the means by which they search their ESI for discoverable information, which predictably engenders suspicion on the part of requesting parties. Amendments to Rules 26 and/or 34 might require open discussion of search strategies prior to production, require the

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*Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179 (E.D. La. May 2, 2012) (discovery completed in 20 months, "including taking 311 depositions, producing approximately 90 million pages of documents, and exchanging more than 80 expert reports").

[6] Lawyers for Civil Justice, DRI -- Voice of the Defense Bar, Federation of Defense & Corporate Counsel and International Association of Defense Counsel, *Comment to Civil Rules Advisory Committee -- Now Is the Time for Meaningful New Standards Governing Discovery, Preservation, and Cost Allocation*, 7 (Mar. 15, 2012) (noting that the advent and subsequent surge of electronic discovery "has dramatically changed litigants' experience of the discovery process"), in ADDENDUM TO AGENDA MATERIALS FOR THE MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 91 (Mar. 22-23, 2012), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

disclosure of details concurrent with production, or instruct courts that the work-product doctrine should be narrowly construed in this context.

Third, summary procedures for resolving discovery disputes, employed by many districts in their local rules and many judges in their individual practices, have proven effective. Those include, for example, frequent status conferences at which pending issues can be addressed informally, mandatory pre-motion conferences before the filing of a motion, or rules requiring the initial presentation of discovery disputes by short letters.[7] A court's initial response need not amount to an order, but may be limited to a broad outline of how the dispute should be resolved, perhaps followed by a stern warning that one or more parties will be displeased if the court is later required to revisit the dispute at length. While the Rules cannot specify summary procedures that would be acceptable to all courts, Rule 37 might direct courts to adopt such procedures so as to limit the burdens that arise from disputes.

Fourth, the above-referenced FJC Report, and perhaps the experience of most judges and lawyers, suggests that the misconduct that has created whatever problems currently exist in the discovery process emanates from a small minority of lawyers. But lawyers who are disinclined to abide by the spirit of the Rules will not be motivated to do so merely by the imposition of new Rules. They will, however, find greater motivation if they perceive that they are likely to be held publicly accountable for their misconduct. To that end, courts should be encouraged to detail and condemn misconduct in the course of discovery, and to impose -- or at least threaten to impose -- sanctions for such misconduct more freely than they have done in the past.[8] That, too, might be specified in Rule 37. Although that would impose something of a burden on the courts, the effort would pay dividends as uncooperative lawyers are motivated to reform themselves, or see their reputations suffer in a way that limits the likelihood of their being retained in subsequent cases.

Finally, even if it were necessary to amend Rule 26(b)(1) to narrow the scope of discovery in all cases, the proposed amendment is so vague that wide-ranging and unpredictable interpretations of the Rule would negate any benefits that arise from it. In particular, the word

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[7] *See* Rules 37.2 and 37.3 of the Local Rules of Civil Procedure of the United States District Courts for the Southern and Eastern Districts of New York; Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, 263 (August 2013) (hereinafter "August 2013 Preliminary Draft"), http://www.uscourts.gov/uscourts/ rules/preliminary-draft-proposed-amendments.pdf; *In re Pilot Project Regarding Case Mgmt. Techniques in Complex Civil Cases in the Southern District of New York*, Standing Order No. M10-468, § 3(A) (S.D.N.Y. Nov. 1, 2011), http://www.nysd.uscourts.gov/rules/ Complex_Civil_Rules_Pilot.pdf.

[8] *See* FED. R. CIV. P. 26(g) advisory committee's note (1983) ("Sanctions to deter discovery abuse would be more effective if they were diligently applied 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'. . . Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor. Because of *the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules*, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it.") (emphasis added; citations omitted).

"proportional" is, by itself, not a standard. Every court might, for example, deem a different volume of discovery "proportional" in a case involving a claim for X dollars. The variations will multiply in the many cases involving issues that cannot be reduced to dollar figures. And to the extent that courts err on the side of limiting discovery, such errors would undermine Congressional intent that certain types of cases that typically involve relatively small amounts of money (*e.g.*, Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. and Truth In Lending Act, 15 U.S.C. § 1601, *et seq*. cases) be brought in federal court.

In short, the proposed amendment is akin to carpet-bombing all parties who seek discovery, when a series of surgical strikes directed at the minority who abuse the existing process would achieve the same ends, without substantial collateral damage to the legal process.

**Explanation for Recommendation Endorsing the Proposed Amendment's Second Change (Changing Sentence About Discovery of Information Not Admissible)**

The proposed amendment is recommended because litigants and courts sometimes conclude from the current Rule that documents and information not relevant to any party's claim or defense are discoverable if they "appear[] reasonably calculated to lead to the discovery of admissible evidence." This has led to an overly expansive definition of the scope of discovery, namely that "[t]oo many lawyers, and perhaps judges, understand the [reasonably calculated language] to mean that there are no limits on discovery, because it is always possible that somehow, somewhere, a bit of relevant information may be uncovered."[9] The proposed amendment should help resolve this misimpression while reaffirming the non-controversial proposition that information and documents do not need to be admissible in evidence to be discoverable.

The notion that "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" was included in the 1946 amendments to Rule 26 (effective 1948). It was added because some federal courts had concluded that if evidence would not be admissible at trial, it was off limits during discovery. *See* FED. R. CIV. P. 26(b) advisory committee's note (1946) ("[S]everal cases . . . have erroneously limited discovery on the basis of admissibility [and] it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay.") (citing cases). The "reasonably calculated" language was intended to "make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence." *Id.*

Rule 26(b)(1) allows for "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). This is the "scope" of discovery, at least

[9] Memorandum from Advisory Committee on Federal Rules of Civil Procedure to Standing Committee on Rules of Practice and Procedure, at 137 (Dec. 5, 2012) (hereinafter "December 2012 Memorandum"), in Committee on Rules of Practice and Procedure, Cambridge, MA, Jan. 3-4, 2013, at 227 (hereinafter "January 2013 Agenda"), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

as it relates to relevancy. The Association understands that the "reasonably calculated" sentence was only ever meant to address the relatively discrete issue of the discoverability of inadmissible evidence, not materially expand the definition of relevancy or the scope of discovery. Yet, as formulated by some courts, the concept of "reasonably calculated to lead to the discovery of admissible evidence" tends to creep into and, arguably, expand the scope of discovery beyond relevant information and documents. *See, e.g.*, *LeFever v. Ferguson*, Nos. 11-cv-935, 12-cv-664, 2013 WL 3456758, at *8 (S.D. Ohio July 19, 2013) (stating that the "scope of relevant information in discovery is that which is 'reasonably calculated to lead to the discovery of admissible evidence'") (citation omitted); *Smith v. Bayer Material Sci., LLC*, No. 12-cv-171, 2013 WL 3153467, at *3 (N.D. W. Va. June 19, 2013) (suggesting that discovery need not be "relevant" to be discoverable; "the Court finds that the request is relevant, or at least reasonably calculated to lead to the discovery of admissible evidence"); *Metro Pony, LLC v. City of Metropolis*, No. 11-cv-144, 2011 WL 2729153, at *2 (S.D. Ill. July 13, 2011) ("[T]he scope of discovery under the Federal Rules of Civil Procedure is broad in scope, permitting discovery 'regarding any nonprivileged matter that is relevant to any party's claim or defense' *or that* 'appears reasonably calculated to lead to the discovery of admissible evidence.'") (emphasis added). Similarly, litigants often argue that discovery requests are proper if they merely seek information "reasonably calculated to lead to the discovery of admissible evidence."

Other courts frame the issue more precisely: information is either relevant or not, and the "reasonably calculated" language only means that relevant information is not affected by its ultimate admissibility. *See, e.g.*, *Payne v. Belgarde Prop. Servs., Inc.*, No. 11-5094, 2012 WL 5986537, at *5 (D.S.D. Nov. 29, 2012) ("Rule 26(b) limits the scope of discovery to relevant information, which 'need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'") (citation omitted); *Arnott v. U.S. Citizenship & Immigration Servs.*, No. 10-1423, 2012 WL 8609607, at *1 (C.D. Cal. Oct. 10, 2012) ("[T]he scope of discoverable information may now [after the 2000 amendments] be stated as follows: any unprivileged matter relevant to the claim or defense of any party, and/or *relevant information* reasonably calculated to lead to the discovery of admissible evidence.") (emphasis added).

While the proposed amendment may not change the result in many cases given the already liberal standard that governs discovery, an overly expansive interpretation of the current Rule's "reasonably calculated" clause threatens to "obliterate all limits on the scope of discovery."[10] The proposed new language more succinctly and effectively communicates that relevant information is discoverable whether or not it is admissible at trial and, by omitting any reference to "relevant information," lessens the opportunity for confusion.

**Dissenting View**

The existing rule relies on language -- "reasonably calculated to lead to the discovery of admissible evidence" -- that embodies well-developed legal concepts, supported by a wealth of

[10] Civil Rules Advisory Committee, *Draft Minutes*, at 14 (Nov. 2, 2012), in January 2013 Agenda, *supra* note 9, at 264.

case law.[11] If any new language is to be adopted, litigants should have some sense of what they can expect as a result of it in any court.

**Explanation for Recommendation Endorsing the Proposed Amendment's Third Change (Deleting Court-Managed Discovery)**

Even with the deletion of the sentence -- "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." -- Rule 26(b)(1) will continue to permit "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." This standard "is still a very broad one." 8 CHARLES WRIGHT, ARTHUR R. MILLER & RICHARD MARCUS, FEDERAL PRACTICE & PROCEDURE § 2008, at 131 (3d ed. 2010) (hereinafter "8 WRIGHT, MILLER & MARCUS"). The Association believes that discovery seeking information that is relevant to the subject matter involved in the action, but which is not relevant to a claim or defense, is rarely, if ever, actually needed by the propounding party. The Duke Conference Subcommittee agrees with our position: "It is difficult to see why discovery that is not relevant to any party's claim or defense should be allowed."[12] The Association also is mindful that the current rule arguably imposes unwelcome burdens on the courts by authorizing applications to the court for discovery of information not relevant to a claim or defense, but relevant to the subject matter involved in the action.

Accordingly, the Association finds that the proposed amendment will not impair a party's right to obtain the discovery it actually needs, and it will protect the responding party or non-party from the burdens imposed by discovery that, in the end, provides no benefit to anyone.

The history of the language to be deleted -- "discovery relevant to the subject matter involved in the action" -- is noteworthy. The Federal Rules as promulgated in 1937 used the following language to define the scope of inquiry for depositions: "any matter, not privileged, which is relevant to the subject matter in the pending action, whether relating to a claim or defense . . . of any party." 6 JAMES M. MOORE ET AL., MOORE'S FEDERAL PRACTICE 26 App.-1 (3d ed. 1999). This same language came to define the scope of all discovery and remained largely unchanged until the 2000 amendments to the Federal Rules. While courts interpreted this language broadly, they acknowledged that discovery of matters that were not relevant to any party's claim or defense is generally improper. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978) ("The key phrase in this definition -- 'relevant to the subject matter involved in the pending action' -- has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . . At the same time, 'discovery, like all matters of procedure, has ultimate and necessary

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[11] One member of the Subcommittee favors a compromise that would entail adopting the text of the proposed rule, but for the last sentence, which would be replaced with the following: "Information within this scope of discovery need not be admissible in evidence if it is reasonably calculated to lead to the discovery of admissible evidence." That substitution would ensure the maintenance of a well-defined standard.

[12] *See* December 2012 Memorandum, *supra* note 9, at 137, in January 2013 Agenda, *supra* note 9, at 227.

boundaries.' . . . Thus, it is proper to deny discovery of matter . . . unless the information sought is otherwise relevant to the issues in the case.") (citation omitted); *cf. Hickman v. Taylor*, 329 U.S. 495, 501 (1947) ("The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.").

Since the "relevant to the subject matter" language in the original rule did not reflect precisely the scope of discovery as interpreted by the courts, there have been many calls to amend this language. For example, following a recommendation by the ABA, the Standing Committee published in 1978 a proposed amendment that would refine Rule 26(b)(1) by deleting the phrase "subject matter" from the rule. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note (2000). Finally, the Federal Rules were amended in 2000 by creating two categories of discovery: party-managed discovery of matters relevant to any party's claim or defense, and court-managed discovery of matters relevant to the subject matter of the action. The Advisory Committee explained the purpose of the amendment: "The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." FED. R. CIV. P. 26(b)(1) advisory committee's note (2000). Many courts and commentators have observed that the 2000 amendments did not bring about a major shift in the scope of party-managed discovery. *See* 8 WRIGHT, MILLER & MARCUS, § 2008, at 133-34 (citing cases and authorities).

**Explanation for Recommendation Endorsing the Proposed Amendment's Fourth Change (Deleting Illustrations of Discoverable Matters)**

The proposed amendment removes the illustrations of discoverable matters in the current rule because they are now entrenched concepts. *See* August 2013 Preliminary Draft, *supra* note 7, at 266. The Association agrees that the illustrations reflect well-known concepts and their deletion will not adversely affect practice.

## PROPOSED AMENDMENTS TO RULE 26(c)(1)(B)

**Proposed Amendments and Their Purpose**

Rule 26(c) addresses protective orders, and Rule 26(c)(1) lists a protective order's potential directives. The proposed amendment adds the allocation of expenses to this list, making explicit a court's implicit authority to order this directive. The red-lined rule and the advisory committee's note explaining the amendment's rationale are set forth below.

> **(1) In General**. * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> ***  *  ***
>
> **(B)** specifying terms, including time and place <u>or the allocation of expenses,</u> for the disclosure or discovery;

**Committee Note**

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

**Recommendations of the Association**

The Association endorses this amendment.

**Explanation for Recommendation**

Cost sharing is, as the Report by the Advisory Committee on Civil Rules to the Standing Committee dated December 5, 2012 notes, a "major topic" for discussions, and the proposed minor change to Rule 26(c)(1)(B) may only be the first of several future amendments.[13] The Advisory Committee's Report recognizes that cost sharing is "so important as to require in-depth study," and the issue has been proposed to the Discovery Subcommittee for future study so that consideration of the topic does not delay other proposed changes. The inherent tension, as recognized by the Advisory Committee's Report, is between the potential reductions in discovery burdens and the "deeply entrenched" American Rule that parties should bear their own costs in litigation.[14]

The Association favors the proposed change to Rule 26(c)(1)(B), as it does not substantively alter the current rule. Rule 26(c)(1) already includes a non-exhaustive list of items that a court may address when issuing a protective order. Subsection (B), which is one of the eight subsections, currently provides that a protective order may specify terms, "including time and place, for the disclosure or discovery." The proposed amendment provides the court with the explicit authority to award costs and/or provide for cost sharing, which is currently implicit in the Rule. *See, e.g.*, *Oppenheimer Fund*, 437 U.S. at 356-63 (generally discussing discovery cost shifting in context of which party should bear cost of identifying potential class members); *In re Two Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 965-66 (1st Cir. 1993) (recognizing authority of court to allocate discovery expenses); *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 335-38 (E.D. Pa. 2012) (citing *Oppenheimer Fund* and allocating costs of ESI discovery); *Am. Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 448 (W.D. Mo. 1976) (noting that "the Court may order that a party seeking discovery pay a portion of the expenses incurred in obtaining discoverable materials").

The Advisory Committee, however, is concerned that current subsection (B) could be construed narrowly to apply only to scheduling details, due to the close association of the phrase

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[13] *See* December 2012 Memorandum, *supra* note 9, at 129, in January 2013 Agenda, *supra* note 9, at 219.

[14] *Id.* at 145, in January 2013 Agenda, *supra* note 9, at 235.

"specifying terms" with "time and place."[15] The proposed amendment resolves this concern by ensuring that allocation of discovery expenses is within a court's authority.

With respect to what expenses are recoverable and can be allocated, courts again have broad discretion to award expenses (in addition to attorneys' fees) as the circumstances may warrant. *See, e.g.*, *Clear View Inv., Ltd. v. Oshatz*, 233 F.R.D. 393, 394-95 (S.D.N.Y. 2006) (defendant ordered to share plaintiff's copying costs); *Am. Standard, Inc.*, 71 F.R.D. at 448 (requiring defendant to pay half of plaintiff's expenses in transcribing interviews and preparing motion for protective order).

**Dissenting View**

The discussion of the proposed amendment fails to address the fundamental changes that are contemplated by the allocation of litigation expenses. The American Rule, a foundational part of the American justice system, contemplates the parties will bear their own expenses. The proposed amendment alters that approach by adding "an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery."[16] The Advisory Committee observes that the allocation of expenses and the possible abrogation of the American Rule is currently under consideration.[17] The better approach is to include the proposed amendment in that discussion, as approaching the issue piecemeal impedes a clear evaluation of the general proposal and its impact on the operation of the civil justice system.

## PROPOSED AMENDMENTS TO RULE 26(d)(2)

**Proposed Amendments and Their Purpose**

Rule 26(d) describes the timing and sequence of discovery and provides that absent a stipulation or court order, discovery may not be served before a Rule 26(f) conference. The proposed amendment permits a document request to be delivered before a Rule 26(f) conference, with service deemed to occur at the first Rule 26(f) conference, and recognizes that parties may stipulate to case-specific sequences of discovery. The red-lined rule and advisory committee's note explaining the amendment's rationale are set forth below.

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15 *Id.* at 146, in January 2013 Agenda, *supra* note 9, at 236.

16 *See* Advisory Committee on Civil Rules Report to the Standing Committee, at 12 (May 8, 2013) (hereinafter "May 2013 Report"), in Committee on Rules of Practice and Procedure, Washington, DC, June 3-4, 2013, at 67 (hereinafter "June 2013 Agenda"), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-06.pdf.

17 *See id*. ("The Committee soon will begin to focus on proposals advanced by some groups that greater changes should be made in the general presumption that the responding party should bear the costs imposed by discovery requests. It will be some time, however, before the Committee determines whether any broader recommendations might be made.").

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

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

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

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

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

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

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

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

**Committee Note**

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

**Recommendations of the Association**

The Association endorses these Proposed Amendments.

**Explanation for Recommendations**

The Association concludes that an amendment *permitting* early Rule 34 requests gives the parties the opportunity to address substantive discovery issues concretely at the Rule 26(f) conference and, thereby, promotes a more efficient discovery process. The benefits of this

voluntary procedure greatly outweigh any perceived detriment to a party who might be reluctant to reveal discovery strategy prior to the Rule 26(f) conference. Moreover, the amendment merely clarifies what is already effectively permissible under the current rule.

## PROPOSED AMENDMENTS TO RULES 26(f)(3)(D) and 16(b)(3)(B)(iv)

### Proposed Amendments and Their Purpose

Rule 26(f)(3) supplies a list of topics that the parties' discovery plan must address. The Proposed Amendment adds to this list the parties' views on preserving ESI and agreements under FRE 502. The red-lined rule is set forth below.

> **(3)** ***Discovery Plan***. A discovery plan must state the parties' views and proposals on: * * *
>
> > **(C)** any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
> >
> > **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

The parallel Proposed Amendment to Rule 16(b)(3)(B) adds that a scheduling order may provide for the preservation of ESI and agreements under FRE 502.[18] The red-lined rule is set forth below.

> **(B)** ***Permitted Contents***. The scheduling order may: * * *
>
> > **(iii)** provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;
> >
> > **(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.

The purpose of these Proposed Amendments is to make attorneys more aware of the benefits of discussing preservation issues and entering into an FRE 502(d) agreement. *See* August 2013 Preliminary Draft, *supra* note 7, at 263.

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[18] Parallel amendments to Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed, and may be shaped by prefiling requests to preserve and responses thereto.

**Recommendations of the Association**

The Association endorses these Proposed Amendments.

**Explanation for Recommendations**

FRE 502, a relatively recent addition to the Rules of Evidence, provides guidelines for the treatment of attorney-client privileged and work-product materials that are disclosed during discovery, in particular the potential waiver of those protections following disclosure in different circumstances. Most notably for purposes of the Proposed Amendment, FRE 502(d) provides:

> **Controlling Effect of a Court Order**. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court -- in which event the disclosure is also not a waiver in any other federal or state proceeding.

The Association regards the addition of a specific reference to FRE 502 as an effort by the Advisory Committee to encourage attorneys to discuss FRE 502(d) orders in particular. Many litigants address issues related to inadvertent disclosure and waiver in "clawback" agreements. As a result of unawareness with the protection offered by FRE 502(d) and clawback agreements, lawyers and clients typically undergo expensive and time-consuming privilege reviews. FRE 502(d) presents an underused but potentially valuable tool to lessen the time and expense associated with privilege reviews and related waiver issues.

FRE 502(d) does not depend on whether disclosure was inadvertent, and the Advisory Committee's Note to FRE 502(d) establishes that an FRE 502(d) order may provide for non-waiver regardless of the care taken by the disclosing party. As such, a well-developed discovery plan memorialized in a FRE 502(d) court order can all but eliminate the potential waiver of privilege during the production process. This is a positive, as litigants could potentially lessen, and even avoid altogether, the burden of conducting a privilege review before producing documents.

## PROPOSED AMENDMENTS TO RULE 30(a)(2)(A)(i)

**Proposed Amendments and Their Purpose**

Rule 30(a)(2) provides that the presumptive limit of depositions taken by each side is 10. The Proposed Amendment would reduce this presumptive limit to five per side. The red-lined rule and the Duke Conference Subcommittee's explanation for the amendment's rationale are set forth below.

**(2)** ***With Leave***. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):[19]

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

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

According to the Duke Conference Subcommittee:

Reducing the presumptive limit on the number of depositions was considered at length. Some judges at the Duke Conference expressed the view that civil litigators over-use depositions, apparently holding the view that every witness who testifies at trial must be deposed beforehand. These judges noted that they regularly see lawyers effectively cross-examine witnesses in criminal trials without the benefit of depositions, a practice widely viewed as sufficient to satisfy the demands of due process. The judges also observed that they rarely, if ever, see witnesses effectively impeached with deposition transcripts. At the same time, many parties are opting to resolve their disputes through private arbitration or mediation services that are less expensive than civil litigation because they do not involve depositions, and yet these alternatives are thought sufficient to reach resolution of important disagreements.

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

[19] This change from (b)(2) to (b)(1) is one of a number of cross-references to present (b)(2) that would have to be changed to conform to the proposed movement of Rule 26(b)(2)'s proportionality concept to Rule 26(b)(1)'s definition of the scope of discovery.

On the other hand, the Subcommittee has heard that the present limit of 10 depositions works well -- that leave is readily granted when there is good reason to take more than 10, and that parties do not wantonly take more than 5 depositions simply because the presumptive limit is 10. More pointedly, the Subcommittee also has heard from several lawyers who represent individual plaintiffs in employment discrimination cases, arguing that they commonly need more than 5 depositions to establish their claims.

In short, there are a number of cases with more than five depositions, and most of them involve 10 or fewer. The question is whether it will be useful to revise Rules 30 and 31 to establish a lower presumptive threshold for potential judicial management. Setting the limit at 5 does not mean that motions and orders must be made in every case that deserves more than 5 -- the parties can be expected to agree, and should manage to agree, in most of these cases. But the lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and -- when those avenues fail -- in securing court supervision. The Committee Note addresses the concerns expressed by those who oppose the new limit by stressing that leave to take more than five depositions must be granted when appropriate. The fear that lowering the threshold will raise judicial resistance seems ill-founded. Courts are willing now to grant leave to take more than 10 depositions per side in actions that warrant a greater number. The argument that they will become reluctant to grant leave to take more than 5, or more than 10, is not persuasive.

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

The Committee Note emphasizes the court's responsibility to grant leave to exceed 5 depositions, "recognizing that the context of particular cases often will justify more."[20]

**Recommendations of the Association**

The Association opposes this Proposed Amendment.

[20] Duke Conference Rules Package, in Advisory Committee on Civil Rules, Norman, OK, April 11-12, 2013, at 85-86 (hereinafter "April 2013 Agenda"), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf.

**Explanation for Recommendations**

The Association is extremely concerned with the proposed reduction from 10 depositions to five. According to the statistics cited by the Advisory Committee, nearly half of the cases in which expert depositions occur involve at least one side taking more than five depositions. Although these statistics demonstrate that the majority of cases involve each side taking fewer than five depositions, the Association notes the statistics might be skewed by cases that were resolved before the completion of discovery, either by settlement or motion practice. In the Association's experience, a large portion of federal court cases require more than five depositions by one side where the case proceeds to trial. The Association is therefore concerned that the Proposed Amendment sets a new presumptive limit that is "too small" for a large percentage of cases (and which would require judges to divert judicial resources to re-setting the limit in a large percentage of cases), and that the new presumptive limit of five depositions would interfere with parties' ability to prepare their cases.

Limiting each side to five depositions also reduces the likelihood of settlement. This is because the additional information provided by discovery permits the parties to assess more accurately the strengths and weaknesses of their cases. Although the parties could stipulate to additional depositions, the proposed change does not require a court to approve stipulations requiring additional depositions. On the contrary, under the text of the proposal, a court could refuse to approve a stipulation if, for example, the court unilaterally concluded that the number of depositions was not "proportional" to the case.[21]

Additionally, the reduction of the number of depositions from 10 to five may make one party less willing to stipulate to additional depositions, under the theory that the lack of complete discovery would hurt its adversary more than it would hurt that party. In the event a party had to appeal to the court for additional depositions, the Association is concerned that the court would view the new five-deposition limit as presumptively correct. Finally, the Association is also concerned that both the court and litigants would view the reduction of the number of depositions as an indication that discovery should be cut in half from what it currently is.

The Association therefore opposes this proposal. To the extent there is a concern that some cases do not merit more than five depositions, the Association believes that this concern is more appropriately addressed by one party filing a motion for a protective order that argues the discovery sought is not "proportional" under Rule 26(b)(2)(C). The end result of leaving the

[21] Although the Association recognizes that courts must manage their dockets, if the parties can complete the discovery they agree to within the time allotted by the court, the Association does not believe the court should forbid the parties from doing so. The Association also strongly suggests that judges give deference to stipulated discovery agreements, including agreements as to the discovery period. Some judges, unfortunately, set discovery cutoffs that all parties believe are far too short. Placing primacy on the expedition of cases detracts from justice. It also results in increased litigation costs because parties are required to "go full bore" to meet the deadline, and are deprived of the opportunity to take some discovery and then re-assess their positions. Additionally, the Association notes that, while the Rules Committee frequently speaks of encouraging cooperation between lawyers, it is counterproductive to the aspirational goal of cooperation to have cooperative lawyers' agreements rejected by the court.

presumptive limit at 10 depositions, but permitting a party to seek a protective order to reduce that number (a practice that is permitted under the current rules but, perhaps, is insufficiently utilized), would be to reduce the judicial resources required to administer the discovery process, and to focus those judicial resources on cases that the parties agree merit judicial intervention.

The proffered justification for this Proposed Amendment, as well as the amendments to Rule 30(d)(1) and Rule 33(a)(1), is to reduce expense and delay. But the materials relied upon by the Advisory Committee do not adequately support this concern. To the contrary, the materials merely state that discovery is subjectively viewed as too expensive in a small minority of cases. Although discovery undeniably has costs, it is critical to allowing parties to safeguard their rights. As a result, discovery should not be restricted without good cause.

The Association agrees that judicial involvement and supervision are often beneficial. The Association recognizes, however, that judicial resources are limited, and that a judge's time is best spent on substantive issues. As a result, and while recognizing that a single set of discovery rules will not be appropriate in every case, the Association believes that the existing presumptive limit for the number of depositions is appropriate and works in the vast majority of cases.

## PROPOSED AMENDMENTS TO RULE 30(d)(1)

### Proposed Amendments and Their Purpose

Rule 30(d)(1) provides that the presumptive duration of each deposition is limited to seven hours. The Proposed Amendment reduces this presumptive duration to six hours. The red-lined rule and the Duke Conference Subcommittee's explanation for the amendment's rationale are set forth below.

> **(d) Duration; Sanction; Motion to Terminate or Limit**
>
> > **(1)** ***Duration***. Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of ~~7~~ 6 hours.

According to the Duke Conference Subcommittee:

> Shortening the presumptive length of a deposition from 7 hours to 6 hours reflects revision of earlier drafts that would have reduced the time to 4 hours. The four-hour limit was prompted by experience in some state courts. Arizona, for example, adopted a 4-hour limit several years ago. Judges in Arizona federal courts often find that parties stipulate to 4-hour limits based on their favorable experience with the state rule. But several comments have suggested that for many depositions, 4 hours do not suffice. At the same time, several others have observed that squeezing 7 hours of deposition time into one day, after accounting for lunch time and other breaks, often means that the deposition extends well into the evening. Judges also have noted that 6 hours of trial time makes for a very full day when lunch and breaks are considered. The reduction to 6 hours is

intended to reduce the burden of deposing a witness for 7 hours in one day, but without sacrificing the opportunity to conduct a complete examination.[22]

**Recommendations of the Association**

The Association takes no position on this Proposed Amendment, unless it is accompanied by a proposed amendment to the Advisory Committee Note. With that amendment to the Advisory Committee Note, the Association would endorse the amendment to the Rule.

**Explanation for Recommendations**

The Association is concerned with the reduction in the length of a "deposition day" from seven hours to six. Although the Association acknowledges the concern that allowing seven hours of testimony in a single day often results in a deposition that does not adjourn until well into the evening, the Association believes that a one-seventh reduction in the permitted deposition time could prejudice the rights of parties, especially in complex or multi-party cases. The Association feels, however, that the vast majority of depositions could be completed in six hours if counsel can rely on the courts' strict enforcement of Rule 30(c)(2) (precluding speaking objections), and intolerance for other common delay tactics. To that end, the Advisory Committee Note should encourage courts to order the reopening of depositions plagued by such tactics more readily than they have under the existing rule. If the prohibitions on speaking objections and other delay tactics are not enforced, however, the Association feels that the potential for "running out the clock" is unacceptably high. Absent the above-referenced amendment to the Advisory Committee Note, the Association takes no position as to the Proposed Amendment to the Rule. With the amendment to the Advisory Committee Note, the Association would endorse the Proposed Amendment to the Rule.

## PROPOSED AMENDMENTS TO RULE 33(a)(1)

**Proposed Amendments and Their Purpose**

Rule 33(a)(1) provides that the presumptive number of interrogatories a party may serve on another party is limited to 25. The Proposed Amendment would reduce this presumptive limit to 15 interrogatories. The red-lined rule and the Duke Conference Subcommittee's explanation for the amendment's rationale are set forth below.

> **(1)** ***Number***. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than ~~25~~ 15 written interrogatories, including all discrete subparts.

According to the Duke Conference Subcommittee:

> The proposal to reduce the presumptive number of Rule 33 interrogatories to 15 has not attracted much concern. There has been some concern that 15

[22] Duke Conference Rules Package, in April 2013 Agenda, *supra* note 20, at 86.

interrogatories are not enough even for some relatively small-stakes cases. As with Rules 30 and 31, the Subcommittee has concluded that 15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number.[23]

**Recommendations of the Association**

The Association opposes this Proposed Amendment.

## PROPOSED AMENDMENTS TO RULE 34

**Proposed Amendments and Their Purpose**

Rule 34(b)(2) describes the procedure whereby a party may respond to a request for documents or an inspection of things. The Proposed Amendments to Rule 34(b)(2) add that (1) the grounds for objections must be stated with specificity; (2) the responding party must produce documents within a reasonable time; and (3) the producing party must state whether documents are being withheld based on an objection. The red-lined rule and the Duke Conference Subcommittee's explanation for the amendment's rationale are set forth below.

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

**(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection to the request~~ the grounds for objecting to the request with specificity, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

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

According to the Duke Conference Subcommittee:

More specific concerns underlie Rule 34 proposals addressing objections and actual production. Objections are addressed in two ways. First, Rule

[23] Duke Conference Rules Package, in April 2013 Agenda, *supra* note 20, at 86-87.

34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. This language is borrowed from Rule 33(b)(4), where it has served well. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision responds to the common lament that Rule 34 responses often begin with a "laundry list" of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld. Providing that information can aid the decision whether to contest the objections. The Committee Note addresses a particular question: it is proper to state limits on the extent of the search without further elaboration -- for example, that the search was limited to documents created on or after a specified date.

Actual production is addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). Present Rule 34 recognizes a distinction between permitting inspection of documents, electronically stored information, or tangible things and actually producing copies. The distinction, however, is not clearly developed in the rule. If a party elects to produce materials rather than permit inspection, the current rule does not indicate when such production is required to be made. The new provision directs that a party electing to produce must state that copies will be produced, and directs that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. The Committee Note recognizes the value of "rolling production" that makes production in discrete batches. Rule 37 is amended by adding authority to move for an order to compel production if "a party fails to produce documents."[24]

**Recommendations of the Association**

The Association endorses these Proposed Amendments.

**Explanation for Recommendations**

The Association believes the Proposed Amendments will streamline discovery practice without impinging litigants' rights. Specifically, the Association believes the Proposed Amendments to Rule 34(a)(2)(B) and (C) will have the beneficial effect of alerting the requesting party as to whether, and why, documents have been withheld. As a result, the requesting party will know if it has reason to consider moving to compel. The Association observes that, because the proposed Committee Note specifies that a stated limitation in a response (*e.g.*, statement that the request was being interpreted not to call for the production of documents generated before a certain date) constitutes a statement that documents are being withheld subject to the objection, these Proposed Amendments will be workable. Additionally, because the Proposed Amendments are largely amplifications of existing law and reflect good

[24] Duke Conference Rules Package, in April 2013 Agenda, *supra* note 20, at 87-88.

practices,[25] the Association believes they will not adversely impact current practice. To the contrary, the Association believes that by making clear that responding parties should employ good practices, the Proposed Amendments will reduce gamesmanship and expedite the discovery process.

## PROPOSED AMENDMENTS TO RULE 36(a)(2)

### Proposed Amendments and Their Purpose

Rule 36(a) describes the procedure for requests for admission. The Proposed Amendment would limit the number of requests for admission served by one party on another to 25, excepting those going to "the genuineness of any described documents." The red-lined rule and the Duke Conference Subcommittee's explanation for the amendment's rationale are set forth below.

> **(a) Scope and Procedure**.
>
> * * *
>
> **(2)** ***Number***. Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts.

According to the Duke Conference Subcommittee:

> For the first time, a presumptive limit of 25 is introduced for the number of Rule 36(a)(1)(A) requests to admit the truth of facts, the application of law to fact, or opinions about either. "[A]ll discrete subparts" are included in the count, to be determined in the same way as under Rule 33(a)(1). The limit does not apply to requests to admit the genuineness of any described document under Rule 36(a)(1)(B). As with other numerical limits on discovery, the court should recognize that some cases will require a greater number of requests, and set a limit consistent with the limits of Rule 26(b)(1) and (2).[26]

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[25] For proposed rule 34(a)(2)(C), *see Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 574 (D. Md. 2010) ("It is improper to state, as Defendant did, that production will be made at some unspecified time in the future."). For proposed rule 34(b)(2)(B), *see Pulsecard, Inc. v. Discovery Card Servs., Inc.*, 168 F.R.D. 295, 303 (D. Kan. 1996) ("Although Fed. R. Civ. P. 34, governing production of documents and things, provides no similar language with respect to specificity and waiver of objections [as Rule 33], no reason exists to distinguish between interrogatories and requests for production."); FED. R. CIV. P. 34(b) advisory committee's note (1970) ("The procedure provided in Rule 34 is essentially the same as that in Rule 33[.]").

[26] Duke Rules Package, in April 2013 Agenda, *supra* note 20, at 98.

**Recommendations of the Association**

The Association opposes this Proposed Amendment.

**PROPOSED CHANGES TO RULE 37(e)**

Rule 37(e) creates a safe harbor for the failure to preserve electronically stored information. Proposed Rule 37(e) substantially alters this rule by: (1) applying the Rule to all discovery, and not simply ESI; (2) providing for curative measures independent of fault as a remedy for the failure to preserve discoverable information; and (3) permitting the imposition of sanctions where the court finds that a party's actions either: "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."

The red-lined amendment to Rule 37(e) is set forth below.

**(e)** ~~**Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

**Failure To Preserve Discoverable Information.**

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

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

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

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

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

**(2)** ***Factors to be considered in assessing a party's conduct***. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have

been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

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

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Subsections (B)(i) and (B)(ii) of proposed Rule 37(e)(1) both apply the same types of curative remedies regardless of fault, consider the same factors in determining whether sanctions should be imposed, and look to Rule 37(b)(2)(A) for the appropriate sanction. However, while (B)(i) requires proof of willfulness or bad faith conduct, (B)(ii) requires no proof of fault, given the severity of the harm sustained by an opposing party in those rare instances of irreparable deprivation of a meaningful opportunity to present or defend claims.

The rationale for the Proposed Amendment is to adopt a uniform rule for sanctions and curative measures arising from the failure to preserve discoverable information and, thereby, eliminate conflicting case law. *See* August 2013 Preliminary Draft, *supra* note 7, at 317-28.

**Recommendations of the Association**

The Association endorses proposed Rule 37(e) as is, and responds as follows to the five questions posed by the August Draft.

1. Should the rule be limited to sanctions for loss of ESI?: The Association endorses the adoption of the proposed rule as is, which is applicable to all discoverable information and tangible evidence.

2. Should proposed Rule 37(e)(1)(B)(ii) be retained?: The Association recommends adoption of this proposed subsection as is.

3. Should the provisions of current Rule 37(e) be retained?: The Association opposes retaining the current rule, assuming adoption of the proposed rule.

4. Should "substantial prejudice" be defined?: The Association does not recommend defining "substantial prejudice."

5. Should "willfulness" and "bad faith" be defined?: The Association does not recommend defining either term, but does suggest the need for and desirability of some clarification of these terms in the Committee Note.

**Explanation for Recommendations**

*Should the rule be limited to sanctions for loss of ESI?*

Initially, it is noteworthy that the entire focus of the rule is modified from concern about the production of ESI to the *preservation* of all discoverable information. Preservation is a necessary prerequisite to production, and the concept and mechanics of preservation and retrieval lie at the heart of the issues addressed by proposed Rule 37(e). Clearly, the impetus for most of the proposed changes to the Federal Rules, including Rule 37(e), derives from the explosive growth of electronic media in daily personal and commercial life over the past decade and the burgeoning number of cases involving ESI and resultant discovery issues confronting counsel and the courts.

At the same time, there is a virtue to applying uniform standards to all spoliation issues, regardless of the medium, and having a single set of rules address all such issues. The sense of the Association is that it is desirable to have Rule 37(e) deal with all preservation issues, thereby avoiding artificial distinctions in the rules and case law between ESI and failures to preserve other discoverable information. While existing case law may be adequate to deal with most non-ESI spoliation issues, the factors delineated in proposed Rule 37(e)(2) should prove helpful in assessing the reasonableness or fault surrounding the preservation efforts made or not undertaken in all instances. Moreover, the requirement of a willfulness or bad faith standard would overcome the current split in the circuits regarding whether mere negligence is sufficient to warrant the imposition of sanctions.[27]

For these reasons, the Association endorses the broader scope of proposed Rule 37(e).

[27] Regarding a negligence standard for the imposition of sanctions, it is noteworthy that the First, Second, Sixth, Ninth, and D.C. Circuits have observed that negligent spoliation of ESI may be sufficient to impose sanctions under the current Rule 37(e) by instructing the jury that it could infer that the spoliated evidence was adverse to the negligent party. Conversely, the Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have denied sanctions under Rule 37(e) for the negligent spoliation of ESI. The Third Circuit has not yet ruled on this issue. *Compare United States v. Laurent*, 607 F.3d 895, 902-03 (1st Cir. 2010), *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002), *Beaven v. D.O.J.*, 622 F.3d 540, 554 (6th Cir. 2010), *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993), *and Talavera v. Shah*, 638 F.3d 303, 311 (D.C. Cir. 2011), *with Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004), *Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195, 207-08 (5th Cir. 2007), *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008), *Sherman v. Rinchem Co.*, 687 F.3d 996, 1007 (8th Cir. 2012), *Dalcour v. City of Lakewood*, 492 F. App'x 924, 937 (10th Cir. 2012), *and Rutledge v. NCL (Bahamas), Ltd.*, 464 F. App'x 825, 829 (11th Cir. 2012).

*Should proposed Rule 37(e)(1)(B)(ii) be retained?*

The proposed provision does not require a finding of fault to warrant the imposition of sanctions. "Irreparable deprivation of a meaningful opportunity to present or defend the claims in the litigation" signifies a catastrophic harm to a party's ability to litigate that cannot be remedied by any curative measure. The proposed Committee Note emphasizes that the deprivation must be truly irreparable (not subject to curative measures) and cause the loss of *any* meaningful opportunity to pursue the claims or defenses at the core of a party's litigation position, not merely the pursuit of a peripheral claim or defense. The August 2013 Preliminary Draft's comments and the proposed Committee Note also make clear that such a finding is likely only in extremely rare circumstances and that such harm must be the result of a party's actions, not an Act of God or some third party.[28] Otherwise, sanctions may be imposed only where a party's conduct was willful or in bad faith and caused substantial prejudice to an opposing party. The drafters are clearly attempting to continue the existing rule's safe harbor protection for ESI lost as a result of the routine, good-faith operation of an electronic information system.[29]

While dropping (B)(ii) might make sense if proposed Rule 37(e) were to be limited to ESI, the Association agrees with the drafters that, on balance, the interests of uniformity call for a single set of standards for all spoliation issues.

*Should the provisions of current Rule 37(e) be retained?*

The Association sees no advantage to retaining Rule 37(e)'s language since it actually runs counter to the more detailed and elaborate analysis under either proposed Rule 37(e)(2)(B)(i) or (B)(ii). Retaining the current language would only serve to undermine the analytical processes at work in either of the sections and present a potential unintended "safe harbor" for parties seeking to avoid the type of diligent preservation efforts required under both sections. The Association therefore opposes retaining the rule in its current form.

*Should "substantial prejudice" be defined?*

An additional definition of the phrase "substantial prejudice" does not, in the unanimous view of the Association, appear necessary. The variety of factual backgrounds in cases does not seem to allow for such a definition. The requirement of willful or bad faith conduct, coupled with the five factors set forth in proposed Rule 37(e)(2), while not exclusive, seem to provide helpful measures for determining the gravity of the arguably sanctionable conduct. The extent of harm to a litigant's case can only be assessed in the context of the particular claims or defenses

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[28] In addition, a threshold requirement in (B)(ii) as in (B)(i) is that the lost information should have been preserved in the first place.

[29] At least one member of the Subcommittee believes that this requirement imports, in effect, a negligence standard without articulating one in connection with preservation obligations. The majority, however, believe that this threshold requirement looks not to ascribing fault but to the type of preservation effort arguably required under the various factors set forth in proposed Rule 37(e)(2).

allegedly impaired and by the fact-specific degree of preservation failure and its causes. Like Justice Stewart's definition of pornography, the court will know it when it sees it.

*Should "willfulness" and "bad faith" be defined?*

The Association does not recommend an additional definition for "willfulness," which clearly imports intentional conduct and is explicit in its meaning. It also arguably has a different meaning than the term "bad faith," which Black's Law Dictionary defines as "dishonesty of belief or purpose," although some members of the Association consider the two phrases to mean the same thing.[30] The Association does, however, perceive some ambiguity in the term "willfulness" in relation to the potentially sanctionable conduct at issue. If a party intentionally disposes of ESI in the ordinary course of business, is that "willful" conduct under the rule or must the party also act with the purpose of preventing discovery of the ESI? While the Association believes the latter interpretation reflects how "willfulness" should be applied under the proposed rule, the Association recommends that the Standing Committee clarify this purpose by amending the proposed Committee Note.

The Association's construction of "willfulness" finds support in Third Circuit precedent, which holds that "willfulness involves intentional or self-serving behavior." *Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 875 (3d Cir. 1994). "In evaluating a dismissal, this court looks for the type of willful or contumacious behavior which was characterized as 'flagrant bad faith,' in [*National Hockey League v. Metropolitan Hockey Club, Inc.*, [427 U.S. 639, 643 (1976)]." *Id*. (internal quotation marks omitted). *Accord Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 695 (3d Cir. 1988) (failure of plaintiff and attorney to comply with court orders and discovery requests without plausible excuses and delay appeared to be calculated, so that district court properly found conduct willful, not merely negligent). *But see Sekisui Am. Corp. v. Hart*, No. 12-Civ.-3479, 2013 WL 4116322, at *8 (S.D.N.Y. Aug. 15, 2013) (Scheindlin, J.) (providing adverse inference instruction after finding plaintiffs' intentional destruction of e-mails to be "willful" conduct that evidenced a culpable state of mind as a matter of law, despite the absence of proof of intention to violate any duty of preservation).[31]

The Association also does not recommend a specific definition of the term "bad faith," given the exceedingly fact-specific and sensitive nature of the application of the phrase, in both

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[30] BLACK'S LAW DICTIONARY 159 (9th ed. 2009). It is unclear whether the drafters view the terms "willfulness" and "bad faith" as synonymous. The Third Circuit's list of factors that a trial court must balance to determine an appropriate sanction includes "whether the conduct of the party was willful or in bad faith." *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

[31] Significantly, Judge Scheindlin expressed in dictum her disapproval of proposed Rule 37(e)(1): "I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned (although they can be subject to 'remedial curative measures') even if they were negligent, grossly negligent, or reckless in doing so." *Sekisui Am. Corp.*, 2013 WL 4116322 , at *4 n.51.

discovery and other contexts, and the above-referenced Third Circuit case law. In addition, courts already are deemed to have the inherent power to impose sanctions for bad faith conduct during discovery. *See, e.g.*, *Chevron U.S.A., Inc., v. United States*, 110 Fed. Cl. 747, 807 (2013) (imposing financial sanctions against Government for "bad faith" excessive designation of documents as privileged); *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1333-35 (11th Cir. 2001) (upholding sanctions imposed on Government for "bad faith" conduct in omitting "obviously relevant" documents from discovery).

At the same time, the Association suggests that the proposed Committee Note refer to the types of sanctionable conduct discussed in the above cases or others, so as to provide a useful gloss for the future application of the phrase "bad faith" under the proposed rule. *Chevron* described the Department of Energy counsel's bad faith conduct as evincing "a brazen disregard for the legal process" and "efforts to obfuscate, cover-up, and subvert evidence that was properly discoverable and responsive to [plaintiff's discovery] requests." 110 Fed. Cl. at 807 (citation omitted). Similarly, *Maritime Management* observed: "Other circuits have recognized bad faith where 'a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights.'" 242 F.3d at 1335 (citation omitted).[32]

*Other Possible Issues*

The Association identified additional issues or general areas of concern that the Advisory Committee may want to address:

1. Time to raise preservation issue and/or seek sanctions: Presumably a motion for curative measures or sanctions under the proposed Rule 37(e) would arise during discovery, but might also be raised on summary judgment, in a motion *in limine* or at trial itself, depending upon the sanction being sought (*e.g.*, dismissal of case based on spoliation of evidence; adverse inference instruction; motion for new trial). It might be beneficial for the Committee Note to address this issue.

2. Applicability of sanctions from Rule 37(b)(2)(A): Proposed Rule 37(e)(1)(B) provides that the sanction for a violation of a preservation obligation is an adverse inference instruction or a "sanction listed in Rule 37(b)(2)(A)." Rule 37(b)(2)(A) specifies a non-exhaustive list of potential sanctions and appears to recognize the inherent power of the court to fashion an appropriate sanction. Proposed Rule 37(e), however, does not appear to provide a court with the same flexibility, although that may have been the drafters' intent. This ambiguity should be clarified, either in the text of the proposed Rule or at least in the Committee Note.

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[32] One Subcommittee member, referencing the above Black's Law Dictionary definition of "bad faith" and in light of the above-cited examples in *Chevron* and *Maritime Management*, suggests that, in the Rule 37(e) context, the "dishonest purpose" would be the demonstrated conduct designed to frustrate the purposes of the rule in order to prevent an adverse party from gaining access to discoverable information so that it might effectively utilize the various mechanisms of discovery to litigate its claims or defenses. This member believes that some commentary along these lines in an amended Note might provide useful guidance for the application of the term "bad faith" under the proposed rule.

## PROPOSED AMENDMENTS TO RULE 84

### Proposed Amendments and Their Purpose

Rule 84 provides: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." Thirty-six forms are appended to the Federal Rules, including 12 complaints for various claims (*e.g.*, recover a sum certain, negligence, negligence under FELA, damages under Merchant Marine Act, conversion, specific performance of contract to convey land, patent infringement, copyright infringement).

The Proposed Amendment to Rule 84 abrogates the rule and the forms, and amends Rule 4(d)(1)(D) to incorporate Forms 5 and 6.

The Standing Committee's reasons for this amendment are (1) the forms have minimal usefulness: They are rarely used by lawyers, do not provide meaningful help to pro se litigants, and do not address most of the substantive claims that comprise the bulk of the federal docket; (2) the minimal use of the forms does not justify the burden on the Judicial Conference to maintain and update the forms to ensure that they comply with current practice; and (3) there is a "tension" between Rule 84 and emerging pleading standards, which is made acute because the forms have hardly been amended substantively in the last 75 years.[33]

### Recommendations of the Association

The Association takes no position on the Proposed Amendment.

### Explanation for Recommendation

The Association could not reach a consensus on whether some of the complaint forms conflict with judicial interpretations of Rule 8(a), including *Bell Atlantic v. Twombly*[34] and *Ashcroft v. Iqbal*.[35] Ultimately, the Association's views on the Proposed Amendment were greatly fragmented, with some members strongly opposed to the amendment, some members supporting the Proposed Amendment, and some members who believe the conflict between Rule 8(a) and Rule 84 should be resolved but cannot decide whether the better approach is the abrogation of Rule 84 or the revision of some complaint forms.

The analysis of the two primary views -- opposing and favoring the Proposed Amendment -- are set forth below.

#### Reasoning Opposing the Proposed Amendment

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33 *See* Memorandum from Advisory Committee on Civil Rules 18-19 (May 8, 2013; supp. June 2013), in August 2013 Preliminary Draft, *supra* note 7, at 276-77.

34 550 U.S. 544 (2007).

35 556 U.S. 662 (2009).

Since 1948, Rule 84 has provided that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." The complaint, answer and discovery forms and the text of Rule 84, when read together, reinforce that the Federal Rules of Civil Procedure embrace notice pleading under Rule 8(a). Yet, the Advisory Committee contends that "emerging pleading standards" -- those from *Twombly* and *Iqbal* -- create "tension" with Rule 84. The Rules, however, cannot be amended by judicial opinions or by "emerging pleading standards," but only by the Rules Enabling Act process. Since the *Twombly* and *Iqbal* opinions, the Advisory Committee has chosen not to address pleading standards under Rule 8, preferring instead to monitor a common law process, observing the frequency and outcome of motions to dismiss brought under Rule 12(b)(6). The Proposed Amendment appears to be an attempt to reconcile Rule 8 with *Twombly* and *Iqbal* without addressing the language of Rule 8 through the Rules Enabling Act process.

The Advisory Committee asserts that revising the complaint forms would be difficult following the *Twombly* and *Iqbal* decisions. Rule 84, however, does not contain form complaints for the claims at issue in *Twombly* (antitrust) or *Iqbal* (official immunity). Further, the assertion that the forms do not address most of the substantive claims that comprise the bulk of the federal docket ignores that there never was an intention to include form complaints for a wide variety of claims and that the forms' purpose is fulfilled by a small number of samples. *See* FED. R. CIV. P. 84 advisory committee's note (1937) ("Provision is made here for a limited number of official forms which may serve as guides in pleadings.").

The Proposed Amendment may affect developing case law on the pleading standard after *Twombly* and *Iqbal*. Courts, which previously found guidance in the Rule 84 forms and their relationship to the pleading standards articulated in Rule 8(a), will not be able to rely on Rule 84 when addressing pleadings under the *Twombly and Iqbal* decisions. Andrea Kuperman of the Federal Judicial Center was asked by the Advisory Committee to analyze the effect of abrogation of the Rule 84 forms. She concluded that if Rule 84 is abrogated, "it is very unlikely that the case law approving of the forms under Rule 84 will continue to have validity."[36] Courts, which previously had guidance from the Rule 84 complaint forms and their relationship to the pleading standards articulated in Rule 8(a), will not have that support when addressing pleadings under the *Twombly* and *Iqbal* decisions.

The issue whether a complaint based on the forms will suffice on that basis alone or is subject to further inquiry after *Twombly* and *Iqbal* has focused primarily on Form 18, the patent infringement form. Some courts addressing Form 18 have concluded that the *Twombly* and *Iqbal* opinions merely interpret Rule 8(a) and could peacefully co-exist with the complaint forms, which "illustrate the simplicity and brevity that these rules contemplate." For example, the Federal Circuit in *McZeal v. Sprint Nextel Corp*., 501 F.3d 1354, 1356-57 (Fed. Cir. 2007), held

[36] *See* Memorandum from Andrea L. Kuperman to Hon. Gene E.K. Pratter, at 1 (July 6, 2012) (hereinafter "Kuperman Memorandum"), in April 2013 Agenda, *supra* note 20, at 223.

that, for a direct infringement claim, a pleading which was based on Form 18 met the *Twombly* pleading standard,[37] an approach which has been followed by a number of courts.[38]

Other courts have found it more difficult to reconcile Form 18 and the *Twombly* and *Iqbal* pleading standards, and have concluded they were required to follow Rule 84 rather than the *Twombly* and *Iqbal* decisions, which could not have amended Rule 8(a) or the pleading standards detailed in the complaint forms.[39] Two judges have suggested that the solution to this problem is simply to modify or repeal Form 18.[40]

While these decisions may provide reasons to abrogate or revise Form 18, they do not justify the abrogation of all of the forms, many of which serve important functions under the Rules. One example is Form 30, Answer Presenting Defenses Under Rule 12(b). While there is some discussion as to the impact of *Twombly* and *Iqbal* on the meaning of Rule 8(c) and Form 30, some courts have concluded that *Twombly*'s plausibility standard does not apply to affirmative defenses.[41]

The Advisory Committee suggests that after the abrogation of Rule 84, the Administrative Office of the United States Courts (AO) will draft forms, including form complaints, but the AO has not previously offered form complaints on any topic either within or outside the current forms.[42] Nor has the AO offered discovery forms, which are currently

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[37] The plaintiff in *McZeal* appeared *pro se* and the Federal Circuit explicitly applied a "less demanding" pleading standard to this *pro se* plaintiff. *McZeal*, 501 F.3d at 1356. This opinion reflects an instance of the complaint forms providing guidance to *pro se* plaintiffs.

[38] *See Motivation Innovations, LLC v. Express, Inc*., 2012 WL 1415412, at *3 (D. Del. Apr. 24, 2012), report and recommendation adopted, 2012 WL 1835757 (D. Del. May 17, 2012); *Netgear, Inc. v. Ruckus Wireless, Inc*. 852 F. Supp. 2d 470, 473 (D. Del. 2012); *Lodsys, LLC v. Brother Int'l Corp*., 2012 WL 760729, at *3 (E.D. Tex. Mar. 8, 2012); *Elen IP LLC v. ArvinMeritor, Inc.*, 2011 WL 3651113, at *5 (W.D. Wash. Aug. 18, 2011); *e-Lynxx Corp. v. Innerworkings, Inc.*, 2011 WL 3608642, at *3 (M.D. Pa. July 26, 2011); *Clear With Computers, LLC v. Hyundai Motor Am., Inc.*, 2010 WL 3155885, at *2 (E.D. Tex. Mar. 29, 2010).

[39] *See K-Tech Telecomms., Inc. v. Time Warner Cable*, 714 F.3d 1277, 1283 (Fed. Cir. 2013); *R+L Carriers, Inc. v. Driver Tech, LLC* (*In re Bill of Lading Transmission & Processing Sys. Patent Litig*.), 681 F.3d 1323, 1334 & n.6 (Fed. Cir. 2012); *W.L. Gore & Assoc., Inc. v. Medtronic, Inc*., 778 F. Supp. 2d 667, 675 (E.D. Va. 2011); *Automated Transactions, LLC v. First Niagara Fin. Group*, 2010 WL 5819060, at *3-5 (W.D.N.Y. Aug. 31, 2010), *adopted* 2011 WL 601559 (W.D.N.Y. Feb. 11, 2011); *E-Lynxx Corp.*, 2011 WL 3608642, at *3-4; *Clear With Computers, LLC*, 2010 WL 3155885, at *4; *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009).

[40] *See Tyco Fire Prods. LP v. Victaulic Co*., 777 F. Supp. 2d 893, 905 (E.D. Pa. 2011); *McZeal*, 501 F.3d at 1360 (Dyk, J., concurring in part and dissenting in part).

[41] *See Tiscareno v. Frasier*, 2012 WL 1377886, at *15 (D. Utah Apr. 19, 2012); *see also Tyco Fire Prods. LP*, 777 F. Supp. 2d at 900 & n.6; *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010).

[42] *See* United States Courts Web site, Court Forms by Category, http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx.

included in the Appendix. "The Administrative Office forms, moreover, would have to win their way by intrinsic merit, unaided by official status. A court dissatisfied with a particular form would not be obliged to accept it."[43]

The Advisory Committee asserts that "The forms are rarely used by lawyers, do not provide meaningful help to pro se litigants, and do not address most of the substantive claims that comprise the bulk of the federal docket." [44] The conclusion that the forms are not used by practicing attorneys and do not assist *pro se* litigants is anecdotal.[45] It is typical for courts to provide forms to assist litigants in pursuing a case without counsel, and *pro se* litigants, who make up a substantial portion of federal court filers, benefit from the availability of forms in Rule 84. Given their reliance on the forms, it is difficult to understand the Advisory Committee's proposed note that "the purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[46] Arguably, the forms continue to serve a useful function when they are used by *pro se* litigants and some attorneys, and are referenced by the United States Supreme Court.[47]

In the alternative, the argument is advanced that "[t]he forms are no longer needed to encourage simple pleading. Indeed many lawyers want to go beyond the minimum required to state a claim, preferring to plead the facts to support the claimed persuasive story."[48] The observation that many lawyers choose to do more than the minimum required under the Federal Rules does not justify eliminating the forms that were intended to demonstrate the "desirable simplicity and brevity of statement" and that "met with widespread approval in the courts" as a device to demonstrate the "meaning of the language in Rule 8(a) regarding the form of the complaint."[49]

The abrogation is said to be justified because "the minimal use of the forms does not justify the burden on the Judicial Conference to maintain and update the forms to ensure that they comply with current practice," that the work required to maintain the forms would be far greater than is justified by their use,[50] and that "the Rules Enabling Act process is not well

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[43] *See* May 2013 Report, *supra* note 16, at 62, in June 2013 Agenda, *supra* note 16, at 123.

[44] *See* August 2013 Preliminary Draft, *supra* note 7, at 276 ("Lawyers do not much use these forms, and there is little indication that they often provide meaningful help to pro se litigants.").

[45] *See* December 2012 Memorandum, *supra* note 9, at 153, in January 2013 Agenda, *supra* note 9, at 243 ("[The Rule 84 Subcommittee] gathered information about the general use of the forms by informal inquiries that confirmed the initial impressions of the Subcommittee members.").

[46] *See* May 2013 Report, *supra* note 16, at 62, in June 2013 Agenda, *supra* note 16, at 123.

[47] *Twombly*, 550 U.S. at 565 n.10.

[48] *See* April 2013 Agenda, *supra* note 20, at 219.

[49] FED. R. CIV. P. 84 advisory committee's note (1946) (citations and quotation marks omitted).

[50] *See* December 2012 Memorandum, *supra* note 9, at 154, in January 2013 Agenda, *supra* note 9, at 244.

adapted to generating, maintaining and revising a good and useful set of forms."[51] These arguments are advanced while the Advisory Committee acknowledges that the forms have been successfully in use for 75 years. The claim that it would be burdensome to revise the complaint forms ignores that the forms were amended in 2007, and only one form complaint (Form 18) has been identified as requiring revision.

The Advisory Committee has observed repeatedly that it is not yet appropriate to address pleading standards under Rules 8 and 9. If it is premature to consider the pleading standards enunciated under Rules 8 and 9 following the *Twombly* and *Iqbal* decisions, it is inappropriate to abrogate Rule 84 and all of its related forms.

**Reasoning Supporting the Proposed Amendment**

The conflict between Rule 8(a) and Rule 84 should be resolved by either (1) abrogating Rule 84 or (2) revising some complaint forms.

The conflict arises in part from the failure to update the forms over the last 75 years. The Judicial Conference acknowledged, even before the 2007 *Twombly* decision, that the failure to update the pleading forms caused some of them to be insufficient to state a claim under Rule 8(a). Moreover, the twelve pleading forms omit many categories of actions that comprise the bulk of the federal docket. As the Standing Committee observed, most lawyers are not aware of the pleading forms and even fewer utilize them.[52] Many alternative sources that do not need to go through the complex and time-consuming rules amendment process provide excellent forms.

Recent Supreme Court decisions interpreting Rule 8(a) arguably heighten pleading standards by, *inter alia*, providing that "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"[53] Many of the pleading forms, however, contain labels and conclusions. The pleading forms have not been substantively amended to reflect *Twombly* and *Iqbal*, much less earlier judicial interpretations of Rule 8(a). Consequently, there is a "tension" between Rule 8(a) and Rule 84 because some of the forms arguably do not satisfy judicial interpretations of Rule 8(a), particularly the recent ones in *Twombly* and *Iqbal*.

Both Rule 8(a) and Rule 84 supply standards for evaluating the sufficiency of a pleading, but in some cases, these two standards conflict and yield different outcomes. The judiciary is split on whether Rule 84 or judicial interpretations of Rule 8(a) should be used to evaluate a claim's sufficiency. Some judges find that where a claim conforms to the pleading form for that claim, the claim is sufficiently pled, notwithstanding that judicial interpretations of Rule 8(a)

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[51] *See* June 2013 Agenda, *supra* note 16, at 168.

[52] *See also* 14 DANIEL R. COQUILLETTE & JUDITH A. MCMORROW, MOORE'S FEDERAL PRACTICE § 84.02[1], at 84-3 (3d ed. 2013) ("[C]ourts have recognized that relatively few complaints actually follow the forms in the Appendix of Forms.").

[53] *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

dictate a different outcome.[54] Other judges find that the sufficiency of a claim should be evaluated by judicial interpretations of Rule 8(a), notwithstanding that the claim conforms to a particular pleading form.[55] Some judges find that courts are equally bound by Rule 84 and judicial interpretations of Rule 8(a) and, therefore, should try to harmonize the two standards to the extent possible.[56] Most judges find that the two standards cannot be reconciled.[57]

The existence of these conflicting viewpoints is undesirable for many reasons, not the least of which is that it creates uncertainty for litigants and produces inconsistent outcomes. The conflict fosters the appearance of injustice by applying a less rigorous pleading standard to some claims simply because a form pleading for that claim is appended to the Federal Rules.

The conflict should be resolved by the Judicial Conference, either by modifying the form pleadings so that they conform to judicial interpretations of Rule 8(a) or by abrogating Rule 84. The Proposed Amendment adopts the second resolution, abrogation of Rule 84 and, therefore, should be supported.

The opposition to abrogation argues that it is preferable that Rule 84 and Rule 8(a) remain in conflict, since this conflict contributes to the development of judicial interpretations of Rule 8(a). The evolution of case law interpreting Rule 8(a) can proceed without Rule 84. Indeed, almost all judicial decisions addressing the sufficiency of a pleading do not mention Rule 84 because very few claims conform to a pleading form.

The opposition also contends that Rule 84 should not be abrogated because the Civil Rules Advisory Committee is studying the effects of the *Twombly* and *Iqbal* decisions on Rule 8(a). This study and any prospective amendments to Rule 8(a) would not be affected by the abrogation of Rule 84. And there is no reason to delay resolving the conflict between Rules 8(a) and 84 until such time, if at all, the Judicial Conference decides to revise Rule 8(a).

The opposition also argues that the abrogation of Rule 84 may invalidate the case law interpreting Rule 84. This case law, however, simply reflects the existence of a conflict between

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[54] *See, e.g., K-Tech Telecomms., Inc.*, 714 F.3d at 1283; *R+L Carriers, Inc.*, 681 F.3d at 1334 & n.6; *General Elec. Capital Corp. v. Posey*, 415 F.3d 391, 396-97 (5th Cir. 2005); *E-Lynxx Corp.*, 2011 WL 3608642, at *3-4; *McCauley v. Chicago*, 671 F.3d 611, 622-24 (7th Cir. 2011) (Hamilton, J., dissenting); Kuperman Memorandum, *supra* note 36, at 232-35.

[55] *See, e.g., Via Vades LLC v. Skype, Inc*., No. 11-507, 2012 WL 261367, at *2-3 (D. Del. Jan. 27, 2012); *Medsquire LLC v. Spring Med. Sys. Inc*., 2:11-cv-04504, 2011 WL 4101093, at *2 (C.D. Cal. Aug. 31, 2011); *Ingeniador, LLC v. Interwoven*, 874 F. Supp. 2d 56, 66 (D.P.R. 2012); *Gudenas v. Cervenik*, 2010 WL 987699, at *3 & n.2; *R+L Carriers, Inc.*, 681 F.3d at 1348-51 (Newman, J., dissenting); *K-Tech Telecomms., Inc.*, 714 F.3d at 1287 (Wallach, J., dissenting); Kuperman Memorandum, *supra* note 36, at 238-41.

[56] *E.g., K-Tech Telecomms., Inc.*, 714 F.3d at 1288 (Wallach, J., dissenting).

[57] *See Automated Transactions, LLC*, 2010 WL 5819060, at *3; *W.L. Gore & Assocs.*, 778 F. Supp. 2d at 674-75.

Rule 8(a) and Rule 84 which should be resolved. The opposition is also wrong to criticize the Advisory Committee for observing, based on anecdotal evidence, that the pleading forms are rarely used. This critique is not justified, nor is a full blown empirical study warranted. There is no evidence that the forms are used on more than rare occasions, and most lawyers in this Association were unaware of Rule 84 or the forms.

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