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With respect to discovery, Mr. Stancil said the federal rule amendments are adopting the proportionality standard from Utah. Burden-shifting and proportionality become part of what is relevant and not relevant. Mr. Hafen asked how many other states have adopted Utah's approach, and Mr. Stancil said not many. Mr. Hafen said that what we've done has been good for the practice in Utah and he is curious whether it has had any influence nationally. The federal rules seem to suggest that it has, and Judge Pullan has testified to these folks. Judge Pullan commented that Utah gave great comfort to the federal rules committee that this was doable. Denver has a Rule 1 initiative and is keeping track of discovery rule changes in various states. Judge Toomey said that the evaluation we received was positive. Mr. Stancil reported that we will no longer see "reasonably calculated to lead to the discovery of admissible evidence" in the federal rules. We will have to wait and see how that plays out in the case law. Judge Furse said that the magistrates are being taught in trainings that the standard for relevance is narrower.

Mr. Stancil also reported that judges are now expressly allowed to allocate expenses through protective orders, as well as specifying the time, place, and manner of discovery. Early Rule 34 requests have also been adopted; parties may issue Rule 34 requests "more than 21 days after" service of the summons and complaint. Previously, such requests could not be issued until after the attorney conference. Mr. Stancil believes these early requests disfavor defendants because it ratchets up their anxiety. He will be surprised if plaintiffs do not use it for that purpose—it has a disproportionate impact on defendants. Judge Pullan commented that by serving RFPs before the scheduling conference, you might have a better sense of potential preservation issues.

Mr. Stancil said that parties are now required to address issues relating to the preservation of ESI in their discovery plan. Conforming amendments deal with the change to proportionality. He is interested to hear from the committee regarding refusals to produce on proportionality grounds, as he is concerned about objections on that basis. Rule 37(e) implements changes regarding the preservation of ESI. If ESI should have been preserved in anticipation of litigation, and cannot be restored because a party failed to take reasonable steps to preserve, the court may order measures no greater than necessary to cure the prejudice. It limits the district court's ability to issue negative inference instructions to situations where a party acted with intent to deprive the other side of information.

Mr. Stancil said that he doesn't entirely understand the changes to Rule 55, but that the amendments got rid of all forms except Rules 5 and 6.

Mr. Hafen said that he would like to see the subcommittee come back to us and say whether we should consider making some of these same changes to the Utah rules. One of our pillars in rulemaking is that if we can be consistent with what the federal court has done, we should. Mr. Hafen offered the committee's thanks for Paul Stancil and Tim Shea's work in getting the pilot program launched for earlier judicial involvement in Tier 3 cases.

## **IX. Adjournment.**

The meeting adjourned at 6:02 pm. The next meeting will be held on January 27, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.



















































































