DUKE CONFERENCE SUBCOMMITTEE RULES SKETCHES

This set of sketches reflects Subcommittee work following the miniconference held in Dallas on October 8, 2012, including a conference call on October 22. Notes on the miniconference are included in the original agenda materials for the November meeting. Notes on the Conference call are attached. This set describes new material added to the sketches set out in the original agenda materials at pages 353-395. The new materials are set out in italicized bold type for easy identification at the beginning of each relevant section. They reflect views expressed by participants in the Dallas miniconference, and the Reporter's attempt to capture the views of the Subcommittee as formed after the miniconference and in the October 22 conference call. The advantages of review by the Subcommittee of the new materials have been surrendered in favor of distribution to the Committee at least a few days before the November meeting. The suggestions carry forward many of the original sketches for consideration at the November meeting and beyond, but would defer consideration of some and would revise others.

The most prominent themes developed at the 2010 Duke Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards are the subject of continual study. Other rules, however, can profitably be considered for revision. The sketches set out here reflect work by the Duke Conference Subcommittee after the Conference concluded. The early stages generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. The proposals have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts — indeed, choices must eventually be made among a number of alternatives included for

purposes of further discussion.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; emphasize the value of holding an actual conference of court and parties before issuing a scheduling order; and establish a nationally uniform set of exceptions from the requirements for issuing a scheduling order, making initial disclosures, holding a Rule 26(f) conference, and observing the discovery moratorium. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing discovery requests to be served at some interval after the action is begun, but deferring the time to answer for an interval after the scheduling order issues.

The next set of changes look more directly to the reach of discovery. They begin with alternative means of emphasizing the principles of proportionality already built into the rules. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Other approaches do not rank as important parts of the overall package and are set out more tentatively. They can survive or fall away based on individual merit. These include emphasizing the value of deferring contention discovery to the end of the discovery period; reexamining the role of initial disclosures; a more express recognition of cost-shifting as a condition of discovery; and adding preservation to the provisions of Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) that refer to electronically stored information.

The last proposal is really one item — a reflection on the possibility of establishing cooperation among the parties as one of the aspirational goals identified in Rule 1.

These proposals are illustrated by sketches of possible rules text. The sketches are just that, sketches. Variations are presented for several of them, and footnotes identify some of the more obvious questions that will need to be addressed as the sketches develop into specific recommendations for adoption.

These proposals have benefited from guidance provided in discussions with the full Advisory Committee. Both Committee and Subcommittee have devoted more time to some of these proposals than to others. Some will deserve further refinement, while others will deserve to be discarded. And the books remain open for additions of new topics. Suggestions are welcome.

The Subcommittee will continue to refine these sketches. The next step is likely to involve some form of informal outreach to

bar groups, perhaps including a miniconference, to gather perspectives on how the proposals are likely to play out in the trenches of adversary litigation. If all goes well, a package of proposals will be presented to the Advisory Committee with a recommendation that it seek the Standing Committee's approval for publication.

I. Scheduling Orders and Managing Discovery

A. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

Shortening the time for service under Rule 4(m) carries forward. The encouragement for an actual, contemporaneous scheduling conference also won consensus support.

There was support for shortening the time to issue a scheduling order, but also concern that setting the time too early could mean that under-prepared lawyers are unable to support an effective conference. It would be possible to expand the times set out in proposed Rule 16(b)(1) and still shorten the current times, which are widely viewed as too long; sufficient flexibility could also be provided by allowing delay for good cause.

Some concern was expressed about the mandate to hold a scheduling conference in all cases not exempted from initial disclosures by Rule 26(a)(1)(B). Many cases on the federal docket are not particularly complicated, and a conference may impose significant burdens without any corresponding benefit. This concern could be met in part by adding to the list of exemptions, and in part by carrying forward the option to exempt cases by local rule.

In all, these matters could be reflected in revised sketches:

(b) Scheduling.

(1) Scheduling Order. Except in ~~categories of actions exempted by local rule~~, a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or by local rule,[1] the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

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

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.[2]

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[1] **The present rule refers to "categories of actions exempted by local rule." That phrasing could be carried forward if it seems useful to attempt to regulate the mode of establishing local-rule exemptions.**

[2] The provision that the conference may be "by telephone, mail, or other means" is deleted. The intent is to require that the conference involve direct contemporaneous communication among the parties and court. "Conference" is used to imply such communication. The Committee Note can observe that telephone, videoconferencing, Skype, or other means of direct communication are proper.

An alternative would be to adopt rule text that specifies direct contemporaneous communication. Something like: "at a

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order within the earlier of ~~120~~ 60[3] days after any defendant has been served with the complaint or ~~90~~ 45[4] days after any defendant has appeared.

[The alternative that extends the time periods when a defendant is allowed 60 days to answer could be adapted to this form if the alternative proves attractive.]

Two changes in Rule 16(b) scheduling-order practice can be presented together in one draft, along with a parallel change in Rule 4(m). The purpose of these changes is to reduce delay and enhance the process of managing a case.

One change is to accelerate the time when the court enters a scheduling order. The purpose is to speed the progress of a case. The change is illustrated by two provisions, one shortening the time allowed by Rule 4(m) to serve process, the other shortening the time to enter the scheduling order after service (or appearance).

The other change emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. There has been some discussion of eliminating Rule 16(b)(1)(A), foreclosing entry of a scheduling order based on the parties' Rule 26(f) report without a conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management order can be crafted without a conference.[5]

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scheduling conference with the court [in person] or by a means of contemporaneous communication."

[3] **This could be 90 days.**

[4] **This could be 60 days.**

[5] There is support for retaining Rule 16(b)(1)(A). The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold

Whether or not Rule 16(b)(1)(A) is carried forward, it is desirable to eliminate the (b)(1)(B) provision allowing a conference to be held by "mail, or other means." Whatever "other means" are contemplated, it is better to require an actual face-to-face or voice-to-voice conference.

Rule 4(m)

(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. But if the plaintiff shows good cause * * *.

Rule 16(b)

(b) SCHEDULING.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule,[6] 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~~.[7]

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared.

The Department of Justice has expressed concern about

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a pro forma conference. The dockets in some courts may not permit scheduling conferences in all cases.

[6] The question whether to adopt a uniform national set of exemptions modeled on Rule 26(a)(1)(B) is addressed in part I B.

[7] The provision that the conference may be "by telephone, mail, or other means" is deleted. The intent is to require that the conference involve direct contemporaneous communication among the parties and court. "Conference" is used to imply such communication. The Committee Note can observe that telephone, videoconferencing, Skype, or other means of direct communication are proper.

An alternative would be to adopt rule text that specifies direct contemporaneous communication. Something like: "at a scheduling conference with the court [in person] or by a means of contemporaneous communication."

accelerating the times in this fashion, advancing the reasons that allow it extra time to answer under Rule 12(a)(2) and (3). Similar reasons might be urged as part of the incentives to waive service, reflected in 12(a)(1)(A)(ii). The following alternative draft is written in terms of a defendant who is allowed 60 days to answer, picking up all of these variations.[8]

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:

(A) within the earlier of 60 days after any defendant has been served with the complaint or 45 days after any defendant has appeared; or

(B) in a case in which these rules allow a defendant 60 days to answer the complaint, within 100 days after that[9] defendant has been served with the complaint or 45 days after that defendant has appeared.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

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[8] The 60 and 45 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." It seems likely that the parties should have more time to prepare for the 26(f) conference. That could be accomplished by setting the time for the conference, and for the 26(f) report, closer to the time for the scheduling order. The need to consider a longer period in cases that allow a defendant 60 days to answer is framed by the illustrative 60- and 45-day periods. If they are lengthened, there may be less reason to make specific provision for cases with a longer period to answer.

[9] "that" defendant is used deliberately. Even with a reduced Rule 4(m) period, one defendant might be served on the day of filing, while the 60-days-to-answer defendant might be served on the 60th day, or even later. But there may be complications when there is more than one 60-days-to-answer defendant. Is this good enough?

B. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

Support was found for establishing uniform exemptions for initial disclosures, the Rule 26(f) conference, the discovery moratorium, and scheduling orders, subject to the possibility of recognizing local rule exemptions in Rule 16(b). But a survey of local rules will be made to see whether there are other categories of actions that should be added to the uniform list; if possible, a docket survey will be made to determine what percentage of the federal docket is represented by the additional categories. If common ground is found, it may be possible to establish a uniform national list and forgo any continuing option for local rules exempting other categories of cases from Rule 16(b).

Rule 16(b) provides that scheduling orders are not required "in categories of actions exempted by local rule." This bow to local practices may have been important when the rule was adopted in 1983, a time when active case management was less familiar than it is today. A survey of the local rules was made in developing the 2000 amendments that, by Rule 26(a)(1)(B), added exemptions that excuse nine categories of proceedings from the initial disclosure requirements. Cases exempted from initial disclosure are further exempted from the Rule 26(f) conference and from the Rule 26(d) discovery moratorium, which is geared to the 26(f) conference. The FJC reported at the time that the exempted categories accounted for 30% of the federal docket.

It may be time to substitute a uniform set of exemptions from Rule 16(b) for the present reliance on local rules. There are obvious advantages in integrating exemption from the scheduling order requirement with the exemptions from initial disclosure, parties' planning conference, and discovery moratorium. Even if most local rules have come into close congruence with Rule 26(a)(1)(B), it could be useful to have a uniform national standard.[10] At the same time, it is not yet apparent whether any serious losses flow from whatever degree of disuniformity persists.

If a uniform set of exemptions is to be adopted, it seems sensible simply to rely on the initial disclosure exemptions now in place. No dissatisfaction with the list has appeared, although that may be in part a function of ambivalence about initial

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[10] The uniform standard might be supplemented by allowing for additional exemptions by local rule to account for local variations in discovery practice. If local experience shows little discovery and little need for management in a category of cases, an additional exemption might not seem to be a threat to uniformity. It is easy to add a local-rule option to Rule 16(b). But that might add clutter to Rules 26(d) and (f) if the categories exempt from scheduling orders by local rule are also to be exempt from the discovery moratorium and the parties' conference.

disclosure practice. The main question may be location: should the list remain where it has been for several years, relying on incorporation by cross-reference in Rule 16(b)? That may be the conservative approach. On the other hand, there is an aesthetic attraction to placing the list in Rule 16(b), so all cross-references are backward. But several counters appear. The first is familiarity — people are accustomed to the present system. Changing Rule 16(b) to adopt a cross-reference is simple, and avoids amending Rules 26(a)(1)(B), (d), and (f) to cross-refer to Rule 16(b). And little harm is done — indeed some good may come of it — if a court inadvertently enters a scheduling order where none is required. If pursued, the change would look like this:

(b) SCHEDULING.

(1) *Scheduling Order*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) ~~categories of actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: * * *

C. Informal Conference With Court Before Discovery Motion

The proposal for an informal conference with the court before making a discovery motion was well received. But the caution that concerned the Subcommittee was renewed: judges who do not adopt this practice now are likely to resist any requirement, and to resist vigorously. It seems prudent to go forward with the sketch that adds the premotion conference as a permitted subject for the scheduling order.

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. Both approaches are sketched here, although the mandatory approach drew little support in Subcommittee discussion. The first illustration adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs. The second illustration imposes on the parties an obligation to request a pre-motion conference, but leaves the court free to deny the request. This approach could be strengthened further by requiring the court to hold the conference, but it likely is not wise to mandate an informal procedure against a judge's preferred management style. The sketch places this approach in Rule 7, but it could instead be added to Rule 26, perhaps as a new subdivision (h). That choice need not be made now.

Rule 16(b)(3)(B)(v)

(3) * * *

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

(v) direct that before filing a motion for an order

relating to discovery the movant must request an informal conference with the court.

[present (v) and (vi) would be renumbered]

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery[11] the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and][12] request [an informal

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[11] Many rules refer to "discovery" without embellishment. It may be better to use this generic term than to attempt to refer to the discovery rules by number — e.g., "a motion under Rules 26 through 37 or 45." A Rule 27 proceeding to perpetuate testimony, for example, is commenced by a "petition." At the same time, it expressly provides for a motion to perpetuate testimony pending appeal, Rule 27(b). A catalogue of discovery rules would also have to wrestle with such matters as Rule 69(a)(2) discovery in aid of execution, which may invoke "the procedure of the state where the court is located." On the other hand, a generic reference to "discovery" might seem to invoke procedures for getting information from persons in foreign countries, or for providing discovery in aid of foreign proceedings. E.g., 28 U.S.C. §§ 1782, 1783. This might be "discovery under these rules." In a related vein, RLM asks whether these puzzles justify reconsideration of the decision in the Style Project to abandon the index section, most recently Rule 26(a)(5), that provided a list of discovery methods. That would provide an indirect definition, distinguishing discovery from disclosure and shortcircuiting arguments that, for example, Rule 36 requests to admit are not a "discovery" device.

RLM also asks whether this language covers submission to the court for a determination of privilege or protection as trial-preparation material after receiving the information in discovery and then receiving a Rule 26(b)(5) notice of the claimed protection. If Rule 26(b)(5) contemplates that the "determination" is itself an order, then the submission is a request for an order and, by Rule 7(b)(1), is a "motion." If the "determination" is something less than an order, then we need decide whether we want to require a pre-submission conference.

[12] RLM asks how this relates to the requirement that parties meet and confer before making a discovery motion. There is much to be said for requiring the meet-and-confer before the pre-motion conference. This presents a tricky drafting issue. The attempt in rule text is a place-keeper, no more. Some motions relating to discovery do not seem to require a pre-motion "meet and confer." In addition to Rule 26(b)(5)(B), noted above, Rule 26(b)(3)(C) provides a request to produce a witness statement and a motion to compel if the

conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or *after the conference* ~~if the conference fails to resolve the issues [that would be] raised by the motion~~.

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request is refused.

D. Discovery Before Parties' Conference

Several miniconference participants said that they would serve early discovery requests if the Rule 26(d) discovery moratorium were relaxed. Most of them regularly represent plaintiffs, but at least one corporate counsel said he would welcome the opportunity to receive early requests. But it was pointed out that the sketches that link response time to entry of a scheduling order could lengthen the time to respond as compared to present practice. Under present practice, a party can serve discovery requests immediately after the Rule 26(f) conference, triggering the time to respond. That trigger is earlier than the scheduling conference and order. There is reason to wonder whether that consequence is serious. But it could be addressed by starting the time to respond to early requests at the conclusion of the 26(f) conference. That approach presents problems for depositions, but can be resolved by allowing early discovery only under Rules 33, 34, 35, and 36. Probably it would be desirable to cross-refer to the Rule 26(d) provision on time to respond in the response-time provisions of Rules 33, 34, and 36.

The current sketches include alternative versions of an approach that would require some period of delay before any party can serve discovery requests in advance of the Rule 26(f) conference. The uncertainty reflected in these alternatives led to reconsideration of the question whether there should be any initial delay. Earlier practice that allowed a plaintiff to go first was tied to the assumption that the party who first initiates discovery should be allowed to complete discovery before other parties are allowed to begin their own discovery. That practice generated complicated strategic behavior and was rightly abandoned. But the problem of priority does not arise so long as Rule 26(d)(2) persists. Allowing a plaintiff to serve requests as early as the summons and complaint would provide an opportunity that could not be matched by the defendant, but the defendant would have the advantages of addressing actual requests at the 26(f) conference and enjoying a longer time to consider the requests before responding. The rule would be simpler if there is no waiting time.

The choices may be more complicated still. Doubts were expressed about the probability that many parties will take advantage of an opportunity for early discovery. Most lawyers seem to delay discovery as long as possible, and are unlikely to serve requests before the Rule 26(f) conference. The discovery rules are complicated now. Further complications should be introduced only for reasons better than providing the possibility of early discovery. And even if the time to respond is set to begin at the conclusion of the 26(f) conference, early service may provide a psychological advantage when the responding party asks for an extension of time. It will be argued that extra time already has been enjoyed as a result of the early service, and the argument may prevail even though there was little or no advantage from service at a time when defendant and defense counsel were barely beginning

to become familiar with the case and the issues. There also is a possible ambiguity in calculating time from the Rule 26(f) conference because conferences often are informal, providing occasions for disputes as the time of the conference.

The simplest sketch of Rule 26(d)(1) reflecting this discussion might look something like this:

> ***(1) Timing. A party may ~~not~~ seek discovery from any source under Rules 33, 34, 35, and 36 at any time after the action is commenced. ~~before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.~~ If the discovery is sought before the parties have conferred under Rule 26(f) in an action not exempted from Rule 26(f) the time to respond runs from the [first] Rule 26(f) conference.***[13]

These changes would enable a party to launch discovery requests before the Rule 26(f) conference, but defer the obligation to respond to a time after the conference. The idea is that the

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[13] **This version omits depositions entirely, in part in deference to Rule 30(a)(2)(A)(iii), which would have to be rewritten so that leave of court must be obtained "to take the deposition before the ~~time specified in Rule 26(d)~~ parties have conferred under Rule 26(f) if the case is not exempted from Rule 26(f).**

Several reasons suggest that depositions should be omitted from early discovery. Substantial time to prepare may be required, and depositions often should not be the first wave of discovery. The rules not provide for early depositions with leave, and without leave if the witness is expected to leave the United States and become unavailable. And, less gloriously, Rules 30 and 31 do not contain the definite response periods provided in Rules 33, 34, and 36. Running the time for a deposition from the conclusion of the Rule 26(f) conference provides little guide, and little protection.

That leaves the question of nonparty document discovery under Rule 45. Rather than complicate the drafting further, and rather than struggle with the practical problems that might arise, it may be better to confine early discovery to inter-parties requests.

There are solid grounds for concern that many lawyers will overlook timing provisions set out in Rule 26(d)(1) when considering the times to respond under Rules 33, 34, and 36. Rule 26 does not invite frequent rereading. Rule 33(b)(2) can be used to illustrate a possible cross-reference: "The responding party must serve its answers and any objections within the later of 30 days after being served with the interrogatories or — if the interrogatories were served before the [first] parties' conference under Rule 26(f) — 30 days after the conference.

conference may work better if the parties have some idea of what the actual first wave of discovery will be. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. The Subcommittee has rejected an approach that would enable a party to serve a deposition notice, interrogatories, production requests, and requests to admit with the complaint. That form might operate primarily for the advantage of plaintiffs; defendants might not have enough time to develop discovery requests, particularly if the times for the Rule 26(f) conference and Rule 16(b) conference and order are shortened. The surviving approach introduces some delay between filing — or, more likely, service or appearance by a defendant — and the first discovery requests. Drawing careful time lines will be an important part of this approach.

Rule 26(d): Waiting Period

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later}[14] ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~[15] 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.

Rule 30(a)

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

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[14] The suggested periods are first approximations. If we set the scheduling conference at 60 days after any defendant is served, and set the Rule 26(f) conference 14 days before the scheduling conference, the window for initiating discovery requests is reduced. Some workable compromise must be found.

[15] This change was suggested during general discussion of discovery before the Rule 26(f) conference. The only purpose is to make clear the general understanding that ordinarily parties may stipulate to something the court can order.

26(b)(2):

(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;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition at a time before ~~the time specified in Rule 26(d)~~ a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * * [16]

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[16] These choices suggest several questions. Early drafts provided that "A party must obtain leave of court * * * if * * * the party seeks to take the deposition less than 14 days after a scheduling order is entered under Rule 16(b) * * *." The snag is that a notice of deposition served before the Rule 26(f) conference and before the scheduling order cannot identify a date that will be at least 14 days after the scheduling order. The current draft text seeks to circumvent that problem, bypassing any attempt to specify the means of setting the date for the deposition. The thought is that the parties should be able to work this out at the 26(f) conference, at the scheduling conference, or after the scheduling order is entered. The Committee Note could point this out.

An alternative could be a bit more direct, but also more than a bit more awkward: "if * * * before a scheduling order is entered under Rule 16(b), the party seeks to set the date for the deposition, unless * * *." This alternative says directly that court permission is required to set any specific date in an early deposition notice.

The draft does not set any specific delay after the scheduling order enters. It would be possible to set a specific period — the deposition may not be taken until [14] days after the scheduling order is entered. But this complication may not be necessary. In many circumstances the parties will prefer to defer depositions until after substantial discovery by other means, particularly Rule 34 document discovery. And depositions used to identify the subjects and sources of other discovery may be useful at an early time. (Under present practice, a notice of deposition can be served at any time after the Rule 26(f) conference, setting a reasonable time to comply if a Rule 45 subpoena is used.)

A proceeding exempted from initial disclosures by Rule 26(a)(1)(B) is exempt from the discovery moratorium in present Rule

Rule 31(a)(2)(A)(iii)

Rule 31(a)(2)(A) would, as now, mirror Rule 30(a)(2)(A), except that, as now, Rule 31 would not include a provision for deponents departing the country. A party must obtain leave of court if:

> **(iii)** the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B);[17] or * * *

Rule 33(b)(2)

> **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later.[18] A shorter or longer time may be

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26(d). That exemption is carried forward in the draft. Those proceedings also are exempt from the Rule 26(f) parties' conference and would be exempt from the scheduling order requirement under proposed Rule 16(b). The same exemption appears in proposed Rules 31. The current sketches propose a simpler drafting approach to Rules 33, 34, and 36, but that requires further thought. One alternative for 33, 34, and 36 is described in note 14 below.

[17] This is a first attempt to integrate the Rule 31 process for framing cross questions, redirect questions, and recross questions with early discovery requests. Focusing on the time for taking the deposition seems awkward in this context. Forcing the other parties to frame cross questions, and so on, before the 26(f) conference or the scheduling order, seems out of keeping with the general plan to permit early requests as a means of enhancing early cooperation and management without forcing premature responses.

[18] The reference to "any" scheduling order is a questionable attempt to simplify the drafting. Present Rule 26(d) clearly exempts all modes of discovery from the discovery moratorium in cases exempt from initial disclosures. The drafts for Rule 30 and 31 explicitly adopt this exemption. The drafts of Rules 33, 34, and 36 short-circuit this formula, on the premise that if there is no scheduling order there is no reason for setting a time to respond measured by a scheduling order. But there is at least one potential complication: a court may enter a scheduling order even though not required to do so. If that happens after Rule 33, 34, or 36 requests are served — whether before or after the initial 30-day

stipulated to under Rule 29 or be ordered by the court.

Rule 34(b)(2)(A)

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

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 35

There is no apparent need to revise Rule 35 for this purpose.

Rule 36(a)(3)

(3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Rule 45

Earlier drafts asked whether Rule 45 should be amended in parallel with the provisions for discovery between the parties. One parallel would be to set limits on the time to respond to early discovery requests authorized by draft Rule 26(d)(1). Another would be to impose numerical limits on the number of requests, similar to those proposed for requests to produce documents. The Subcommittee has concluded that there is no apparent need to add these complications to Rule 45. Courts know how to prevent a party from resorting to Rule 45 as a means of attempting to shorten the time to respond to Rule 34 requests to produce. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice. And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance.

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period has expired — questions could arise as to the time to respond. The scheduling order should resolve those questions. But it may not.

One alternative: "answers and objections must be served within the later of 30 days after being served with the interrogatories or — if the action is not exempt from Rule 16(b) — within 30 days after a scheduling order is entered."

II. Other Discovery Issues

A. Proportionality: Rule 26(b)(1)

It is difficult to resist the proposition that discovery should be confined to limits reasonably proportional to the needs of the case. The underlying concept was adopted in Rule 26(b)(2) in 1983, with the expectation that the new cost-benefit calculus would solve most problems of excessive discovery. That expectation has not been realized. More recently, Rule 26(b)(1) was amended in 2000 to distinguish between lawyer-managed discovery of material relevant to the parties' "claims or defenses" and court-managed discovery of material relevant only to a more broadly conceived "subject matter involved in the action." In part the hope was to provide a stimulus to more active involvement in discovery by judges who had been holding aloof. The optimistic assessment is that the 2000 amendment had some slight effect. However that may be, and however well discovery works in a high percentage of all cases as measured by total docket numbers, serious, even grave, problems persist in enough cases to generate compelling calls for further attempts to control excessive discovery. The geometric growth in potentially discoverable information generated by electronic storage adds still more imperative concerns. And these concerns are exacerbated by the problem of preserving information in anticipation of litigation, a problem addressed by the proposed revisions of Rule 37(e) that are presented separately by the Discovery Subcommittee.

Despite the attraction of proportionality concepts as a means of attempting to control excessive discovery, substantial concern remains that even a shared pragmatic understanding of proportionality does not provide sufficiently definite meaning to enshrine "proportionality" in rule text. The initial sketches, and post-Dallas attempts to sketch alternative ways to incorporate "proportional" into Rule 26(b)(1) have not allayed these concerns.

Those who expressed concern with adding "proportional" to Rule 26(b)(1) without further refinement also commonly expressed support for the cost-benefit limits on discovery mandated by Rule 26(b)(2)(C)(iii). These provisions were seen to provide suitably nuanced guidance to avoid interminable wrangling in contentious discovery cases.

The inability to control excessive discovery by revising the scope of discovery in 2000, and the substantial support for Rule 26(b)(2)(C)(iii), have combined to suggest that it would be desirable to transfer the calculus of (iii) to become part of the Rule 26(b)(1) definition of the scope of discovery. This transfer is illustrated by the sketch set out below.

The sketch makes further changes as well. Discovery is confined to matter relevant to any party's claim or defense, eliminating the present provision that, on finding good cause,

allows a court to expand discovery to the subject matter involved in the action. It is difficult to see why discovery that is not relevant to any party's claim or defense should be allowed. Substantial limits are placed on the third sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The concern is that the "reasonably calculated" concept has failed in practice. Too many lawyers, and perhaps judges, understand the rule 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.

In all, this sketch reflects a determination that it is important to attempt once more to adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938. Reducing the burdens of discovery also enhances access to the courts by reducing what could be a daunting obstacle. There are increasing demands to make far more dramatic changes.

The current sketches of Rule 26(b)(1) and 26(b)(2)(C)(iii) look like this:

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

Other revisions would be made in Rule 26(b)(2). Subparagraph (A) would incorporate references to proposed limits on the numbers of discovery requests and to the length of depositions. Subparagraph (B) would be amended to refer to the scope of discovery under (b)(1) rather than to subparagraph (C). And subparagraph (C) would be revised to reflect the transfer of (iii) to (b)(1):

(C) When required. On motion or on its own, the court must

limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

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

This approach would require revising many of the cross-references to Rule 26(b)(2) in other rules, substituting Rule 26(b)(1). For example, Rule 30(a)(2) would begin: "A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) ~~(2)~~: * * *."

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. The rules provide for this. Rule 26(b)(2) is the most explicit provision, and also the most general. Rule 26(b)(2)(C) says that "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed * * * if it determines * * * that the burden or expense outweigh the likely benefit." Rule 26(g)(1)(B)(iii) provides that signing a discovery request, response, or objection certifies that it is "neither unreasonable nor unduly burdensome or expensive," considering factors that parallel Rule 26(b)(2)(C). Rule 26(b)(1), after describing the general scope of discovery, concludes: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This sentence was adopted as a deliberate redundancy, and preserved in the Style Project despite valiant efforts by the style consultants to delete it. Rules 30, 31, 33, and 34 expressly incorporate Rule 26(b)(2). Rule 26(c), in addition, provides for an order that protects against "undue burden or expense."

The question is whether still greater prominence should be accorded the proportionality limit, hoping that somehow one more rule behest to behave reasonably will revive a faltering principle. There is ample reason to doubt the efficacy of revising or adding to concepts that already are belabored in deliberately redundant rule text. And there is always a risk that any variation in rule language will provoke arguments — even successful arguments — that the meaning has changed. Adding an express reference to "proportionality," moreover, could easily lead to one more class of blanket objections and an increase in nonproportional arguments about proportionality. If "proportionality" is added to rule text, it will be important to state in the Committee Note that a proportionality objection must be supported by specific reasons informed by the calculus of Rule 26(b)(2)(C).

Despite these possible grounds for pessimism, the Subcommittee believes that it is important to attempt to give proportionality a more prominent role in defining the scope of discovery. The concept is important, and should be more vigorously implemented in practice.

Many approaches are possible, ranging from simple attempts to incorporate Rule 26(b)(2)(C) concepts more prominently in Rule 26(b)(1) to adding explicit references to "proportionality" in rule text. It is even possible to think about revising Rule 26(b)(2)(C) itself, although the present text seems a good expression of the factors that shape the calculus of proportionality.

The fate of earlier efforts to emphasize Rule 26(b)(2)(C), including the deliberately redundant cross-reference retained as the final sentence of Rule 26(b)(1), suggests that a relatively bold approach may be needed to accomplish much. The Subcommittee is attracted to a revision of Rule 26(b)(1) that would introduce "proportionality" as an express limit on the scope of discovery:

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

This approach courts the risks that inhere in adopting any new word in rule text. It seems likely that the new word will provoke litigation about its meaning, and litigation about discovery is seldom a good thing. But the Committee Note can mark the relationship to Rule 26(b)(2)(C) concepts, drawing from the express incorporation of (b)(2)(C) at the end of (b)(1).

The mildest approaches considered by the Subcommittee would emphasize the principles of Rule 26(b)(2)(C) without seeking to add "proportionality" to rule text. The first alternative sketched below seems the mildest and may be desirable for that reason. Other sketches are preserved, however, to prompt further discussion.

The simplest strategy is to move proportionality into a more prominent place in Rule 26(b)(1). That could be done in many ways. The simple cross-reference could be moved up, perhaps to the first sentence:

> Unless otherwise limited by court order, and subject to [the limitations imposed by] Rule 26(b)(2)(C),[19] the

[19] It might be objected that it is the judge, not Rule 26(b)(2)(C) itself, that imposes proportionality limits. More importantly, merely moving around the clause that refers generally to 'the limitations' may not seem

scope of discovery is as follows:

This approach could be seen as no more than a style change. But it is more. It expressly qualifies the broad general scope of discovery. Invoking present (b)(2)(C) reduces the risk of unintended consequences. But it may stand a good chance of producing the intended consequences.

Much the same thing could be done in a slightly different style form, and with the same observations:

> * * * the scope of discovery is as follows: Parties may obtain discovery, within the limitations imposed by Rule 26(b)(2)(C), regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach seems to tie (b)(2)(C) more directly to the scope of discovery. Either alternative could encourage courts to view proportionality as an essential element in defining the proper scope of discovery.

"Proportionality" also could be added to the text of Rule 26(b)(2)(C)(iii):

> The burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the reasonable needs of the case,[20] considering ~~the needs of the case,~~ the amount in controversy, * * *

If 26(b)(2)(C)(iii) were revised this way, it likely would be desirable to make a parallel change in Rule 26(g)(1)(B)(iii), so that signing a discovery request, objection, or response certifies that it is

> proportional to the reasonable needs of the case, and is neither unreasonable nor unduly burdensome or expensive, considering ~~the reasonable needs of the case,~~ prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[21]

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adequate to address the problem of widespread misunderstanding.

[20] This may be no more than another way of saying what is already in the rule.

[21] Should "the parties' resources" or "and the importance of the discovery in resolving the issues" be added to complete the parallel to (b)(2)(C)(iii)?

B. Limiting the Number of Discovery Requests

There was little controversy over the proposals to reduce to 15 the presumptive number of Rule 33 interrogatories and to adopt a presumptive limit of 25 for Rule 36 requests to admit.

There was greater concern about the proposal to reduce the presumptive limits on depositions to 5 per side, and to reduce the presumptive duration of a deposition to 4 hours. The main argument was that the present limits — 10 depositions per side, lasting up to 7 hours — work well. Some cases legitimately need more than 5 depositions per side, and there is no point in requiring the parties to seek the court's permission. So for the length of a deposition. On the other hand, FJC data show that most cases involve fewer than 5 depositions. A limit that reflects common practice should work well. In Professor Gensler's memorable phrase, "it is easier to manage up from a lower limit than to manage down from a higher limit." The deposition sketches are carried forward.

There was greater resistance to the sketch that would impose a presumptive limit of 25 requests to produce under Rule 34. Many participants in the miniconference believe that Rule 34 burdens are reduced if the requesting party frames a larger number of narrowly and sharply focused requests than if forced to frame a smaller number of broadly diffuse requests. And there may be disputes about how to count the number of requests. In a different direction, one participant suggested that the problem is not the number of requests but the number of sources that must be searched. Focusing on requests for electronically stored information, this participant suggested the rule should limit the number of "custodians" whose records must be searched. These concerns merit careful thought. The sketches, however, carry forward without change.

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These issues deserve serious consideration.

Many studies over the years, many of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive

limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Illustration is easy for Rules 30(a)(2)(A)(i) and 30(d)(1):

> **(a) When a Deposition May Be Taken.** * * *
> **(2)** *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
> **(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; * * *
>
> **(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~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d)(1).

Rule 33(a)(1) is even simpler:

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

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Things are not so simple for Rule 34. It may not be as easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be

overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

> **(a) In General.** A party may serve on any other party ~~a~~ no more than [25] request~~s~~ within the scope of Rule 26(b):
> * * *
> **(3)** Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

(As noted above, the Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

Rule 36 requests to admit could be limited by a model that conforms to Rule 33. A clear version would add a new 36(a)(2), building on present (a)(1):

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
> (A) facts, the application of law to fact, or opinions about either; and
> (B) the genuineness of any described document.
> **(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)[22] on any other party, including all discrete subparts.

[22] This would be "(A) and (B)" if the more elaborate proposal to defer the time to respond described below is adopted.

C. Discovery Objections and Responses

The miniconference accepted the sketches that sharpen the requirement that Rule 34 objections be specific and that require a statement whether anything is being withheld on the basis of an objection.

The sketch that addresses the time for actual production, as compared to stating that inspection will be permitted, produced broad agreement on the need to reflect the fact that frequently production cannot be made all at once at the time for the response, but also to recognize that the time for production should not be open-ended. "Rolling production" is a common and necessary mode of compliance. This concern is reflected in a revised sketch:

> ***(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, including the reasons. If the responding party elects to produce copies of documents or electronically stored information [in lieu]{instead} of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request or a later reasonable [time]{date} stated in the response.***

The proposal to add "not evasive" to the certifications attributed by Rule 26(g)(1) to a discovery request, response, or objection met vigorous opposition at the miniconference. Many participants felt this addition is unnecessary and might promote additional litigation. The Subcommittee has decided to withdraw this sketch, in part because the certifications already stated in Rule 26(g)(1)(B) can be used to reach evasive responses.

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. The Subcommittee believes these proposals deserve serious consideration.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request

to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

It would be easy to draft Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

> **(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 [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

This problem might be addressed by adding a new sentence to Rule 34(b)(2)(C):

> **(C)** *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.[23]

[23] Could this be simplified: "An objection must state whether anything is being withheld on the basis of the

Rules 34 and 37: Failure to Produce

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make it available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Rule 34(b)(2)(B) would be expanded by adding a new sentence:

> **(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, including the reasons.[24] If the responding party elects to produce copies of documents or electronically stored information [in lieu of permitting]{rather than permit} inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.[25]

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

> **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

Rule 26(g): Evasive Responses

Rule 26(g) provides the counterpart of Rule 11 for discovery. Signing a discovery request, response, or objection certifies that it is consistent with the Rules. It also certifies that a request, response, or objection is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Those strictures might seem to reach evasive responses. And it has been protested that adding an explicit prohibition of evasive responses will simply provide one

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objection"?

[24] This sentence would be amended to include a specificity requirement under the proposal described earlier in this section.

[25] Requiring complete production by the time stated for inspection may give a slight advantage to the requesting party — work with the produced copies often will be easier than inspection. But that seems a quibble.

more occasion to litigate about discovery practices, not about the merits. Nonetheless, it may be useful to add an explicit prohibition to 26(b)(1)(B)(i). By signing, an attorney or party certifies that the request, response, or objection is:

> **(i)** not evasive, consistent with these rules, and warranted * * *.

D. Rules 33 and 36: Contention Discovery

The sketches on contention discovery drew little interest at the miniconference. One participant defended the use of early contention discovery to help focus the action. If presumptive limits are reduced for the numbers of interrogatories and adopted for requests to admit, any problems in present practice are likely to be resolved. These sketches likely will prove unnecessary.

Discussion at the Conference and elsewhere suggests that contention discovery can be misused. Some observations doubt the value of any contention discovery. Others reflect concern with the timing of contention discovery, arguing that it should be postponed to a time when the completion of other discovery makes it feasible to frame contentions with some assurance. The proposals sketched here focus on the timing question.

Contention discovery was added to Rules 33 and 36 in 1970. What has become Rule 33(a)(2) provides:

> An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

The 1970 Committee Note elaborated on the timing question:

> Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

Similarly, Rule 36(a)(1)(A) provides for requests to admit the truth of "facts, the application of law to fact, or opinions about either." The Committee Note is similar to the Rule 33 Note:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

It has been suggested that this open-ended approach to timing should be tightened up by requiring court permission to submit contention interrogatories or requests to admit until the close of all other discovery. That would preserve the opportunity for early contention discovery, but not permit it as freely as the present rules.

The question is whether early contention discovery is so often misused as to justify a change. An illustration of the potential values of early contention discovery is provided by one of the cases cited in the 1970 Committee Note to Rule 33. The FELA plaintiff in Zinsky v. New York Central R.R., 36 F.R.D. 680 (N.D. Ohio 1964), alleged that at the time of his injury his duties were in furtherance of interstate commerce. The railroad defendant denied all allegations of the complaint. The plaintiff then served an interrogatory asking whether at the time of the accident, etc. There is a very real prospect that the denial of the commerce element was pro forma. Confronted with the interrogatory, there is a reasonable chance the railroad will admit the commerce element, putting that issue out of the case. Alternative forms of discovery aimed at showing that the New York Central really is engaged in commerce, at the nature of the plaintiff's duties in relation to the defendant's commerce, and so on, would impose substantial burdens, often serving little purpose.

As the Committee recognized in generating the 1970 amendments, the other side is equally clear. There may be no point in using contention discovery to supplement the pleadings until discovery is complete as to the issues underlying the contention discovery. Developing pleading practice may have a bearing — to the extent that fact pleading increases, there may be still better reason to defer the switch from pleading to discovery as a means of framing the parties' contentions.

Practical experience and judgment are called for. If early contention discovery is misused often enough to be a problem, either because it makes too much supervisory work for the courts or because the parties suffer through the battle without court intervention, it may be time to revise the rules.

One other difficulty must be noted. The 1970 Committee Note to Rule 33 observed: "Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful * * *." The Note to Rule 36 was similar: "it is difficult as a practical matter to separate 'fact' from 'opinion' * * *." The Notes seem to assume that it is easier to separate law-application issues from fact or opinion, but that depends on clear analysis. Remember that "negligence" is treated as a question of fact to be decided by a jury, and to be reviewed for clear error when decided in a bench trial. The drafts that follow make no attempt to depart from the vocabulary adopted in 1970. They are offered without taking any position on the question whether it is better to leave the present rules unchanged, relying on specific case management to achieve

proper timing in relation to the needs and opportunities presented by specific cases.

Revising Rule 33(a)(2) can be done directly, or it might be done in combination with Rule 33(b)(2) so as to avoid the need to resolve a seeming inconsistency.

Rules 33(a)(2), (b)(2) Together

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention].[26] A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 36

Rule 36 time provisions make for more difficult drafting. A temporary illustration may suffice. Rule 36(a)(1) is amended to enable cross-reference in (a)(3):

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(2) relating to:

(A) facts or opinions about facts~~,~~;

(B) the application of law to fact, or opinions about the application of law to fact ~~either~~; and

(B~~C~~C) the genuineness of any described documents.

(a)(3) *Time to Respond; Effect of Not Responding.* A

[26] Will there be disputes whether an interrogatory asks for a fact, not an opinion or contention relating to fact? Or the application of law to fact? Which is it for this question: "When did you make the offer?"

matter is admitted unless, within 30 days after being served — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] —[27] the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

[27] This may need more work. Expert trial witness discovery is governed by the time set for disclosure under Rule 26(a)(2), and deposition of an expert trial witness comes after the report.

E. Initial Disclosures

Views about the value of initial disclosures continue to be divided. Expanded disclosure requirements in the practices of some states are being explored in empirical studies. This topic deserves continued attention, but specific proposals seem premature.

Conference reactions to Rule 26(a)(1) initial disclosures can be roughly described. Many participants thought the practice innocuous — it does not accomplish much, but does not impose great burdens. Some believe that any burden is too great, because so little is accomplished; given the limited nature of the disclosures, discovery is not reduced. And there is always the risk that an absent-minded failure to disclose will lead to exclusion of a witness or information. Still others believe that there is a real opportunity for good if the disclosure requirement is expanded back to resemble the form that was reflected in the rules from 1993 to 2000. They point out that the scope of initial disclosures was reduced only as a compromise to help win approval of the amendment that deleted the opportunity to opt out of initial disclosure requirements by local rule.

The starting point of any effort to reinvigorate initial disclosures likely would be the 1993 version. As to witnesses, it required disclosure "of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." The provision for documents was similar, but limited to those within the possession, custody, or control of the party. That went far beyond the present rule, which covers only witnesses and documents "the disclosing party may use to support its claims or defenses." One hope for the 1993 version was that it would encourage particularized pleading for the purpose of forcing broader disclosures. Whether or not that function was served, developing pleading practices may lower any hopes in this direction. The broader purpose was to anticipate the first wave of inevitable discovery, simplifying and expediting the process. The list of exemptions added in 2000 could work to improve this substitute for discovery by reducing the number of cases in which disclosure is required even though the parties would have pursued less, or even no, discovery. Still, the 1993 version would provide no more than a starting point. More work would need to be done before attempting even a sketch of a new disclosure regime.

The Subcommittee has not found much reason to take up initial disclosure practice at present. But the question deserves to be carried forward for broader comment.

F. Cost Shifting (Discovery only)

The Subcommittee believes that at least the sketch that would make cost-shifting a more prominent feature of Rule 26(c) should go forward.

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. The Subcommittee is not enthusiastic about cost-shifting, and does not propose adoption of new rules. But the topic is both prominent and important. These sketches are carried forward — and may deserve to be carried forward for some time — to elicit broader discussion.

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The suggestion that more explicit provisions would advance the use of cost shifting does not answer the question whether advance is desirable. Cost shifting will be highly controversial, given the still strong tradition that a party who has discoverable

information should bear the cost of retrieving it. (Rule 45(c)(2)(B)(iii) protects a nonparty against significant expense in responding to a subpoena to produce.) Becoming accustomed to cost shifting in the realm of electronically stored information may not reduce the controversy, in part because the fear of computer-based discovery makes it easier to appreciate the risks of overreaching discovery requests.

If a cost-shifting order enters, it is important to consider the consequences if the party ordered to bear an adversary's response costs prevails on the merits. Prevailing on the merits does not of itself mean that the discovery was justified. It may be that none of the discovered information was used, or even usable. Or it may have had only marginal value. On the other hand, the fact that discovery materials were not used, whether to support motions, summary judgment, or at trial, does not mean the discovery was unjustified. The materials may have had value for many pretrial purposes, and may have been winnowed out only to focus on the most compelling materials. Or the discovered information may have led a party to abandon a position that otherwise would have been pursued further, at additional cost to all. The most likely outcome is discretion to excuse part or all of the costs initially shifted to the requesting party. Rather than characterize the shifted costs as "costs" for Rule 54(d), this discretion can be directly built into the cost-shifting rule. The discretion could easily defer actual payment of the shifted costs to a time well after the discovery is provided and a bill is presented.

A conservative approach might do no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

> **(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; * * *

A more elaborate approach might add a new paragraph I:

> **(I)** <u>requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request],</u>[28] <u>including terms for payment and subject to reconsideration [at any time</u>

[28] One reason to add the language in brackets is to avoid any confusion as to disclosure; Rule 26(c) seems haphazard in alternating between "disclosure or discovery" and simply "discovery."

before final judgment].[29]

Still greater elaboration is possible, attempting to list factors that bear on a cost-bearing order. A relatively safe approach to that would be to build cost-bearing into Rule 26(b)(2)(C), adopting all of the factors in that rule:

> **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

None of these sketches approach the more radical idea that has been taken up by some close observers of the rules. This idea is that the discovery rules were adopted without the slightest inkling of the expenses that would become involved as the practice evolved, and without any consideration of the effects of a default assumption that a party asked to provide discovery should bear the costs of responding. The proposal is that each party should bear the costs another party incurs in responding to the discovery it requests. Any change as fundamental as this one should be taken up, either by this Subcommittee or the Discovery Subcommittee, only under direction of the Advisory Committee.

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[29] The bracketed phrase is a place-keeper. Reconsideration may be appropriate even as the discovery continues — the yield of important information may justify reverting to the assumption that a party who has discoverable information must bear the costs of uncovering it and providing it. And the allocation of expenses may be strongly influenced by the outcome on the merits. Perhaps the deadline should extend beyond entry of final judgment — a Rule 59(e) motion to alter or amend the judgment might be appropriate. If so, it might help to include an express cross-reference.

It may not be necessary to add a provision for reassessment after appeal. Certainly the appellate court can review the order. And a remand that does not address the issue should leave the way open for reconsideration by the trial court in light of the outcome on appeal.

RLM adds this question, by analogy to a division of opinions under Rule 11. Some courts impose sanctions for filing an action without reasonable inquiry, even though subsequent proceedings show support for the positions taken. Might a comparable approach be justified when the response to an unreasonable discovery request yields information that could properly be requested? Something may turn on an ex post diagnosis of the difficulty of reaching the responsive information by a better-focused request, including an attempt to guess whether a better-focused request could have been framed in terms that would defeat a narrowing interpretation and result in failure to produce the proper material.

G. Preservation in Rules 16(b)(3), 26(f)

There was little discussion of these sketches, which at least are innocuous and at best may provide helpful reminders of the need to tend to preservation obligations. They may help in implementing the revisions of Rule 37(e) being advanced by the Discovery Subcommittee.

The Evidence Rules Committee is concerned that many lawyers still do not recognize the advantages of agreements on the effect of disclosure under Evidence Rule 502(e). These topics also could be added to Rule 16(b)(3)

> ***(B) Permitted Contents. The scheduling order may: * * ***
>
> ***(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 Rule 502(e) of the Federal Rules of Evidence;***

and Rule 26(f)(3):

> ***(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 Rule 502(d) and (e) of the Federal Rules of Evidence;***[30]

Because the Conference provided many suggestions for discovery reform, many topics are suitable for the agendas of both Subcommittees. A particular illustration is the rather modest suggestion that preservation of electronically stored information be added to the topics appropriate for a scheduling order and for inclusion in the parties' Rule 26(f) discovery plan. Without yet attempting to map a plan for coordination between the Subcommittees, these drafts illustrate the relative simplicity of possible amendments. Whether there is any need to add this particular detail to the general provisions in the present rules is a fair question. It is particularly a fair question because present Rule 26(f)(2) includes "discuss any issues about preserving discoverable information * * *." The only apparent place for further reinforcement is in the (f)(3) description of the mandatory items for a discovery plan.

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[30] **This drafting assumes that any request to adopt the agreement in a court order should mean that it is a Rule 502(e) agreement, and that the order should be governed by Rule 502(d).**

Rule 16(b)(3)(B)(iii)

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

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

Rule 26(f)(3)(C)

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *[31]

[31] Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

III. Cooperation: Rule 1

Discussion at the conference provided substantial support for going forward with the first part of the Rule 1 sketch: The rules "should be construed, administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding." There was substantial opposition to adding the further sentence that "The parties should cooperate to achieve these ends." The opposition extended to a suggested softening that would say only that the parties "are expected to cooperate to achieve these ends." Much of the opposition rested on concern that cooperation is an open-ended concept that, if embraced in rule text, could easily lead to less cooperation and an increase in disputes in which every party accuses every other party of failing to cooperate. The concept of cooperation could be spelled out in the Committee Note once it is clear that Rule 1 applies to lawyers and not simply the court. The Subcommittee does not recommend going forward with that second sentence.

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[32] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

Despite these reservations, the Subcommittee is interested in adding rule language that encourages cooperation. Initial discussion in the Advisory Committee reflects similar interest, even a measure of enthusiasm. The aspiration of the Civil Rules is articulated in Rule 1. Rule 1 now addresses the courts, but it could be amended to include the parties.

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[32] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

An illustration of a Rule 1 approach can be built out of the ACTL/IAALS pilot project rules:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[33] determination of every action and proceeding[, and the parties should cooperate to achieve these ends].[34]
>
> or:
>
> * * * [These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. The parties should cooperate to achieve these ends.

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[33] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

[34] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

APPENDIX

The revised sketches set out in bold have not yet been incorporated in this appendix.

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule, leaving alternative sketches to footnotes in an effort to improve clarity of illustration.

Rule 1

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding[, and the parties should cooperate to achieve these ends].[35]

Rule 4

(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. But if the plaintiff shows good cause * * *.

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or after the conference.[36]

Rule 16

(b) SCHEDULING.

(1) *Scheduling Order.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)[37] ~~categories of~~

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[35] A simpler alternative is sketched in Part III.

[36] A simpler and milder version, clearly preferred by the Subcommittee, is set out as Rule 16(b)(3)(B)(v) below. This sketch is carried forward only for purposes of discussion.

[37] As noted above, the Rule 26(a)(1)(B) exemptions could be moved to Rule 16(b), changing later references accordingly.

~~actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

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

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

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:

(A) within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared; or

(B) in a case in which these rules allow a defendant 60 days to answer the complaint, within 100 days after that defendant has been served with the complaint or 45 days after that defendant has appeared.[38]

(3) * * *

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

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

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.[39]

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

Rule 26

(a)(1)(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must * * *

(b)(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery, proportional to the reasonable needs of the case, regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.[40]

(c)(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,

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[38] This is the alternative version that responds to Department of Justice concerns. The simpler version is easy to derive.

[39] A more complex and nearly mandatory alternative is set out as Rule 7(b)(3) above. The Rule 7(b)(3) draft is carried forward only for purposes of discussion.

[40] Several alternatives are described in Part II A.

including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *[41]

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later} ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

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

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

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

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

(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; * * *

(g)(1)(B)(i) *Signature Required; Effect of Signature.* [By signing, an attorney or party certifies that a discovery request, response, or objection is:] not evasive, consistent with these rules, and warranted * * *.

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the

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[41] The alternatives sketched in Part II F are intriguing: One would add a new paragraph to Rule 26(c)(1), describing an order

(I) requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request], including terms for payment and subject to reconsideration [at any time before final judgment].

The other would include cost sharing in the general proportionality provisions of Rule 26(b)(2)(C):

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

court must grant leave to the extent consistent with Rule 26(b)(2):

(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;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition at a time before ~~the time specified in Rule 26(d)~~ a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * *

(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~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

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

(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 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * or

(iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B); or * * *

Rule 33

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

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served

with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

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

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later. 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 [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.

Rule 36

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

(A) facts or opinions about facts~~,~~;

(B) the application of law to fact, or opinions about the application of law to fact ~~either~~; and

(B~~C~~) the genuineness of any described documents.

(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) and (B) on any other party, including all discrete subparts. * * *

(~~3~~4) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] — the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.[42]

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

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[42] If all of these provisions are adopted, it may be better to depart from the order of provisions in the present rule, setting the times for responding after the provision for a written answer or objection:

> A matter is admitted unless the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request]. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.