All Aboard

More than 30 years ago, the civil rules were amended to try to bring proportionality to discovery. But very little changed in practice. On Dec. 1, 2015, new rules with the same goal take effect. In the pages that follow, judges and lawyers outline the changes, discuss the intended impact, and offer guidelines for adapting to this new — and yet familiar — landscape. **Are we finally on the right track?**

New Rules, New Opportunities

by David G. Campbell

IN May of 2010, some 200 judges, lawyers, and academics gathered for two days at the Duke University Law School to evaluate the state of civil litigation in federal court. The conference was sponsored by the Advisory Committee on the Federal Rules of Civil Procedure. Many studies, surveys, and papers were prepared in advance of the conference to aid the discussion. Although the gathering found that federal civil litigation works reasonably well and that a complete overhaul of the system is not warranted, the participants also concluded that several improvements clearly are needed. Four stood out in particular: greater cooperation among litigants, greater proportionality in discovery, earlier and more active case management by judges, and a new rule addressing the preservation and loss of electronically stored information ("ESI").

The Advisory Committee took the findings of the Duke conference and drafted amendments that address these four areas of focus. The amendments have been approved unanimously by the Advisory Committee, the Standing Committee on the Rules of Practice and Procedure, the Judicial Conference of the United States, and the United States Supreme Court and will take effect on Dec. 1, 2015, unless Congress acts to disapprove them. As Congressional disapproval appears unlikely, judges and lawyers should become familiar with the new rules. The Advisory Committee believes they present a unique opportunity to improve the delivery of civil justice in federal courts.

Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required. As a result, over the course of the next several months the Advisory Committee, the Federal Judicial Center ("FJC"), and other groups will be promoting the new rule amendments and their intended improvements. This article is a small step in that direction. If the amendments have their intended effect, civil litigation will become more efficient and less expensive without sacrificing any party's opportunity to obtain the evidence needed to prove its case.[1]

DAVID G. CAMPBELL is a United States District Court judge for the District of Arizona. His term as chair of the Advisory Committee on the Federal Rules of Civil Procedure concluded in October.

THE DUKE CONFERENCE AND DRAFTING OF THE AMENDMENTS

Participants in the Duke conference included federal and state judges from trial and appellate courts around the country, plaintiff and defense lawyers, public interest lawyers, in-house attorneys from business and government, and distinguished law professors. The FJC and other organizations conducted studies and surveys in advance of the conference, and more than 40 papers and 25 compilations of data were presented. Some 70 judges, lawyers, and academics made presentations to the conference, followed by a broad-ranging discussion among all participants.[2]

The Advisory Committee prepared a post-conference report for Chief Justice John Roberts.[3] The report noted that there was no general sense that the 1938 approach to the Federal Rules of Civil Procedure has failed. "While there is need for improvement, the time has not come to abandon the system and start over."[4] The report identified three specific areas of needed improvement: "What is needed can be described in two words — cooperation and proportionality — and one phrase — sustained,

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active, hands-on judicial case management."[5] The report also noted "significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve [ESI] and the consequences of failing to do so."[6]

Following the Duke conference, the Advisory Committee appointed a subcommittee to develop rule amendments based on conference presentations and conclusions. The subcommittee compiled a list of all proposed rule amendments made at the conference and then held numerous calls and meetings to winnow and refine the suggestions. Over the course of two years, the subcommittee held many discussions, circulated drafts of proposed rule amendments, and sponsored a mini-conference with invited judges, lawyers, and law professors to discuss possible amendments. The subcommittee presented recommendations for full discussion at meetings of the Advisory Committee and the Standing Committee in 2011, 2012, and 2013.

While this work was underway, a separate subcommittee worked on a rule to address the preservation and loss of ESI. This subcommittee also held numerous discussions and meetings, circulated and refined drafts, and sponsored a mini-conference with judges, lawyers, and technical experts to discuss possible solutions to the litigation challenges presented by ESI.

The proposed amendments were published for public comment in August 2013. Over the next six months, more than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Advisory Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the subcommittees revised the proposed amendments and again presented them to the Advisory and Standing Committees, where they were adopted unanimously. The rule amendments were then approved without dissent by the Judicial Conference of the United States and the Supreme Court.

The amendments affect more than 20 different provisions in the civil rules, but this article will address them in terms of the four areas of focus identified at the Duke conference: cooperation, proportionality, early and active judicial case management, and ESI.

COOPERATION

There was near-unanimous agreement at the Duke conference that cooperation among litigants can reduce the time and expense of civil litigation without compromising vigorous and professional advocacy. In a survey of members of the ABA Section of Litigation completed before the conference, 95 percent of respondents agreed that collaboration and professionalism by attorneys can reduce client costs.[7]

Cooperation, of course, cannot be legislated, but rule amendments and the actions of judges can do much to encourage it. Rule 1 now provides that the civil rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment will add the following italicized language: The rules "should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." The intent is to make clear that parties as well as courts have a responsibility to achieve the Rule 1 goals.

The Committee Note to this proposed amendment observes that "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

Sanctions are not the only means of discouraging litigation abuses; judges often have opportunities to remind litigants of their obligation to cooperate. Such admonitions can now be backed with a citation to Rule 1.

PROPORTIONALITY AND OTHER DISCOVERY CHANGES

The Advisory Committee report to the Chief Justice noted "[o]ne area of consensus in the various surveys" conducted before the Duke conference: "that district and magistrate judges must be considerably more involved in managing each case from the outset, to tailor motion practice and shape the discovery to the reasonable needs of the case."[8] This wording captures the meaning of "proportional" discovery; it is discovery tailored to the reasonable needs of the case. It affords enough information for a litigant to prove his or her case, but avoids excess and waste. Unwarranted document production requests, excessive interrogatories, obstructive responses to legitimate discovery requests, and unduly long depositions all result in disproportionate discovery costs.

Studies completed in advance of the Duke conference suggested that disproportionate discovery occurs in a significant percentage of federal court cases. An FJC survey of closed federal cases found that a quarter of the lawyers who handled the cases believed that discovery costs were too high for their client's stake in the case.[9] Other surveys showed greater dissatisfaction. Members in the American College of Trial Lawyers ("ACTL") widely agreed that today's civil litigation system takes too long and costs too much, resulting in some deserving cases not being filed and other cases

with meritorious defenses being settled to avoid the costs of litigation.[10] In a survey of the ABA Litigation Section, 89 percent of respondents agreed that litigation costs are disproportionately high in small cases, and 40 percent agreed that they are disproportionately high in large cases.[11] A survey of the National Employment Lawyers Association ("NELA") found universal sentiment that the discovery process is too costly, with a significant majority indicating that discovery is abused in almost every case.[12] In a report summarizing the surveys prepared for the Duke conference, the Institute for Advancement of the American Legal System ("IAALS") found that between 61 percent and 76 percent of respondents in the ACTL, ABA, and NELA surveys agreed that judges do not enforce existing proportionality limitations.[13]

The concept of proportionality is not new. It has been in the federal rules since 1983. Rule 26(b)(2)(C) provides that "[o]n motion or on its own, the court must limit the frequency and extent of discovery . . . if it determines that . . . 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." Rule 26(b)(1) — which establishes the scope of permissible discovery — declares that "[a]ll discovery is subject to" the limitations in Rule 26(b)(2)(C). And Rule 26(g)(1)(B)(iii) provides that a lawyer's signature on a discovery request or response constitutes a certification that the request or response is not "unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."

Despite the longstanding existence of these proportionality provisions in the rules, the Duke conference concluded that judges do not apply them. In response, the Advisory Committee chose to move the factors in Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). Thus, under the proposed amendment, the scope of discovery in civil litigation now will be defined as follows:

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

The intent of this change is to make proportionality unavoidable. It will now be part of the scope of discovery. Information must be relevant and proportional to be discoverable.

It is worth emphasizing that this change is not intended to deprive any party of the evidence needed to prove its claims or defenses. The intent is to eliminate disproportionate discovery in cases where such elimination is needed. The change will make a difference, however, only if judges are willing to engage in a dialogue with the parties and make decisions regarding the amount of discovery reasonably needed to resolve a case. This calls for active case management — judges who intervene early, help the parties identify what is needed to prepare the case for trial, and set reasonable schedules to complete that preparation without undue time or expense.

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The Advisory Committee changed the order of the Rule 26(b)(2)(C) factors to refer first to "the importance of the issues at stake" and second to "the amount in controversy." This was done to avoid any implication that the amount in controversy is the most important consideration. Cases seeking little or no monetary relief may require significant discovery. The Committee also added a new factor — "the parties' relative access to relevant information" — to highlight the reality that some cases involve an asymmetrical distribution of information. Judges should recognize that proportionality in such cases often will mean that one party must bear greater burdens in responding to discovery than the other party. Discovery is not necessarily disproportionate just because information is flowing mainly from one party to another.

To address concerns raised during the public comment process, the Advisory Committee added a committee note explaining that the amendment to Rule 26(b)(1) does not place the burden of proving proportionality on the party seeking discovery. Nor does it authorize boilerplate refusals to provide discovery on the ground that it is not proportional. The intent is to prompt a dialogue among the parties and, if necessary, the judge, concerning

> the amount of discovery reasonably needed to resolve the case.

A few other changes to the discovery rules are intended to support the new focus on efficient discovery.

"REASONABLY CALCULATED TO LEAD"

The amendments to Rule 26(b)(1) will delete a familiar sentence that each of us can recite from memory: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This sentence will be replaced with the following language: "Information within this

scope of discovery need not be admissible in evidence to be discoverable."

The "reasonably calculated to lead" phrase was never intended to define the scope of discovery. The language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would be hearsay and would not be admissible at trial. Inadmissibility was used to bar relevant discovery. The 1946 amendment sought to stop this practice.

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

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

TWO OTHER CHANGES TO RULE 26(b)

The proposed amendments also will delete two existing phrases in Rule 26(b)(1): one that permits discovery relating to the "subject matter" of the litigation on a showing of good cause, and another that permits discovery of "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The Advisory Committee found that the "subject matter" phrase is rarely if ever used. Parties and courts rightly focus on the claims and defenses in the litigation. The Committee also found that discovery into the existence and location of discoverable information is widely enough accepted that rule language is no longer needed. The Committee Note makes clear that these two changes are not intended to narrow the scope of discovery now permitted under Rule 26(b)(1) and provides some examples of the kinds of discovery still permitted.

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OTHER DISCOVERY CHANGES

Rule 26(c)(1)(B) will be amended to include "allocation of expenses" among the terms that may be included in a protective order. This change makes express what the Supreme Court has long found implicit in the rule — that courts may allocate discovery costs when resolving protective order issues. (*See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)). The Advisory Committee thought it useful to make the authority explicit on the face of the rule. This is not a change intended to make cost shifting more frequent, nor is it intended to suggest that cost shifting should be considered as part of the proportionality analysis. It simply is a codification of existing protective order authority.

Some have asked the Advisory Committee to consider adoption of a requester-pays system for civil discovery, which would be a significant departure from historical discovery practice. Although the Advisory Committee agreed to consider that idea, the Committee has not acted on it. To make clear that the addition of the "allocation of expenses" language to Rule 26(c)(1)(B) is not an implicit endorsement of a requester-pays system, the Committee Note includes this language: "Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

The amendments also include three changes to Rule 34. The first requires that objections to document production requests be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, but requires the party to identify a reasonable time for the production. The third requires that an objection state whether any responsive documents are being withheld on the basis of an objection.

These amendments should eliminate three relatively frequent problems: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting to a document request; responses stating that respon-

sive documents will be produced in due course, without indicating when production will occur and which often are followed by long delays; and responses that state various objections, produce some documents, and yet do not say whether any other documents have been withheld on the basis of the objections. All three practices thwart Rule 1's goals of speedy and inexpensive litigation.

Further, an amendment to Rule 26(d) will allow parties to deliver Rule 34 document production requests before the Rule 26(f) meeting between the parties. The 30 days to respond will be calculated from the date of the first Rule 26(f) meeting. The purpose of this change is to facilitate discussion of specific discovery proposals between the parties at the Rule 26(f) meeting and with the court at the initial case management conference.

EARLY, ACTIVE JUDICIAL CASE MANAGEMENT

The Duke conference included some of the best litigators in the country. When discussing ways to improve civil litigation, these lawyers pled for more active case management by judges. This is an excerpt from the report to the Chief Justice:

> Pleas for universalized and invigorated case management achieved strong consensus at the Conference. . . . There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set[.] Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. . . . A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.[14]

Surveys completed before the Duke conference found similar views. More than 70 percent of respondents from the ABA Litigation Section agreed that early intervention by judges helps to narrow issues and reduce discovery. Seventy-three percent agreed that litigation results are more satisfactory when a judge promptly begins managing a case and stays involved.[15] The NELA survey reflects the same view. Almost two-thirds of respondents agreed that overall litigation results are more satisfactory when a judge actively manages a case.[16]

The benefits of early and active case management have been known for years. When Rule 16 was amended in 1983, the Advisory Committee Note included this comment: "Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices."

Of course, Rule 16 already calls for early management of cases by district or magistrate judges. It already contemplates the establishment of a reasonable but efficient schedule for the litigation, with input by the parties in the Rule 26(f) report. And yet lawyers in the surveys and during the Duke conference reported that many federal judges do not actively manage their cases. The rule amendments include four changes aimed at encouraging more active case management.

First, a key to effective case management is the Rule 16 conference where the judge confers with the parties about the needs of the case and sets an appropriate litigation schedule. To encourage case management conferences during which judges and lawyers actually speak with each other, an amendment will delete the language in Rule 16(b)(1)(B) that allows the scheduling conference to be held "by telephone, mail, or other means." This is mostly a matter of emphasis, because the Committee Note explains that conferences may still be held by any means of direct simultaneous communication, including by telephone. And Rule 16(b)(1)(A) will continue to allow courts to base scheduling orders on the parties' Rule 26(f) reports without holding a conference. The change in the text is intended to eliminate the express suggestion that setting litigation schedules by "mail" or "other means" is an adequate substitute for direct communication with parties. In most cases, it is not. The amendment is intended to encourage judges to communicate directly with the parties when beginning to manage a case.

Second, the time for holding the scheduling conference will be moved to the earlier of 90 days after any defendant has been served (reduced from 120 days in the present rule) or 60 days after any defendant has appeared (reduced from 90 days). The intent is to encourage earlier intervention by judges. Recognizing that these time limits may not be appropriate in some cases, the amendment allows judges to set a later time for good cause. The amendments also reduce the time for serving a complaint under Rule 4(m) from 120 days to 90 days. Language has been added to the Committee Note recognizing that additional time will be needed in some cases.

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

Fourth, briefing and deciding discovery motions can significantly delay litigation. The amendments suggest that the judge and the parties consider at the initial case management conference whether the parties should be required to hold an in-person or telephone conference with the judge before filing discovery motions. Many federal judges require such conferences now, and experience has shown them to be very effective in resolving discovery disputes quickly and

inexpensively. As the report to the Chief Justice noted, "[a] judge who is available for prompt resolution of pretrial disputes saves the parties time and money."[17] The amendment encourages this practice.

These changes are modest, but the Advisory Committee hopes they will encourage earlier and more active case management by judges. No other practice can do as much to improve the delivery of civil justice in federal courts.

RULE 37(e): FAILURE TO PRESERVE ESI

Preservation of ESI is a major issue confronting parties and courts, and the loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith. The Advisory Committee was credibly informed that persons and entities over-preserve ESI out of fear that some might be lost, that their actions might with hindsight be viewed as negligent, and that they might be sued in a circuit that permits adverse inference instructions on the basis of negligence. As the report to the Chief Justice noted, "the uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. . . . Conference participants asked for a rule establishing uniform standards of culpability for different sanctions."[18]

The distinguished panel that addressed this issue at the Duke conference suggested that the Advisory Committee draft a rule specifying when a duty to preserve ESI arises, the scope and duration of the duty, and sanctions that can be imposed for breach of the duty. The Committee attempted to write such a rule, but found that it could not identify a precise trigger for the duty to preserve that would apply fairly to the wide variety of cases in federal court. Nor could the Committee specify the scope or the duration of the preservation obligation because both depend heavily on the unique facts of each case.

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The Advisory Committee did conclude that helpful guidance could be provided on the sanctions to be imposed when ESI is lost. The circuit split could be resolved, and the rules regulating sanctions could provide parties with some guidance when making preservation decisions.

The new Rule 37(e) does not purport to create a duty to preserve ESI. It instead recognizes the existing common-law duty to preserve information when litigation is reasonably anticipated. Thus, the new rule applies when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The rule calls for reasonable steps, not perfection, in efforts to preserve ESI.

If reasonable steps are not taken and ESI is lost as a result, the rule directs the court to focus first on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in the new rule limits a court's powers under Rules 16 and 26 to order discovery to achieve this purpose.

If the ESI cannot be restored or replaced, Rule 37(e)(1) provides that the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." This provision deliberately preserves broad trial court discretion. It does not attempt to draw fine distinctions as to the various measures a trial court may use to cure prejudice under (e)(1), but it does limit those measures in three general ways: There must be a finding of prejudice to the opposing party, the measures imposed by the court must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures addressed in subdivision (e)(2).

Rule 37(e)(2) limits the application of several specific sanctions to cases in which "the party acted with the intent to deprive another party of the information's use in the litigation." The sanctions subject to this limitation include presuming that the lost information was unfavorable to the party that lost it, instructing the jury that it may or must presume the information was unfavorable to that party, and dismissing the action or entering a default judgment.

Subdivision (e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. Adverse inference instructions historically have been based on a logical conclusion: If a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the party that destroyed it. Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad-faith loss of the information. (*See*, *e.g.*, *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.") (citations omitted).)

Other circuits permit adverse inference instructions on a showing of negligence. They reason that an adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. (*See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002).) While this rationale has some equitable appeal, the Advisory Committee had several concerns about its application to ESI. First, negligently lost ESI may have been favorable or unfavorable to the party that lost it — mere negligence does not reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that may well become more frequent as ESI multiplies. Third, as we already have seen, permitting an adverse inference for mere negligence creates powerful incentives to over-preserve, often at great cost. Fourth, because ESI is ubiquitous and often is found in many locations, the loss of ESI generally presents less risk of severe prejudice than may arise from the loss of a single tangible item or a hard-copy document.

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

ONE OTHER CHANGE — ABROGATION OF RULE 84

The Federal Rules of Civil Procedure are followed by an appendix of forms, and Rule 84 provides that the forms "suffice under these rules." Many of the forms are out of date, the process for amending them is cumbersome, and the Advisory Committee found that they are rarely used. In addition, many alternative sources of civil forms are readily available, including forms created by commercial publishing companies and forms created by a Forms Working Group at the Administrative Office of the United States Courts, which are available on the federal courts website.

The proposed amendments will abrogate Rule 84 and eliminate the appendix of forms. The Forms Working Group plans to expand the range of forms available on the federal courts website, and the Committee Note makes clear that this change is not intended to signal a change in pleading standards under Rule 8.

CONCLUSION

The American system of civil justice is in many respects the best in the world, but in federal courts it has become too expensive, too time-consuming, and largely unavailable to average citizens and small businesses. The system needs improvement. The proposed amendments on cooperation, proportionality, case management, and the loss of ESI are intended to reduce the cost and delay of civil litigation. They are not intended to accelerate litigation at the cost of justice, deny parties the evidence needed to prove their cases, or create new obstacles to legitimate discovery. The amendments should be applied by courts and parties in an even-handed effort to achieve the goals of Rule 1 — the just, speedy, and inexpensive determination of every action.

The new rules will have no effect, however, unless judges and lawyers also change. Lawyers can increase their cooperation without sacrificing the finest of their legal advocacy skills. They can make the system more accessible by seeking and providing reasonable and proportional discovery. Judges can actively manage cases by intervening early, entering reasonable and proportional case management orders, remaining engaged throughout the life of the case, ruling promptly on discovery disputes and other motions, and setting firm trial dates.

The coming rule amendments provide a new opportunity for all of us to improve our practices, refine our skills, and achieve the just, speedy, and inexpensive determination of every action.

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[1] This paper represents the author's views and not those of the Advisory Committee, although it does borrow from materials prepared by the Committee's superb reporters, Profs. Ed Cooper and Rick Marcus. A more complete description and the actual text of the amendments can be found at http://www.uscourts.gov/file/18218/download.

[2] Materials from the conference ("Conference Materials") can be found at www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

[3] The report to the Chief Justice ("Advisory Committee Report") can be found at www.uscourts.gov/file/reporttothechiefjusticepdf.

[4] *Id.* at 5.

[5] *Id.* at 4.

[6] *Id.* at 8.

[7] Conference Materials, ABA Section of Litigation Member Survey at 3.

[8] Advisory Committee Report at 4.

[9] Conference Materials, FJC Civil Rules Survey at 28.

[10] Conference Materials, Report from the Task Force on Discovery and Civil Justice at 2.

[11] Conference Materials, ABA Section of Litigation Member Survey at 9.

[12] Conference Materials, NELA Survey at 6.

[13] Conference Materials, IAALS, Preserving Access and Identifying Excess at 14.

[14] Advisory Committee Report at 10.

[15] Conference Materials, ABA Litigation Section Member Survey at 3.

[16] Conference Materials, NELA Survey at 13.

[17] Advisory Committee Report at 10.

[18] Advisory Committee Report at 8.