Agenda E-19 (Summary)
Rules
September 2014

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, to take effect on December 1, 2014. . . . . pp. 6-8

2. Approve the proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, and transmit these changes to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.. . pp. 13-18

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

Agenda E-19
Rules
September 2014

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on May 29-30, 2014. All members attended except Deputy Attorney General James M. Cole. Judge Amy J. St. Eve participated by telephone.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Catherine T. Struve, Reporter, of the Advisory Committee on Appellate Rules; Judge Eugene R. Wedoff, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Troy A. McKenzie, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge David G. Campbell, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Reena Raggi, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Sidney A. Fitzwater, Chair of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Judge Michael A. Chagares, Chair of the CM/ECF Subcommittee and member of the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, the Committee's Reporter; Professor R. Joseph Kimble, consultant to the Committee; Jonathan C. Rose, the Committee's Secretary; Benjamin J. Robinson, Counsel and

Deputy Rules Committee Officer; Julie Wilson, Scott Myers, and Bridget M. Healy, Attorneys on the Rules Committee Support Staff; Andrea L. Kuperman, Chief Counsel to the Rules Committees; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee, of the Federal Judicial Center; and George Everly, Michael Shenkman, David Sidhu, and Stephanie Tai, Supreme Court Fellows. Stuart F. Delery, Principal Deputy Assistant Attorney General for the Civil Division, Theodore Hirt, J. Christopher Kohn, Elizabeth J. Shapiro, and Allison Stanton attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, as well as new Form 7, with a request that they be published for comment. The Committee approved the advisory committee's request.

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7 are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence demonstrating that the document was deposited in the institution's internal mail system on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy that requirement. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The proposed amendments also make clear

that where an inmate fails to submit sufficient evidence with the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

"Timely" Tolling Motions

Rule 4(a)(4). As previously reported, a circuit split exists regarding whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). The proposed amendment addresses the circuit split by clarifying the meaning of the word "timely" as it is used in Rule 4(a)(4).

Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." However, the statutory provision setting the deadlines for civil appeals—28 U.S.C. § 2107—does not mention such tolling motions.

Following the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007),[1] several courts held that statutory appeal deadlines are jurisdictional, but that nonstatutory appeal deadlines, such as the Civil Rules' deadlines for post-judgment motions, are nonjurisdictional claim-processing rules. Under this interpretation, where a district court purports to extend the time for making such a post-judgment motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. The question that therefore arises is whether the motion counts as a timely one that tolls the time to appeal under Rule 4(a)(4). The

[1]In *Bowles*, the district court, pursuant to its authority under Appellate Rule 4(a)(6) and 28 U.S.C. § 2107(c), extended the 30-day time period for filing a civil notice of appeal. Instead of the 14-day extension permitted by Rule 4(a)(6) and § 2107(c), however, the court extended the time period by seventeen days. 551 U.S. at 207. The Supreme Court held that the court of appeals lacked jurisdiction to entertain the appeal because it was filed outside the 14-day window allowed by statute. *Id.* at 213. The Court based its holding on the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210.

Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* case law from the Second Circuit is in accord with that position. However, the Sixth Circuit has held to the contrary.

The advisory committee determined that a clarification of the meaning of "timely" in Rule 4(a)(4) was necessary because the conflict in authority arguably arises from ambiguity in the current rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment adopts the majority view that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). The proposed amendment would affect the least change in current law and is consistent with the Court's decision in *Bowles,* which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

Length Limits

Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6. The advisory committee has determined that length limits for documents prepared with a computer should be prescribed in terms of number of words or lines of text ("type-volume" limits). For documents prepared without the aid of a computer, the proposed amendments retain the page limits currently prescribed in the rules.

A change from page limits to type-volume limits requires a conversion from pages to words. The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The proposed amendment to Rule 32 would amend that rule's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits would have the discretion to accept longer briefs. The

proposed amendments also add a new Rule 32(f) setting forth a uniform list of the items that can be excluded when computing a document's length, and make conforming changes to Form 6.

3-Day Rule

Rule 26(c). The CM/ECF subcommittee has recommended that the "3-day rule"[2] in each set of national rules be amended to exclude electronic service. The proposed amendment to Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f) discussed *infra*, but does so using different wording in light of Rule 26(c)'s current structure. Under that structure, the 3-day rule is not applicable if the paper in question is delivered on the date of service stated in the proof of service. The change would therefore be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

Amicus Briefs on Rehearing

Rule 29. Proposed new Rule 29(b) sets default rules for the treatment of amicus filings in connection with petitions for rehearing. No national rule exists that addresses the filing deadlines for and permitted length of amicus briefs in connection with petitions for rehearing, and most circuits have no local rule on point. Attorneys have reported frustration with the lack of guidance.

The proposal does not require any circuit to accept amicus briefs, but establishes guidelines for the filing of briefs when they are permitted. In addition, most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit

[2]The 3-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well established, the consensus among the rules committees is that it no longer makes sense to include electronic service among the types of service that trigger application of the 3-day rule.

could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed revisions of Official Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed amendments were circulated to the bench, bar, and public for comment in August 2013.

Official Forms 3A and 3B

Official Form 3A is filed by individual debtors who request to pay the filing fee in installments, as authorized by 28 U.S.C. § 1930(a). Official Form 3B is filed by individual chapter 7 debtors who request to have the filing fee waived, as authorized by 28 U.S.C. § 1930(f). Both forms state the specific filing fee amounts even though those fees are subject to periodic change by the Judicial Conference; therefore, the advisory committee unanimously recommended that the reference to these fee amounts be removed from the forms. Filing fee amounts would continue to be stated in Director's Forms that are used by clerk's offices to provide information about individual debtors. This proposed change would permit fee information provided to debtors to remain current without having to amend the relevant forms each time there is a change in filing fees. Because the proposed amendments are minor and technical in nature, the advisory committee concluded that publication for public comment was not required.

Official Forms 17A, 17B, and 17C

Official Form 17 would be amended and renumbered as Form 17A and new Forms 17B and 17C as part of the comprehensive revision of the bankruptcy appellate rules. Proposed Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C is based on Appellate Form 6 and would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe length limits as type-volume limits.

No comments were submitted in response to the publication of these forms and the advisory committee unanimously approved them with a recommendation that they go into effect on December 1, 2014, the anticipated effective date of the revised Part VIII bankruptcy rules approved by the Judicial Conference at its September 2013 session.

Official Forms 6 Summary, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2

The modernized means test forms for individual debtors under chapters 7, 11, and 13 were initially published for comment in 2012 as part of the first phase of the forms modernization project, a multi-year endeavor to revise many of the official bankruptcy forms to improve both the forms and the interface between the forms and available technology. As a result of the comments received following publication, the forms were revised and republished in August 2013 along with a new Official Form 22A-1Supp, which was created in response to the comments. In addition, the advisory committee approved conforming revisions to the line number references to the means test forms in Official Form 6 Summary.

The six comments received following republication were generally positive. The advisory committee made several stylistic and formatting revisions as a result of detailed

suggestions about the wording or content of certain provisions. The advisory committee also made a substantive change to Form 22C-2, adding Part 3 ("Change in Income or Expenses") in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010).[3]

The Committee concurred with the advisory committee's recommendation.

> **Recommendation:** That the Judicial Conference approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, to take effect on December 1, 2014.

The proposed revisions to the Official Bankruptcy Forms and proposed new forms are set forth in Appendix A, with an excerpt from the advisory committee report.

Rules and Forms Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 1010, 1011, 2002, 3002, 3002.1, 3007, 3012, 3015, 4003, 5009, 7001, 9006(f), 9009, and new Rule 1012, and revisions of Official Forms 106J, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions, new Forms 106J-2 and 113, and abrogation of Official Forms 11A and 11B, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Chapter 15 Cases

Rules 1010, 1011, 2002, new Rule 1012, and Official Form 401. The proposed amendments to Rules 1010, 1011, and 2002, along with a proposed new Rule 1012, are designed to improve procedures for chapter 15 cases.

[3]In *Hamilton*, the Court held that changes to income or expenses that are known or virtually certain at the time of confirmation may be considered by the court in determining the debtor's projected disposable income. *Id.* at 509.

Chapter 15 was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and is the domestic adoption of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997. The purpose of chapter 15, and the model law on which it is based, is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country. Under chapter 15, a representative of a foreign debtor may petition a United States court to recognize a foreign proceeding in a cross-border insolvency case. If the recognition petition is granted, certain provisions of the Bankruptcy Code will apply to assist the foreign representative in administering the debtor's assets or in pursuing other relief. Shortly after chapter 15 was added to the Bankruptcy Code, the rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice.

Chapter 15 defines two categories of foreign proceedings. Section 1502(4) defines a "foreign main proceeding" as a foreign proceeding pending in the country where the debtor has the "center of its main interests." Section 1502(5) defines a "foreign nonmain proceeding" as a foreign proceeding (other than a foreign main proceeding) pending in a country "where the debtor has an establishment." The advisory committee's subcommittee on technology and cross-border insolvency noted a number of oddities in the rules' treatment of the two types of foreign proceedings, and also noted that the rules contain procedures ill suited for chapter 15 cases.

The goal of the proposed amendments is to improve chapter 15 procedures. The proposed amendments for publication (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and

(3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Along with the proposed rules amendments, a form for chapter 15 petitions (Official Form 401) was approved for publication. The creation of the form arose from the work of the forms modernization project.

Chapter 13 Cases

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and Official Form 113. As previously reported, the advisory committee is in the process of creating a national chapter 13 plan form. The goals of this multi-year effort are to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. The proposed rule and form amendments require use of the plan form and establish the authority needed to implement some of the form's provisions.

The proposed plan form (Official Form 113) and the related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, were published for public comment in August 2013. The advisory committee received approximately 150 written comments, and two witnesses testified at a public hearing in January 2014. A number of commenters opposed a national form altogether, prompting the advisory committee's working group to reconsider the plan form, specifically whether to make it an option that could be adopted by individual courts or judges.

After careful consideration, the working group concluded that an optional plan form would defeat the goal of greater uniformity in chapter 13 practice. At the same time, the working group proposed a number of significant revisions to the published form in response to the concerns raised by the comments. The advisory committee concurred and determined that the revisions made after publication warrant republication.

The revisions include three changes to the plan form worthy of note. First, the revised plan form provides for greater flexibility as to the manner in which a debtor funds a chapter 13 plan, including the provision of payments by multiple "steps" of varying durations and the provision of more options concerning the commitment of a debtor's tax refund. Second, the advisory committee altered Part 7 of the plan form, which sets forth the order of distribution of payments to creditors. As published, Part 7 listed payments of the trustee's fee, followed by payments to secured creditors, with the remaining spaces left blank. Part 7 generated a heavy volume of comments, with a split between those seeking a more detailed order of distributions, those seeking no order of distributions at all (in favor of having the trustee determine the order), and those seeking a completely blank order of distributions. The advisory committee decided to leave this part blank with the exception of the provision of payment of the trustee's fee. However, the revised committee note now states that the debtor may choose to leave the order of distribution to the trustee's direction. Lastly, the advisory committee altered Part 10, the signature box. As published, it required only debtors' attorneys and pro se debtors to sign the form. On further reflection, the advisory committee decided to make signatures by represented debtors optional. A number of comments noted that debtors' attorneys might want their clients to sign the plan, both to increase the evidentiary value of the plan in the proceedings and also to verify that the debtor has reviewed the plan's contents.

Rule 3002.1. Rule 3002.1 applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. It requires the creditor to give notice of any changes in the periodic payment amount and notice of any fees,

expenses, or charges that are incurred after the bankruptcy case is filed. The proposed amendments for publication would clarify when the rule applies and when its requirements cease.

3-Day Rule

Rule 9006(f). The proposed amendment to Rule 9006(f) is in response to the recommendation by the CM/ECF subcommittee that the 3-day rule in each set of national rules be amended to exclude electronic service. The proposed amendment parallels the proposed amendments to Appellate Rule 26(c), Civil Rule 6, and Criminal Rule 45.

Official Forms

Official Forms 11A, 11B, 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions. These forms constitute the last major group of forms that will be revised by the forms modernization project. All of these forms derive from existing forms, but reflect a new numbering system. This group of forms consists primarily of case opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also approved for publication are two revised individual debtor forms, an instruction booklet for non-individuals, and the announcement of the proposed abrogation of two Official Forms.

Official Form 410A. Official Form 410A (current Form 10A) is the mortgage proof of claim attachment. The form is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The form currently requires a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges that remain unpaid, and a statement of the amount

necessary to cure any default as of the petition date. The existing form would be replaced with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculation of the claim and the arrearage amounts.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The advisory committee unanimously approved and submitted proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, with a recommendation that these changes be approved and transmitted to the Judicial Conference. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Duke Rules Package

Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. During the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law, there was nearly unanimous agreement that the disposition of civil actions could be improved. Participants also agreed that this goal should be pursued by several means: education of the bench and the bar; implementation of pilot projects; and rules amendments.

The advisory committee formed a subcommittee to develop rules amendments consistent with the overarching goal of improving the disposition of civil cases by reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding."

A package of rules amendments was developed through numerous subcommittee conference calls, a mini-conference held in October 2012, and discussions during advisory

committee and Committee meetings. The proposed amendments published for comment in August 2013 sought to improve early and active judicial case management through amendments to Rules 4(m) and 16; enhance the means of keeping discovery proportional to the action through amendments to Rules 26, 30, 31, 33, 34, and 36; and encourage increased cooperation among the parties through an amendment to Rule 1.

As expected, the proposed amendments generated significant response; the advisory committee received over 2,300 comments and held three public hearings. The public hearings—held in Washington, D.C.; Phoenix, Arizona; and Dallas, Texas—were well attended by the public and the bar, and the advisory committee heard testimony from more than 120 witnesses. The proposed amendments submitted to the Committee for approval are largely unchanged from those published for public comment. The one significant change as a result of the comments is the withdrawal of amendments that would have reduced the presumptive length and numbers of depositions under Rules 30 and 31, the presumptive numerical limit of interrogatories under Rule 33, and would have established a presumptive numerical limit of requests to admit under Rule 36.

Failure to Preserve Electronically Stored Information

Rule 37(e). Present Rule 37(e) was adopted in 2006 and provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Since the rule's adoption, it has become apparent that a more detailed response to problems arising from the loss of electronically stored information (ESI) is required. This is consistent with a unanimous recommendation by a panel at the Duke Conference that a more detailed rule was necessary.

The advisory committee's discovery subcommittee began work on revising Rule 37(e) with the goal of establishing greater uniformity in how federal courts respond to the loss of ESI. The lack of uniformity—some circuits hold that adverse inference jury instructions can be imposed for the negligent loss of ESI and others require a showing of bad faith—has resulted in a tendency to over preserve ESI out of a fear of serious sanctions if actions are viewed in hindsight as negligent.

When it first began its work, the subcommittee considered many approaches, including establishing detailed preservation guidelines—to establish when the duty to preserve arises, its scope and duration in advance of litigation, and actions available to a court when information is lost. The subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible. The subcommittee chose instead to draft a rule focused on court actions in response to a failure to preserve information that should have been preserved in anticipation of litigation.

Therefore, the resulting proposal focuses on the actions a court may take when ESI "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The proposal uses the duty to preserve that has been uniformly established by case law: the duty arises when litigation is reasonably anticipated.

Proposed Rule 37(e)(1) provides that the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. It further provides that the measures be no greater than necessary to cure the prejudice.

Proposed Rule 37(e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. It permits adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation."

Abrogation of Civil Forms

Rules 4 and 84, and the Appendix of Forms. Proposed amendments to Rules 4 and 84 would abrogate Rule 84 and the Appendix of Forms, and amend Rule 4(d)(1)(D) to append present Forms 5 and 6. As previously reported, the proposed amendments follow significant efforts to gather information about how often the forms are used and whether they provide meaningful help to litigants. After carefully studying the issue, the advisory committee determined that abrogation was the best course.

However, two forms required special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. Accordingly, the advisory committee determined that Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.

Most of the comments submitted were supportive of the proposal. Members of the academic community expressed concern that the Rules Enabling Act process is not satisfied by publishing a proposal to abrogate Rule 84 and the Appendix of Forms. They reasoned that each form has become an integral part of the rule it illustrates; therefore, abrogating the form abrogates the rule as well. The advisory committee carefully considered this perspective but unanimously determined that the publication process and the opportunity to comment on the proposal fully satisfies the Rules Enabling Act.

Final Default Judgment

Rule 55(c). Also published in August 2013 was a proposed amendment to Rule 55(c), the rule that deals with setting aside a default or a default judgment. Three comments were submitted, each of which favored the proposed amendment.

The amendment corrects an ambiguity in the interplay between Rules 55(c), 54(b), and 60(b). The ambiguity arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b) in turn provides a list of reasons to "relieve a party . . . from a final judgment, order, or proceeding . . . ."

Reading these rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. However, some courts have read Rule 55(c) as directing them to consider even nonfinal default judgments within the demanding standards of Rule 60(b). The proposed amendment therefore clarifies that the standards set by Rule 60(b) apply only in seeking relief from a final judgment, by adding in Rule 55(c) the word "final" before "default judgment."

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, and transmit these changes to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Rules Approved for Publication and Comment

As previously reported, in January 2014 the Committee approved publication at a suitable time of Rules 6(d), eliminating electronic service from the 3-day rule, and 82, addressing venue for admiralty and maritime claims. In June 2014, the Committee additionally approved the advisory committee's recommendation to publish Rule 4(m), and approved publication of all of the amendments—the amendments to Rules 6(d), 82, and 4(m)—in August 2014.

The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an apparent ambiguity regarding service abroad on a corporation. Comments received on the proposed amendment to Rule 4(m) published as part of the Duke Rules Package revealed that many practitioners believe the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because there are two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1), but there is no explicit reference to service on a corporation. The proposed amendment clarifies that service abroad on a corporation is excluded from the time set forth in Rule 4(m).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 4, 41, and 45, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Rule 4

The proposed amendments to Rule 4 ("Arrest Warrant or Summons on a Complaint") address service of summonses on organizational defendants. The proposal originated from a suggestion by the Department of Justice to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department advised that current Rule 4 poses an obstacle to the prosecution of foreign corporations charged with offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States.

The proposed amendments make several changes to Rule 4. First, they fill a gap in the current rule by authorizing sanctions if an organizational defendant fails to appear. Second, the amendments restrict the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requiring mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendments address the reality that, while an increasing number of criminal prosecutions involve foreign entities, the rules do not provide for service outside a judicial district of the United States; therefore, the proposed amendments provide a mechanism for service on an organizational defendant outside of the United States. Similar to Civil Rule 4, a non-exclusive list of methods for service is included.

Rule 41

Rule 41 concerns searches and seizures. The proposed amendments to Rule 41's territorial venue provisions—which generally limit searches to locations within a district—would

allow a magistrate judge to issue a warrant to use remote access to search electronic storage media and seize or copy ESI even when that media or information is or may be located outside of the magistrate judge's district. The proposed amendments address two increasingly common situations affected by the territorial restriction: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown; and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

Current Rule 41(b) generally limits warrant authority to searches within a district, but it contains four exceptions where out-of-district or extra-territorial warrants are permitted.[4] The proposed amendments would authorize an additional exception for the two specific circumstances described above.

Lastly, the proposed amendments include a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added indicating the process for providing notice of a remote access search.

Rule 45

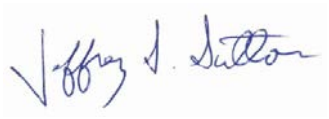
The proposed amendment to Rule 45(c) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Civil Rule 6(d) discussed *supra*. It eliminates the 3-day extension of time periods when service is effected electronically.

[4]Current Rule 41(b) authorizes search warrants for property located outside the district in four circumstances: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a United States territory or a United States diplomatic or consular mission. Fed. R. Crim. P. 41(b)(2)-(5).

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Respectfully submitted,



Jeffrey S. Sutton, Chair

James M. Cole	David F. Levi
Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Jack Zouhary
Susan P. Graber	

Appendix A – Proposed Amendments to the Official Bankruptcy Forms
Appendix B – Proposed Amendments to the Federal Rules of Civil Procedure

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

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 22 and 23, 2014, in Austin, Texas, at the University of Texas School of Law. The draft minutes of that meeting accompany this report in Appendix C. The Committee's actions fall into two categories.

* * * * *

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2013 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rule 9006(f) and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, 427;

(A2) minor amendments to Official Forms 3A and 3B, for which the Advisory Committee seeks approval for transmission to the Judicial Conference without publication;

* * * * *

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2013.

* * * * *

Action Item 2. Official Forms 17A, 17B, and 17C were proposed in connection with the revision of the bankruptcy appellate rules. Form 17A (Notice of Appeal and Statement of Election) would be amended and renumbered, and Forms 17B (Optional Appellee Statement of Election to Proceed in District Court) and 17C (Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)) would be new.

Proposed Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation").

No comments were submitted in response to the publication of these forms, and the Advisory Committee unanimously approved them at the spring meeting. The Committee requests that the Standing Committee approve these forms and forward them to the Judicial Conference, with the recommendation that they go into effect on December 1, 2014, the presumptive effective date of the revised Part VIII bankruptcy rules. These forms will be renumbered as Official Forms 417A, 417B, and 417C when the remaining modernized forms go into effect.

Action Item 3. Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 are the modernized "means test" forms that were initially published in 2012 as part of the first phase of the Forms Modernization Project ("FMP"). The Advisory Committee revised these forms after their initial publication, and the Standing Committee republished them in 2013. In response to the republication, six comments were submitted.

Commenters generally viewed the revisions of the means test forms positively. The National Conference of Bankruptcy Judges ("NCBJ"), for example, thought that the reorganization and revision of the forms made them easier to read and understand, thereby making them easier for debtors to complete and providing clearer information to creditors and trustees.

The comments made a number of detailed suggestions about the wording or content of specific provisions of the means test forms. In response the Advisory Committee made several changes. The changes of greatest significance include the following:

- An instruction about asking for help at the clerk's office was revised to make it clear that the clerk's office could help a filer locate means test data, but that it could not help in completing the form. In addition, the applicable web address for accessing the necessary data was moved to the instructions, where it can be updated as necessary without having to go through the form amendment process.

- The instruction about the grounds for denying chapter 7 relief was revised to state more accurately that "Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims."

- An error on line 33 of Form 22A-2 was corrected by removing the instruction "Do not deduct mortgage payments previously deducted as an operating expense in Line 9."

- The omission of a space on Form 22B for claiming a marital deduction if the debtor has a non-filing spouse was corrected by adding space for the marital deduction on lines 12-14 of the revised form.

Some of the comments raised issues that had previously been debated and resolved by the Advisory Committee in promulgating the existing forms. The Advisory Committee voted not to revisit those legal issues in the context of modernizing the forms. The proposed forms would therefore continue the existing treatment with respect to the following issues:

- Whether the income of a nondebtor spouse not used for household expenses of the debtor or the debtor's dependents is included in current monthly income as defined by §101(10A).

- Whether a chapter 7 debtor who completes the means-test-exemption form (B22A-1Supp) must also complete the Statement of Your Current Monthly Income (B22A-1).

- Whether the means test exemption for reservists and National Guard members is temporary.

- Whether space should be provided in Forms 22A-2 and 22C-2 for a debtor to deduct additional expenses beyond those already listed.

- Whether business expenses should be deducted before, rather than after, calculation of the applicable commitment period.

- Whether the forms should expressly provide a debtor the option of using a different method for determining the number of dependents, along with an explanation of why a different method was used.

- In Forms 22A-2 and 22C-2, whether taxes and insurance included in the mortgage payment should be identified on line 9b (monthly amounts due for debts secured by debtor's residence) rather than on line 33 (deductions for debt payments).

- Whether vehicle ownership expenses should be a predetermined allowance based on the IRS Standards rather than the debtor's actual expenses.

- Whether the debtor should be allowed to deduct ongoing retirement plan contributions as specified in § 541(b)(7).

In drafting revised Form 22C-2, the Advisory Committee made a substantive change in addition to the stylistic and formatting changes proposed by the FMP. It added Part 3 in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), which held that changes to income or expenses reported elsewhere on the 22C forms that have occurred by the time of confirmation or are virtually certain to occur must be considered by the court in determining the debtor's projected disposable income. One comment suggested that debtors should be required to report expected changes only if they are virtually certain to occur within one year of the filing. The Advisory Committee rejected the suggestion because *Lanning* did not specify any time limit for changes that are virtually certain to occur.

The Advisory Committee requests that the Standing Committee approve Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 and send them to the Judicial Conference for approval, with an effective date of December 1, 2014. When the remaining modernized forms become effective, the means test forms will be renumbered Official Forms 108-1, 108-1Supp, 108-2, 109, 110-1, and 110-2.

* * * * *

A2. Amendments for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that amendments to Official Forms 3A and 3B be approved and forwarded to the Judicial Conference and that the amended forms become effective on December 1, 2014.** Because the amendments are minor, technical changes, the Advisory Committee concluded that publication for comment is not required. The text of the amended forms is set out in Appendix A.

Action Item 5. **Official Form 3A** is filed by individual debtors who request to pay the filing fee in installments, as authorized by 28 U.S.C. § 1930(a). **Official Form 3B** is filed by individual chapter 7 debtors who request to have the filing fee waived, as authorized by § 1930(f). The modernized version of Form 3A, which went into effect on December 1, 2013, includes at line 1 the filing fee amount for each chapter. The version of 3B that went into effect at the same time refers to the specific chapter 7 filing fee amount in the order that is part of the form. Because these amounts are subject to periodic change by the Judicial Conference, the

Advisory Committee voted unanimously to remove them from the forms. Filing fee amounts will continue to be stated in Director's Forms that are used by clerk's offices to provide information about bankruptcy to individual debtors (current Director's Form 200 and 201). The proposed change will permit fee information provided to debtors to remain current without having to go through the formal forms amendment process.

* * * * *

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

❑ Check if this is an amended filing

Official Form B 3A

Application for Individuals to Pay the Filing Fee in Installments

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. Which chapter of the Bankruptcy Code are you choosing to file under?

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

2. You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

	You propose to pay…	
	$_____	❑ With the filing of the petition ❑ On or before this date..... _____ MM / DD / YYYY
	$_____	On or before this date..... _____ MM / DD / YYYY
	$_____	On or before this date..... _____ MM / DD / YYYY
+	$_____	On or before this date..... _____ MM / DD / YYYY
Total	$_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

✘ _____
Your attorney's name and signature, if you used one

Date _____
MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Chapter filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total	$_____	

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____
Month / day / year

By the court: _____
United States Bankruptcy Judge

COMMITTEE NOTE

The amounts of the bankruptcy filing fees for various chapters listed on page one of the form were removed from the form. The correct fee amounts are listed on Director's Forms 200 and 201A where they can be updated as necessary without having to go through the official form amendment process.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

☐ Check if this is an amended filing

Official Form B 3B

Application to Have the Chapter 7 Filing Fee Waived

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

Check all that apply:

☐ You
☐ Your spouse
☐ Your dependents _____ How many dependents?

_____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

		That person's average monthly net income (take-home pay)
Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.	**You**	$_____
	Your spouse ... +	$_____
	Subtotal.....	$_____
Subtract any non-cash governmental assistance that you included above.	−	$_____
Your family's average monthly net income	Total.....	$_____

3. Do you receive non-cash governmental assistance?

☐ No
☐ Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

☐ No
☐ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.
Include amounts paid by any government assistance that you reported on line 2.

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

$_____

7. Do these expenses cover anyone who is not included in your family as reported in line 1?

❑ No
❑ Yes. Identify who .....

8. Does anyone other than you regularly pay any of these expenses?
If you have already filled out *Schedule I: Your Income*, copy the total from line 11.

❑ No
❑ Yes. How much do you regularly receive as contributions? $_____ monthly

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form B 6A)* and *Schedule B: Personal Property (Official Form B 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	**$**_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property? | **How much is owed?**

_____ $_____

_____ $_____

Do you believe you will likely receive payment in the next 180 days?

❑ No

❑ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

❑ No

❑ Yes. **Whom did you pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much did you pay? $_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

❑ No

❑ Yes. **Whom do you expect to pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much do you expect to pay? $_____

19. Has anyone paid someone on your behalf for services for this case?

❑ No

❑ Yes. **Who was paid on your behalf?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

Who paid? *Check all that apply:*

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay? $_____

20. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____ ✘ _____

Signature of Debtor 1 Signature of Debtor 2

Date _____ (MM / DD / YYYY) Date _____ (MM / DD / YYYY)

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form B 3B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total		

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at _____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

COMMITTEE NOTE

The amount of the chapter 7 filing fee is no longer preprinted on the blank order attached to the form. If the request for a fee waiver is denied, and if the court instead orders payment by installments, the court or clerk will prepare the order with the correct fee amount.

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Case No. _____
Debtor

Chapter _____

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors also must complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property			$		
B - Personal Property			$		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				$	
E - Creditors Holding Unsecured Priority Claims (Total of Claims on Schedule E)				$	
F - Creditors Holding Unsecured Nonpriority Claims				$	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					$
J - Current Expenditures of Individual Debtors(s)					$
TOTAL			$	$	

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Case No. _____
Debtor

Chapter _____

STATISTICAL SUMMARY OF CERTAIN LIABILITIES AND RELATED DATA (28 U.S.C. § 159)

If you are an individual debtor whose debts are primarily consumer debts, as defined in § 101(8) of the Bankruptcy Code (11 U.S.C. § 101(8)), filing a case under chapter 7, 11 or 13, you must report all information requested below.

☐ Check this box if you are an individual debtor whose debts are NOT primarily consumer debts. You are not required to report any information here.

This information is for statistical purposes only under 28 U.S.C. § 159.

Summarize the following types of liabilities, as reported in the Schedules, and total them.

Type of Liability	**Amount**
Domestic Support Obligations (from Schedule E)	$
Taxes and Certain Other Debts Owed to Governmental Units (from Schedule E)	$
Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedule E) (whether disputed or undisputed)	$
Student Loan Obligations (from Schedule F)	$
Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedule E	$
Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F)	$
TOTAL	$

State the following:

Average Income (from Schedule I, Line 12)	$
Average Expenses (from Schedule J, Line 22)	$
Current Monthly Income (from Form 22A-1 Line 11; **OR**, Form 22B Line 14; **OR**, Form 22C-1 Line 14)	$

State the following:

1. Total from Schedule D, "UNSECURED PORTION, IF ANY" column		$
2. Total from Schedule E, "AMOUNT ENTITLED TO PRIORITY" column.	$	
3. Total from Schedule E, "AMOUNT NOT ENTITLED TO PRIORITY, IF ANY" column		$
4. Total from Schedule F		$
5. Total of non-priority unsecured debt (sum of 1, 3, and 4)		$

COMMITTEE NOTE

Summary of Schedules (Official Forms 6 Summary), is updated on page 2 to give line number references to the amended means-test forms (Official Forms 22A-1, 22B, and 22C-1) for Current Monthly Income.

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

   For appeals in an adversary proceeding.

   ❑ Plaintiff
   ❑ Defendant
   ❑ Other (describe) _____

   For appeals in a bankruptcy case and not in an adversary proceeding.

   ❑ Debtor
   ❑ Creditor
   ❑ Trustee
   ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended and renumbered. It is amended to add to the Notice of Appeal an optional Statement of Election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. Current Rule 8005(a) eliminates the requirement, imposed by former Rule 8001(e), that a separate document be used in making an election to have an appeal heard by the district court rather than the bankruptcy appellate panel. It instead requires a statement that conforms substantially to the Official Form for such an election. Form 17A effectuates Rule 8005(a)'s requirement for election by an appellant by combining the notice of appeal and statement of election. It thereby facilitates compliance with the statutory requirement that an appellant wishing to make an election do so at the time of filing the appeal. 28 U.S.C. § 158(c)(1)(A).

The statement of election in Part 4 is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellant should not complete Part 4.

When a bankruptcy appellate panel is available to hear an appeal, completion of Part 4 is optional. An appellant that wants its appeal heard by the bankruptcy appellate panel should not complete this part.

The form is renumbered as Official Form 17A because a new companion form—Optional Appellee Statement of Election to Proceed in the District Court—is designated as Official Form 17B, and another bankruptcy appellate form— Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—is designated as Official Form 17C.

The fixed caption has been deleted because the short title caption on the current form is not appropriate if the debtor is the appellant or if the appeal is in an adversary proceeding. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b). The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate.

[Caption as in Form 16A, 16B, or 16D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):
   _____

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

   For appeals in an adversary proceeding.

   ❑ Plaintiff
   ❑ Defendant
   ❑ Other (describe) _____

   For appeals in a bankruptcy case and not in an adversary proceeding.

   ❑ Debtor
   ❑ Creditor
   ❑ Trustee
   ❑ Other (describe) _____

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

_____ Date: _____
Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):
_____
_____
_____

COMMITTEE NOTE

This form is new. It is the Official Form for an appellee to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel. If an appellee desires to make that election and the appellant or another appellee has not already done so, the appellee must file a statement that conforms substantially to this form within 30 days of service of the Notice of Appeal. 28 U.S.C. § 158(c)(1)(B).

The form is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellee should not complete this form.

When a bankruptcy appellate panel is available to hear an appeal, completion of the form is optional. An appellee that wants its appeal heard by the bankruptcy appellate panel should not complete this form.

The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b).

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ❑ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- ❑ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

_____ Date: _____
Signature

Print name of person signing certificate of compliance:
_____

COMMITTEE NOTE

This form is new. When the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages, Rules 8015(a)(7)(C) and 8016(d)(3) require an attorney or unrepresented party to certify that the brief complies with the applicable type-volume limitation. Completion of this form satisfies that certification requirement. This form is not needed if the brief meets the applicable page limitation under Rule 8015(a)(7)(A) or 8016(d)(1).

The form does not include a caption because it is included in the brief.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check one box only as directed in this form and in Form 22A-1Supp:

- ❑ 1. There is no presumption of abuse.
- ❑ 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 22A–2).
- ❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 22A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2.	**Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).		$_____	$_____
3.	**Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.		$_____	$_____
4.	**All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.		$_____	$_____
5.	**Net income from operating a business, profession, or farm**			
	Gross receipts (before all deductions)	$_____		
	Ordinary and necessary operating expenses	− $_____		
	Net monthly income from a business, profession, or farm	$_____ **Copy here➔**	$_____	$_____
6.	**Net income from rental and other real property**			
	Gross receipts (before all deductions)	$_____		
	Ordinary and necessary operating expenses	− $_____		
	Net monthly income from rental or other real property	$_____ **Copy here➔**	$_____	$_____
7.	**Interest, dividends, and royalties**		$_____	$_____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
8. **Unemployment compensation** Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔	$_____	$_____
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+$_____	+$_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11..... **Copy line 11 here** ➔ 12a. $_____

Multiply by 12 (the number of months in a year). **x** 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. _____

Fill in the number of people in your household. _____

Fill in the median family income for your state and size of household. .....13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ❑ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3.

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A-2*. Go to Part 3 and fill out Form 22A–*2.*

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 22A–2.

If you checked line 14b, fill out Form 22A–2 and file it with this form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 22A–1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/14

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Form 22A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page 1 of the *Voluntary Petition* (Official Form 1).

   ❑ No. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1).

      ❑ No. Go to line 3.

      ❑ Yes. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Complete Form 22A-1. Do not submit this supplement.

   ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)

      ❑ No. Complete Form 22A-1. Do not submit this supplement.

      ❑ Yes. Check any one of the following categories that applies:

         ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

         ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.

         ❑ **I am performing a homeland defense activity for at least 90 days.**

         ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to Form 22A-1. On the top of page 1 of Form 22A-1, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1. You are not required to fill out the rest of Official Form 22A-1 during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii).

If your exclusion period ends before your case is closed, you may have to file an amended form later.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check the appropriate box as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/14

To fill out this form, you will need your completed copy of *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** .....**Copy line 11 from Official Form 22A-1 here➔**.....1. $_____

2. **Did you fill out Column B in Part 1 of Form 22A–1?**

   ❑ No. Fill in $0 on line 3d.

   ❑ Yes. Is your spouse filing with you?

      ❑ No. Go to line 3.

      ❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

   On line 11, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

   ❑ No. Fill in 0 on line 3d.

   ❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a. _____	$_____
3b. _____	$_____
3c. _____	+ $_____
3d. **Total.** Add lines 3a, 3b, and 3c.	$_____

Copy total here ➔ .....3d. − $_____

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $_____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**

   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. ☐

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. **Subtotal.** Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** ..... $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. **Subtotal.** Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** ..... + $_____

7g. **Total**. Add lines 7c and 7f..... $_____ **Copy total here➔** .....7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart.

To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____
9b. Total average monthly payment	$_____

Copy line 9b here → — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $_____ **Copy line 9c here** → $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____
_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ☐ 0. Go to line 14.
- ☐ 1. Go to line 12.
- ☐ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____
_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.
To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy 13b here → — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here** ..... → $_____

Vehicle 2 **Describe Vehicle 2:** _____
_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy 13e here → — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here** ..... → $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*.
$_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.
    Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - ■ as a condition for your job, or
    - ■ for your physically or mentally challenged dependent child if no public education is available for similar services. $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Official Form 22A-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance		$_____		
Disability insurance		$_____		
Health savings account	+	$_____		
Total		$_____	**Copy total here** ➔	$_____

Do you actually spend this total amount?

- ❑ No. How much do you actually spend? $_____
- ❑ Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2). $_____

32. **Add all of the additional expense deductions.** $_____
Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

		Average monthly payment
	Mortgages on your home:	
33a.	Copy line 9b here ➔	$_____
	Loans on your first two vehicles:	
33b.	Copy line 13b here. ➔	$_____
33c.	Copy line 13e here. ➔	$_____

	Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.	_____	_____	❑ No ❑ Yes	$_____
33e.	_____	_____	❑ No ❑ Yes	$_____
33f.	_____	_____	❑ No ❑ Yes	+ $_____
33g.	Total average monthly payment. Add lines 33a through 33f.			$_____ **Copy total here** ➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	+ $_____
			Total	$_____ **Copy total here** ➔ $_____

35. **Do you owe any priority claims such as a priority tax, child support, or alimony – that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims ..... $_____ ÷ 60 = $_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e).
For more information, go online using the link for *Bankruptcy Basics* specified in the separate instructions for this form. *Bankruptcy Basics* may also be available at the bankruptcy clerk's office.

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13			$_____
Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts). To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.	x	_____	
Average monthly administrative expense if you were filing under Chapter 13		$_____ **Copy total here** ➔	$_____

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*		$_____	
Copy line 32, *All of the additional expense deductions*		$_____	
Copy line 37, *All of the deductions for debt payment*	+	$_____	
Total deductions		$_____ **Copy total here** ➔	$_____

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a.	Copy line 4, *adjusted current monthly income*		$_____	
39b.	Copy line 38, *Total deductions.*	−	$_____	
39c.	Monthly disposable income. 11 U.S.C. § 707(b)(2). Subtract line 39b from line 39a.		$_____ **Copy line 39c here** ➔	$_____
	For the next 60 months (5 years)		x 60	
39d.	**Total**. Multiply line 39c by 60. 39d.		$_____ **Copy line 39d here** ➔	$_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

❑ **The line 39d is less than $7,475*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **The line 39d is more than $12,475*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

❑ **The line 39d is at least $7,475*, but not more than $12,475*.** Go to line 41.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 6), you may refer to line 5 on that form. 41a. $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I) Multiply line 41a by 0.25. $_____ **Copy here** → $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Part 4: Give Details About Special Circumstances

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B).

❑ No. Go to Part 5.

❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	**Average monthly expense or income adjustment**
_____	$_____
_____	$_____
_____	$_____
_____	$_____

Part 5: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/14

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

				Column A **Debtor 1**	*Column B* **Debtor 2**
2.	**Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3.	**Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4.	**All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5.	**Net income from operating a business, profession, or farm**				
	Gross receipts (before all deductions)	$_____			
	Ordinary and necessary operating expenses	− $_____			
	Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6.	**Net income from rental and other real property**				
	Gross receipts (before all deductions)	$_____			
	Ordinary and necessary operating expenses	− $_____			
	Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2**
7. **Interest, dividends, and rovalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ↓		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total average monthly income

Part 2: Deduct any applicable marital adjustment

12. **Copy your total average monthly income from line 11.** $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____	$_____
13b. _____	$_____
13c. _____	+ $_____
13d. Total	$_____ **Copy here.** → 13d. − _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

Part 3: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date_____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2.	**Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).		$_____	$_____
3.	**Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.		$_____	$_____
4.	**All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.		$_____	$_____
5.	**Net income from operating a business, profession, or farm**			
	Gross receipts (before all deductions)	$_____		
	Ordinary and necessary operating expenses	− $_____		
	Net monthly income from a business, profession, or farm	$_____	**Copy here** → $_____	$_____
6.	**Net income from rental and other real property**			
	Gross receipts (before all deductions)	$_____		
	Ordinary and necessary operating expenses	− $_____		
	Net monthly income from rental or other real property	$_____	**Copy here** → $_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you	$_____	
For your spouse	$_____	
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total average monthly income**

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____	$_____	
13b. _____	$_____	
13c. _____	+ $_____	
13d. Total	$_____	**Copy here.** ➔ 13d. — _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... 15a. $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. 15b. $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... 16c. $_____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Disposable Income* (Official Form 22C–2).

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Calculation of Disposable Income (Official Form 22C–2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. §1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... 18. $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.
If the marital adjustment does not apply, fill in 0 on line 19a. 19a. – $_____

Subtract line 19a from line 18. 19b. $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b. ..... 20a. $_____

Multiply by 12 (the number of months in a year). **x** 12

20b. The result is your current monthly income for the year for this part of the form. 20b. $_____

20c. Copy the median family income for your state and size of household from line 16c. ..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 22C–2.

If you checked 17b, fill out Form 22C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

☐ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/14

To fill out this form, you will need your completed copy of *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C–1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. **The number of people used in determining your deductions from income**
   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. ☐

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. Subtotal. Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. Subtotal. Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** + $_____

7g. **Total**. Add lines 7c and 7f. ..... $_____ **Copy total here➔** ..... 7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart. To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____ +	$_____

9b. Total average monthly payment ..... $_____ **Copy line 9b here➔** — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____

_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ☐ 0. Go to line 14.
- ☐ 1. Go to line 12.
- ☐ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____
_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.
To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy13b here → — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this number is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here** → $_____

Vehicle 2 **Describe Vehicle 2:** _____
_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2.
Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy here → — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this number is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here** → $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. $_____

    Do not include real estate, sales, or use taxes.

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.

    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance.

    Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. $_____

    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. $_____

    Payments for health insurance or health savings accounts should be listed only in line 25.

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____

    Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 22C-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

    Health insurance $_____
    Disability insurance $_____
    Health savings account + $_____
    Total $_____ **Copy total here** ➔ ..... $_____

    Do you actually spend this total amount?

    ❑ No. How much do you actually spend? $_____
    ❑ Yes

26. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

    By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)3 and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

32. **Add all of the additional expense deductions.**
Add lines 25 through 31. $_____

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

			Average monthly payment
Mortgages on your home			
33a. Copy line 9b here ..... ➔			$_____
Loans on your first two vehicles			
33b. Copy line 13b here. ..... ➔			$_____
33c. Copy line 13e here. ..... ➔			$_____
Name of each creditor for other secured debt	**Identify property that secures the debt**	**Does payment include taxes or insurance?**	
33d. _____	_____	❑No ❑Yes	$_____
33e. _____	_____	❑No ❑Yes	$_____
33f. _____	_____	❑No ❑Yes	+ $_____
33g. Total average monthly payment. Add lines 33a through 33f.....			$_____

Copy total here ➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

- ❑ No. Go to line 35.
- ❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 = +	$_____
			Total	$_____

Copy total here ➔ $_____

35. **Do you owe any priority claims—such as a priority tax, child support, or alimony— that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

- ❑ No. Go to line 36.
- ❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. ..... $_____ ÷ 60 $_____

36. **Projected monthly Chapter 13 plan payment** $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts).

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office. x _____

Average monthly administrative expense $_____ **Copy total here** ➔ $_____

37. **Add all of the deductions for debt payment.** Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*..... $_____

Copy line 32, *All of the additional expense deductions*..... $_____

Copy line 37, *All of the deductions for debt payment*..... + $_____

Total deductions $_____ **Copy total here** ➔ $_____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. **Copy your total current monthly income from line 14 of Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.** ..... $_____

40. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

41. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $_____

42. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A)**. Copy line 38 here ..... → $_____

43. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstances	Amount of expense
43a. _____	$_____
43b. _____	$_____
43c. _____	+ $_____
43d. **Total**. Add lines 43a through 43c.....	$_____ Copy 43d here → + $_____

44. **Total adjustments.** Add lines 40 and 43d. ..... → $_____ Copy total here → − $_____

45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $_____

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 22C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 22A-2, 22C-1, and 22C-2 are new versions of the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor's current monthly income and compares that calculation to the median income for households of the same size in the debtor's state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income*, if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the pendency of the case. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor's actual expenditures reported in Part 1 of Official Form 22C-2 that are virtually certain to occur while the case is pending. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, Official Forms 22A-2 and 22C-2 permit, at line 23, the deduction of cell phone

expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same line also states that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and Utilities—Insurance and Operating Expenses. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well as for premium payments on the debtor's own policies.

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

MEMORANDUM

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

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

RE: **Proposed Amendments to the Federal Rules of Civil Procedure**

DATE: **June 14, 2014**

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

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

I. THE DUKE CONFERENCE.

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

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

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

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

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

II. THE DUKE PROPOSALS.

In a report to the Chief Justice following the Duke Conference, the Committee provided this summary of key conference conclusions: "What is needed can be described in two words – cooperation and proportionality – and one phrase – sustained, active, hands-on judicial case

management." Since the conference, the Committee and others have sought to promote cooperation, proportionality, and active judicial case management through several means.

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

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

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

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

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

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

A. Discovery Proposals.

1. Withdrawn Proposals.

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

These proposals received some support in the public comment process, but they also encountered fierce resistance. Many expressed fear that the new presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims or defenses. Some asserted that many types of cases, including cases that seek relatively modest monetary recoveries, require more than 5 depositions. Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that agreement among the parties might require unwarranted trade-offs in other areas; and that the showing now required to justify an 11th or 12th deposition would be needed to justify a 6th or 7th deposition, reducing the overall number of depositions permitted under the rules.

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

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

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

a. Scope of Discovery: Proportionality.

There was widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case, but subsequent discussions at the mini-conference sponsored by the Subcommittee revealed significant discomfort with simply adding the word "proportional" to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To provide clearer guidance, the Subcommittee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which currently are incorporated by cross-reference in Rule 26(b)(1), be relocated to Rule 26(b)(1) and included in the scope of discovery. Under this amendment, the first sentence of Rule 26(b)(1) would read as follows:

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

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

Many others saw proportionality as a new limit that would favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy uniform application. They asserted that "proportionality" will become a new blanket objection to all discovery requests. They were particularly concerned that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Some argued that the proposed change is a solution in search of a problem – that discovery in civil litigation already is proportional to the needs of cases.

After considering these public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery, with some

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

modifications as described below, will improve the rules governing discovery. The Committee reaches this conclusion for three primary reasons.

Findings from the Duke Conference.

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

The FJC prepared a closed-case survey for the Duke Conference. The survey questioned lawyers in 3,550 cases terminated in federal district courts for the last quarter of 2008. Although the survey found that a majority of lawyers thought the discovery in their case generated the "right amount" of information, and more than half reported that the costs of discovery were the "right amount" in proportion to their clients' stakes in the case, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients' stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5% of plaintiff attorneys and 39.9% of defendant attorneys in cases that actually settled. On the question of whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs and defendants that the rules should be revised to enforce discovery obligations more effectively.

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

Surveys of ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of

Litigation, 78% percent of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, with 33% of plaintiffs' lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreeing that litigation costs are not proportional in large cases. In the NELA survey, which included primarily plaintiffs' lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce the rules' existing proportionality limitations on their own.

The History of Proportionality in Rule 26.

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

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

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

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

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

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

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

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

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

b. Discovery of Information in Aid of Discovery.

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

Some public comments expressed doubt that discovery of these matters is so well entrenched that the language is no longer needed. They urged the Committee to make clear in the Committee Note that this kind of discovery remains available. The Note has been revised to make this point.

c. Subject-Matter Discovery.

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

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

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

d. "Reasonably calculated to lead."

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

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

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

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

Most of the comments opposing this change complained that it would eliminate a "bedrock" definition of the scope of discovery, reflecting the very misunderstanding the amendment is designed to correct.

3. Rule 26(b)(2)(C)(iii).

Rule 26(b)(2)(C)(iii) would be amended to reflect the move of the proportionality factors to Rule 26(b)(1).

4. Rule 26(c)(1): Allocation of Expenses.

Rule 26(c)(1)(B) would be amended to include "the allocation of expenses" among the terms that may be included in a protective order. Rule 26(c)(1) already authorizes an order to protect against "undue burden or expense," and this includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding. The Supreme Court has acknowledged that courts have that authority now, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), and it is useful to make the authority explicit on the face of the rule to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Committee Note explains that this clarification does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding.

5. Rules 34 and 37(a): Specific Objections, Production, Withholding.

The Committee proposes three amendments to Rule 34. (A fourth, dealing with requests served before the Rule 26(f) conference, is described later.) The first requires that objections to requests to produce be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and should specify a reasonable time for the production. A corresponding change to Rule 37(a)(3)(B)(iv) adds authority to move for an order to compel production if "a party fails to produce documents" as requested. The third amendment to Rule 34 requires that an objection state whether any responsive materials are being withheld on the basis of the objection.

These amendments should eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production. All three practices lead to discovery disputes and are contrary to Rule 1's goals of speedy and inexpensive litigation.

6. Early Discovery Requests: Rule 26(d)(2).

The Committee proposes to add Rule 26(d)(2) to allow a party to deliver a Rule 34 document production request before the Rule 26(f) meeting between the parties. For purposes of determining the date to respond, the request would be treated as having been served at the first Rule 26(f) meeting. Rule 34(b)(2)(A) would be amended by adding a parallel provision for the time to respond. The purpose of this change is to facilitate discussion between the parties at the Rule 26(f) meeting and with the court at the initial case management conference by providing concrete discovery proposals.

Public comments on this proposal were mixed. Some doubt that parties will seize this new opportunity. Others expressed concern that requests formed before the case management conference will be inappropriately broad. Lawyers who represent plaintiffs appeared more likely to use this opportunity to provide advance notice of what should be discussed at the Rule 26(f) meeting. The Committee continues to view this amendment as a worthwhile effort to focus early case management discussions.

B. Early Judicial Case Management.

The Committee recommends several changes to Rules 16 and 4 designed to promote earlier and more active judicial case management.

1. Rule 16.

Four sets of changes are proposed for Rule 16.

First, participants at the Duke Conference agreed that cases are resolved faster, fairer, and with less expense when judges manage them early and actively. An important part of this management is an initial case management conference where judges confer with parties about the needs of the case and an appropriate schedule for the litigation. To encourage case management conferences where direct exchanges occur, the Committee proposes that the words allowing a conference to be held "by telephone, mail, or other means" be deleted from Rule 16(b)(1)(B). The Committee Note explains that such a conference can be held by any means of direct simultaneous communication, including telephone. Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties' Rule 26(f) report without holding a conference, but the change in the text and the Committee Note hopefully will encourage judges to engage in direct exchanges with the parties when warranted.

Second, the time for holding the scheduling conference is set at the earlier of 90 days after any defendant has been served (reduced from 120 days in the present rule) or 60 days after any defendant has appeared (reduced from 90 days in the present rule). The intent is to encourage early management of cases by judges. Recognizing that these time limits may not be appropriate in some cases, the proposal also allows the judge to set a later time on finding good cause. In response to concerns expressed by the Department of Justice, the Committee Note states that "[l]itigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way."

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

Fourth, the proposed amendments identify another topic for discussion at the initial case management conference – whether the parties should be required to request a conference with the court before filing discovery motions. Many federal judges require such pre-motion conferences, and experience has shown them to be very effective in resolving discovery disputes quickly and inexpensively. The amendment seeks to encourage this practice by including it in the Rule 16 topics.

2. Rule 4(m): Time to Serve.

Rule 4(m) now sets 120 days as the time limit for serving the summons and complaint. The Committee initially sought to reduce this period to 60 days, but the public comments

persuaded the Committee to recommend a limit of 90 days. The intent, as with the similar Rule 16 change, is to get cases moving more quickly and shorten the overall length of litigation. The experience of the Committee is that most cases require far less than 120 days for service, and that some lawyers take more time than necessary simply because it is permitted under the rules.

Public comments noted that a 60-day service period could be problematic in cases with many defendants, defendants who are difficult to locate or serve, or defendants who must be served by the Marshals Service. Others suggested that a 60-day period would undercut the opportunity to request a waiver of service because little time would be left to effect service after a defendant refuses to waive service. After considering these and other comments, the Committee concluded that the time should be set at 90 days. Language has been added to the Committee Note recognizing that additional time will be needed in some cases.

C. Cooperation.

Rule 1 now provides that the civil rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment would provide that the rules "be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."

As already noted, cooperation among parties was a theme heavily emphasized at the Duke Conference. Cooperation has been vigorously urged by many other voices, and principles of cooperation have been embraced by concerned organizations and adopted by courts and bar associations. The Committee proposes that Rule 1 be amended to make clear that parties as well as courts have a responsibility to achieve the just, speedy, and inexpensive resolution of every action. The proposed Committee Note explains that "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

The public comments expressed little opposition to the concept of cooperation, but some expressed concerns about the proposed amendment. One concern was that Rule 1 is iconic and should not be altered. Another was that this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate. To avoid any suggestion that the amendment authorizes such sanctions or somehow diminishes procedural rights provided elsewhere in the rules, the Committee Note provides: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

The Committee recognizes that a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but believes that the proposed amendment will provide a meaningful step in that direction. This change should be combined with continuing efforts to educate litigants and courts on the importance of cooperation in reducing unnecessary costs in civil litigation.

D. Summary: The Duke Proposals as a Whole.

The Committee views the Duke proposals as a package. While each proposed amendment must be judged on its own merits, the proposals are designed to work together. Case management will begin earlier, judges will be encouraged to communicate directly with the parties, relevant topics are emphasized for the initial case management conference, early Rule 34 requests will facilitate a more informed discussion of necessary discovery, proportionality will be considered by all participants, unnecessary discovery motions will be discouraged, and obstructive Rule 34 responses will be eliminated. At the same time, the change to Rule 1 will encourage parties to cooperate in achieving the just, speedy, and inexpensive resolution of every action. Combined with the continuing work of the FJC on judicial education and the continuing exploration of discovery protocols and other pilot projects, the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process.

III. RULE 37(e): FAILURE TO PRESERVE ESI.

Present Rule 37(e) was adopted in 2006 and provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Committee recognized in 2006 that the continuing expansion of ESI might provide reasons to adopt a more detailed rule. A panel at the Duke Conference unanimously recommended that the time has come for such a rule.

The Committee agrees. The explosion of ESI in recent years has affected all aspects of civil litigation. Preservation of ESI is a major issue confronting parties and courts, and loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith.

The Committee has been credibly informed that persons and entities over-preserve ESI out of fear that some ESI might be lost, their actions might with hindsight be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Many entities described spending millions of dollars preserving ESI for litigation that may never be filed. Resolving the circuit split with a more uniform approach to lost ESI, and thereby reducing a primary incentive for over-preservation, has been recognized by the Committee as a worthwhile goal.

During the two years following the Duke Conference, the Discovery Subcommittee, now chaired by Judge Paul Grimm of the District of Maryland, considered several different approaches to drafting a new rule, including drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by the Duke Conference panel which called for specific provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. The Subcommittee conducted research into existing spoliation law, canvassed statutes and regulations that impose preservation obligations, received comments and

suggestions from numerous sources (including proposed draft rules from some sources), and held a mini-conference in Dallas with 25 invited judges, lawyers, and academics to discuss possible approaches to an ESI-preservation rule.

The Subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible. A rule that attempts to address these issues in detail simply cannot be applied to the wide variety of cases in federal court, and a rule that provides only general guidance on these issues would be of little value to anyone. The Subcommittee chose instead to craft a rule that addresses actions courts may take when ESI that should have been preserved is lost.

Thus, the proposed Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated. Although some urged the Committee to eliminate any duty to preserve information before an action is actually filed in court, the Committee believes such a rule would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in public comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

Proposed Rule 37(e) applies when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Subdivisions (e)(1) and (e)(2) then address actions a court may take when this situation arises.

A. Limiting the Rule to ESI.

Like current Rule 37(e), the proposed rule is limited to ESI. Although the Committee considered proposing a rule that would apply to all forms of information, it ultimately concluded that an ESI-only rule was appropriate for several reasons.

First, as already noted, the explosion of ESI in recent years has presented new and unprecedented challenges in civil litigation. This is the primary fact motivating an amendment of Rule 37(e).

Second, the remarkable growth of ESI will continue and even accelerate. One industry expert reported to the Committee that there will be some 26 billion devices on the Internet in six years – more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere on remote servers, often referred to as the "cloud," complicating the preservation task. Thus, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants.

Third, the law of spoliation for evidence other than ESI is well developed and longstanding, and should not be supplanted without good reason. There has been little complaint to the Committee about this body of law as applied to information other than ESI, and the Committee concludes that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, but repeated efforts made clear that it is very difficult to craft a rule that deals with failure to preserve tangible things. In addition, there are some clear practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, as well as an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e) should be limited to ESI.

B. Reasonable Steps to Preserve.

The proposed rule applies if ESI "that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it." The rule calls for reasonable steps, not perfection. As explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that a party's level of sophistication may bear on whether it should have realized that information should have been preserved.

C. Restoration or Replacement of Lost ESI.

If reasonable steps were not taken and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits a court's powers under Rules 16 and 26 to order discovery to achieve this purpose. At the same time, however, the quest for lost information should take account of whether the information likely was only marginally relevant or duplicative of other information that remains available.

D. Subdivision (e)(1).

Proposed Rule 37(e)(1) provides that the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. It further provides that the measures be no greater than necessary to cure the prejudice.

Proposed subdivision (e)(1) does not say which party bears the burden of proving prejudice. Many public comments raised concerns about assigning such burdens, noting that it often is difficult for an opposing party to prove it was prejudiced by the loss of information it never has seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

The proposed rule does not attempt to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three general ways: there must be a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures listed in subdivision (e)(2).

E. Subdivision (e)(2).

Proposed (e)(2) provides that the court:

> only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As already noted, some circuits permit such instructions upon a showing of negligence, while others require bad faith. Subdivision (e)(2) permits adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Committee views this definition as consistent with the historical rationale for adverse inference instructions.

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

Circuits that permit adverse inference instructions on a showing of negligence adopt a different rationale: the adverse inference restores the evidentiary balance, and the party that lost

the information should bear the risk that it was unfavorable. *See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some equitable appeal, the Committee has several concerns when it is applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it – negligence does not necessarily reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies. Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

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

Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury that it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of that favorable information.

The Committee Note states that courts should exercise caution in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used

when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

IV. ABROGATION OF RULE 84.

The Federal Rules of Civil Procedure are followed by an Appendix of Forms. The Appendix includes 36 separate forms illustrating things such as the proper captions for pleadings, proper signature blocks, and forms for summonses, requests for waivers of service, complaints, answers, judgments, and other litigation documents. Rule 84 provides that the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

Many of the forms are out of date. The sample complaints, for example, embrace far fewer causes of action than now exist in federal court and illustrate a simplicity of pleading that has not been used in many years. The increased use of Rule 12(b)(6) motions to dismiss, the enhanced pleading requirements of Rule 9 and some federal statutes, the proliferation of statutory and other causes of action, and the increased complexity of most modern cases have resulted in a detailed level of pleading that is far beyond that illustrated in the forms.

Amendment of the civil forms is cumbersome. It requires the same process as amendment of the civil rules themselves – amendments proposed by the Committee must be approved by the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. Public notice and comment are also required. The process ordinarily takes at least three years.

In addition to being out of date and difficult to amend, the Committee's perception was that the forms are rarely used. The Committee established a Rule 84 Subcommittee, chaired by Judge Gene Pratter of the Eastern District of Pennsylvania, to consider the current forms and the process of their revision, and to recommend possible changes. Members of the Subcommittee canvassed judges, law firms, public interest law offices, and individual lawyers, and found that virtually none of them use the forms.

Many alternative sources of civil forms are available. These include forms created by private publishing companies and a set of non-pleading forms created and maintained by a Forms Working Group at the Administrative Office of the United States Courts ("AO"). The Working Group consists of six federal judges and six clerks of court, and the forms they create in consultation with the various rules committees can be downloaded from the AO website at http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx. A May 2012 survey of the websites maintained by the 94 federal district courts around the country found that 88 of the 94 either link electronically to the AO forms or post some of the AO forms on their websites. Only six of the 94 mention the Rule 84 forms on their websites or in their local rules, confirming that the rules forms are rarely used.

The Subcommittee ultimately recommended that the Committee get out of the forms business. The Committee agreed, and published a proposal in August 2013 to abrogate Rule 84 and eliminate the forms appended to the rules. The two exceptions to this recommendation are

forms 5 and 6, which are referenced in Rule 4 and would, under the proposal, be appended to that specific rule.

Very few of the public comments addressed the abrogation of Rule 84. Among the objections, most asserted that the elimination of the forms would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards. A few argued that the forms assist pro se litigants and new lawyers, but of these, only one stated that the writer had ever actually used the forms. The general lack of response to the Rule 84 proposal reinforced the Committee's view that the forms are seldom used.

After considering the public comments, the Committee continues to believe that the forms and Rule 84 should be eliminated. The forms are not used; revising them is a difficult and time-consuming process; other forms are readily available; and the Committee can better use its time addressing more relevant issues in the rules. The Committee continues to review the effects of *Twombly* and *Iqbal*. If it decides action is needed in this area, the more direct approach will be to amend the rules, not the forms.

V. RULE 55.

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 1. Scope and Purpose

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

Committee Note

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

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

consistent with — and indeed depends upon — cooperative and proportional use of procedure.

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

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Committee Note

Subdivision (m). The presumptive time for serving a defendant is reduced from 120 days to 90 days. This

change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

Rule16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

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

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

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

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~unless the judge finds good cause for

delay, the judge must issue it within the earlier of ~~120~~90 days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

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

* * * * *

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

* * * * *

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

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after

information is produced, including agreements reached under Federal Rule of Evidence 502;

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

(~~v~~vi) set dates for pretrial conferences and for trial; and

(~~vi~~vii) include other appropriate matters.

* * * * *

Committee Note

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

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

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

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

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

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

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need

not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

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

* * * * *

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

* * * * *

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

* * * * *

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * * *

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

* * * * *

(d) Timing and Sequence of Discovery.

* * * * *

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

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

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

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

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

(~~2~~3) ***Sequence.*** Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

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

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

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

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

* * * * *

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

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

* * * * *

Committee Note

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The

new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . ."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily

retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in

philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule

adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the

pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for

disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

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

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

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan —

issues about preserving electronically stored information and court orders under Evidence Rule 502.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * * * *

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

* * * * *

(d) Duration; Sanction; Motion to Terminate or Limit.

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

* * * * *

Committee Note

Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

* * * * *

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

* * * * *

Committee Note

Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 33. Interrogatories to Parties

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

* * * * *

Committee Note

Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

* * * * *

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

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that

inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An

objection to part of a request must specify the part and permit inspection of the rest.

* * * * *

Committee Note

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

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

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to

the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

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

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

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

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

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

* * * * *

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

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit

inspection — as requested under Rule 34.

* * * * *

(e) Failure to ~~Provide~~Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* * * * *

Committee Note

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

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for

spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of

devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including

governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;

the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the

information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw

adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to

conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

Rule 55. Default; Default Judgment

* * * * *

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

* * * * *

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

Committee Note

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

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

* * * * *

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

* * * * *

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

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

* * * * *

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

(Caption)

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

Why are you getting this?

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

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the

date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

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

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

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

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

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Rule 4 Waiver of the Service of Summons.

(Caption)

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

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

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

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

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

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

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

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

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

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Committee Note

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