

# The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation

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**By: John J. Jablonski and  
Alexander R. Dahl**



*John J. Jablonski devotes his practice to solving complex, high-risk problems that arise from the intersection of law and technology. With more than 20 years of litigation experience (including trials to verdict and appeals), he leverages courtroom experiences to provide corporate clients with practical risk-avoidance advice, strategies, and solutions. He has significant experience in matters involving security, technology, information governance, transportation, environmental law, and product liability. John has a rare ability to translate complex legal, technology, security, and information governance issues into plain English and workable counsel. He guides clients through every aspect of data loss response and related litigation, regulatory compliance, risk analysis, and classification; large loss portfolio analysis in support of due diligence for mergers and acquisitions and creation of alternative fee structures for legal services; and data preservation and e-discovery issues. A widely recognized authority on the protection and preservation of data, John is a frequent presenter and author on privacy and data security, electronic discovery, electronic evidence investigation and preservation, best practices for corporate legal hold guidelines, and implementation of legal holds. He is a member of the editorial advisory board of Law Technology News, a member of the International Association of Privacy Professionals, a past President of his local ARMA International chapter, and co-author of the book Seven Steps for Legal Holds of ESI and Other Documents. John is recognized in The Best Lawyers of America and Super Lawyers, among other honors.*

*Alexander R. Dahl is General Counsel to Lawyers for Civil Justice, a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system. He is also a shareholder in the Washington, D.C., office of Brownstein Hyatt Farber Schreck, where he provides strategic public policy and legal counsel concerning legal reform, health care, corporate mergers and congressional investigations. Alex previously served as the Deputy Staff Director and Senior Counsel to the U.S. Senate Judiciary Committee, and*

as an Assistant U.S. Attorney in the District of Columbia. Prior to his government service, Alex practiced general commercial litigation in Salt Lake City, Utah. He began his legal career as a law clerk for the Honorable Dee V. Benson, U.S. District Court Judge for the District of Utah.

**A** MENDMENTS to the Federal Rules of Civil Procedure (FRCP) will take effect on December 1, 2015 (the “2015 Amendments”) unless Congress acts to modify or reject them, which is highly unlikely.<sup>1</sup> Collectively, the changes are designed to lower the costs of litigation by 1) providing judicial tools to encourage and enforce proportional discovery limited to information relevant to “claims and defenses,” and 2) reducing costs associated with over-preservation and ancillary litigation by establishing a uniform national standard for preservation obligations and a safe harbor for parties that take reasonable steps in good faith to preserve electronically stored information (“ESI”).

This article provides an overview of these and other key 2015 Amendments along with examples of analytical methodologies to help courts and lawyers apply the Amendments as envisioned and, where appropriate, providing context and support from existing cases and commentary.

<sup>1</sup> The amendments were transmitted to the Congress on April 29, 2015 as part of a “Rules Package,” available at <http://www.uscourts.gov/file/document/congress-materials>. References herein to the text and Committee Note are from that package. References to the related June 2014 Rules Committee Report (the “June 2014 Rules Committee Report”) are attached to the Standing Committee Report (ST09-2014), available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>.

## I. Introduction

The Amendments embrace a number of measures stemming from the Duke Conference of May 2010, which was convened by the Advisory Committee on Civil Rules (“Rules Committee”) to address persistent complaints about the costs of discovery (especially e-discovery), preservation of ESI and standards for sanctions for the destruction of such material.<sup>2</sup> After the Conference, the two subcommittees assigned to respond (the “Duke” Subcommittee, for all rules other than Rule 37(e), and the “Discovery” Subcommittee for issues relating to spoliation) considered a number of potential rules and amendments through a transparent process in which public participation was deep and effective.

This process included two “mini-conferences” held before the Rules Committee released initial proposals in August, 2013, followed by three public hearings involving 120 testifying witnesses and over 2,300 written comments. After careful consideration of competing arguments and, in some cases, substantial revisions, the Rules Committee, the Judicial Conference and the Supreme Court unanimously approved the final package of amendments. Many of the surviving proposals can be traced to discussions at the Duke Conference and the proposals

<sup>2</sup> Hon. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 540-541 (2010).

and submissions relating to it, such as the LCJ White Paper.<sup>3</sup>

The 2015 Amendments can have a dramatic impact if judges and lawyers implement them in the manner intended by the Rules Committee. They reflect the realities of current discovery and address many of the core issues not adequately treated in the 2006 Amendments.<sup>4</sup> More data exists now than any time in our history, a problem that a revised Rule 26(b) addresses by embedding proportionality principles in both the scope of discovery and in cost allocation. Moreover, the replacement for Rule 37(e) provides a uniform culpability standard, which rejects the focus on the loss of a few emails to justify sanctions (e.g. *Pension Committee*<sup>5</sup>).

The amendments reflect agreement among a diverse spectrum of stakeholders that the high costs and burdens of discovery, especially e-discovery, are skewing the U.S. civil justice system. Unre-

strained e-discovery is inordinately costly.<sup>6</sup> Not only does this provide perverse incentives for requesting parties to make unlimited demands (at the cost of producing parties), but the costs routinely force unfair settlements for reasons other than a lack of merits.

Large majorities of the plaintiffs' and defense bars share the view that e-discovery demands (and the threat of sanctions) are abused.<sup>7</sup> The Committee concluded after the Duke Conference that "excessive discovery occurs in a worrisome number of cases."<sup>8</sup> A survey of the Association of Corporate Counsel administered by the Institute for the Advancement of the American Legal System ("IAALS")<sup>9</sup> found

<sup>3</sup> Lawyers for Civil Justice submitted a comprehensive list of needed reforms in advance of the Conference. See Lawyers for Civil Justice, *White Paper: Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century*, May 2, 2010, available at <http://www.uscourts.gov/file/document/reshaping-rules-civil-procedure-21st-century-need-clear-concise-and-meaningful>.

<sup>4</sup> See generally 234 F.R.D. 219 (2006).

<sup>5</sup> *Pension Committee v. Banc of America Securities*, 685 F. Supp.2d 456, 465 (S.D.N.Y. 2010) (failure to do otherwise than use litigation hold "is likely to result in the destruction of relevant information"), *abrogated in part by* *Chin v. Port Authority*, 685 F.3d 135, 162 (2nd Cir. 2012) ("[we] reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*. *Contra* Pension Comm. of Univ. of Montreal Pension Plan").

<sup>6</sup> RAND Institute for Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 1, 16 (2012) (at least 73% of costs in surveyed instances), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

<sup>7</sup> Rebecca Love Kourlis, Jordan M. Singer, and Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system*, 92 JUDICATURE 78 (Sep.-Oct. 2008), available at [http://iaals.du.edu/images/wygwam/documents/publications/Survey\\_Experienced\\_Litigators\\_Finds\\_Serious\\_Cracks\\_In\\_US\\_CJS2008.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf); accord AMERICAN BAR ASSOC. SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report\\_aba\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf).

<sup>8</sup> 2013 PROPOSAL, 265, available at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>.

<sup>9</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010) available at [http://iaals.du.edu/images/wygwam/documents/publications/Civil\\_Litigation\\_Survey2010.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf).

that 80 percent of chief legal officers or general counsel disagree with the statement that “outcomes are driven more by the merits of the case than by litigation costs.” As the American College of Trial Lawyers (“ACTL”) put it in advance of the Duke Conference, “[a]lthough the civil justice system is not broken, it is in serious need of repair.”<sup>10</sup> Against this backdrop of a federal justice system in need of repair, the 2015 Amendments were drafted and unanimously approved at each milestone along their path to enactment, including meaningful improvements to rules governing proportionality, allocation of costs, preservation and sanctions.

## II. Proportionality

The Rules Committee has provided a comprehensive series of amendments to enhance the use of proportionality in discovery. The Committee concluded after the Duke Conference that “[t]he problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands.”<sup>11</sup>

Revised Rule 26(b)(1) narrows the scope of discovery to only that information which is relevant to the claims and defenses and is “proportional to the needs of the case.” A court “must limit the frequency or extent of proposed discovery,” on its own if necessary, where the discovery “is outside the scope permitted by Rule 26(b)(1).”<sup>12</sup> This contrasts with

the current situation where those limits are based on a remote subsection of the Rule and are little used, despite the best efforts of past amendments.<sup>13</sup>

As the Chair of the Subcommittee explained, “[a]ll discovery must [now] be relevant to a party’s claim or defense.”<sup>14</sup> This is not radical. There is no significant difference in impact between a limitation applied after a determination of relevancy (the current rule)<sup>15</sup> and one where the limitation helps determine if the information is within the scope of discovery (the revised rule). The change in emphasis will force parties and courts to confront “discovery cost containment” at the outset of litigation<sup>16</sup> and “balance its utility against its cost.”<sup>17</sup>

<sup>13</sup> Rule 26(b)(2)(C)(iii)(assessing whether “the burden or expense of the proposed discovery outweighs its likely benefit”).

<sup>14</sup> Minutes, April 10-11 Rules Meeting, at 3 (lines 108-109) (hereinafter “Minutes”), available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2014#pagemode=bookmarks>.

<sup>15</sup> The current rule provides that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” See also *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010) (the rule “limit[s] discovery . . . to ensure that the scope” is “reasonably proportional to the value of the requested information, the needs of the case, and the parties resources”).

<sup>16</sup> Edward D. Cavanagh, *The 2015 Amendments to the [Fed R. Civ. P.]: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, 13-APR ANTITRUST SOURCE 1, \*9 (April 2014).

<sup>17</sup> *Kleen Products v. Packaging Corporation*, 2012 WL 4498465, at \*13 (N.D. Ill. Sep. 28, 2012) (quoting *U.S. ex rel. McBride v. Halliburton*, 272 F.R.D. 235, 240 (D.D.C. 2011)).

<sup>10</sup> ACTL & IAALS, *Final Report of Joint Project*, at 2 (2009); see also *id.* at 7 (stating that “proportionality should be the most important principle applied to all discovery”).

<sup>11</sup> 2013 PROPOSAL, *supra* note 8, at 265.

<sup>12</sup> Revised Rule 26(b)(2)(C); see also Committee Note, 24.

The balance of Rule 26(b)(1) – authorizing “subject matter” discovery and alluding to matters which “appears reasonably calculated to lead to the discovery of admissible evidence” – will also be stricken.<sup>18</sup>

As revised, Rule 26(b)(1) limits a party to discovery of the following:

[A]ny 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.<sup>19</sup>

Parties and courts alike must clearly consider the proportionality factors when pursuing discovery and resolving discovery disputes with their return to Rule 26(b)(1) as an explicit component of the scope of discovery. Despite claims by critics that the scope of discovery has been changed in material and unfair ways,<sup>20</sup> the re-insertion

<sup>18</sup> Rule 26(b)(1).

<sup>19</sup> Revised Rule 26(b)(1).

<sup>20</sup> Patricia Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees* (hereinafter “Moore, Anti-Plaintiff Pending Amendments”), 57, UNIV. OF CINCINNATI L. REV. (forthcoming)(2015) (“proportionality is now an element, not a limit, on the scope; subject matter discovery has been eliminated and the “reasonably calculated” test has been lost.”),

of proportionality factors into Rule 26(b)(1) is a “modest” adjustment.<sup>21</sup>

## A. Historical Context

The Rules Committee has been trying for decades to formulate effective rules for reducing discovery abuse. Critics have raised serious concerns that discovery abuse, misuse and excessive cost pose significant danger to the administration of justice since the adoption of the Federal Rules of Civil Procedure in 1938.<sup>22</sup> After numerous attempts to address these concerns, the problem remained,<sup>23</sup> and the Committee undertook the first tentative steps in 1983 to introduce “proportionality” into the rule, albeit not by that name. Despite acknowledgment of a need for

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available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621895](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621895).

<sup>21</sup> Craig B. Shaffer and Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 2013 FED. CTS. L. REV. 178, 195 (2013) (the proposal will not “materially change obligations already imposed upon litigants, their counsel, and the court”).

<sup>22</sup> See White Paper, *supra* note 3, at 1-3 (tracing growth of dissatisfaction with “unnecessary delay, volumes of records and expense” in 1960s and 1970s due to expansive amendments to concerns about and discovery abuse and excessive expense today, despite amendments in the 1980s promoting judicial management and adoption of presumptive limits on discovery in 1993 and suggesting that “more than tinkering at the edges” is essential); see also *supra* note 3 at 18-19 (driving up costs to levels disproportionate to the underlying disputes and promoting settlements that go well beyond perceived liability).

<sup>23</sup> See, e.g., Rules Committee Report (May 18, 1998) (“Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine”), available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-1998>.

“stronger medicine,” numerous amendments since then have proven ineffective to solve the problems of discovery abuse, misuse and excessive costs.<sup>24</sup> The history of the numerous attempts to curb discovery problems is succinctly reiterated in the proposed Committee Note:

- The 1983 Amendments added new provisions “to deal with the problem of over-discovery.” As the Committee Note explained at the time, the objective was “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 Committee’s intent was “to encourage judges to be more aggressive in identifying and discouraging discovery overuse.”<sup>25</sup>
- The 1993 Amendments added two factors to the considerations relating to discovery limitations that were “intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . .” Those factors were (1) whether “the burden or expense of the proposed discovery outweighs its likely benefit,” and (2) “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 . . . .”<sup>26</sup>

- The 2000 Amendments, acknowledging a frustration with the lack of emphasis on proportionality, added a statement to Rule 26(b)(1) 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 accompanying 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.”<sup>27</sup>

As the volume and character of discovery changed from paper to electronically stored information, the Committee added provisions in 2006 to deal with ESI. Facing a tidal wave of potential unnecessary costs accruing from unrestrained discovery of ESI, the Committee added what is now Rule 26(b)(2)(B) to require a showing of “good cause” – based on proportionality concerns<sup>28</sup> – before requiring production from sources of ESI which are inaccessible because of undue burden or costs.<sup>29</sup> Courts have ignored the

<sup>24</sup> The Committee Note explains that “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.”

<sup>25</sup> Committee Note, 17-18.

<sup>26</sup> Committee Note, 18.

<sup>27</sup> Committee Note, 19.

<sup>28</sup> See Committee Note (2006), reproduced at 234 F.R.D. 219, 337 (2006).

<sup>29</sup> See, e.g., *Rodriguez-Torres v. Government Development Bank*, 265 F.R.D. 40, 44 (D. P.R. 2010) (undue costs outweighed likelihood of finding relevant information and mere hope that the production included relevant evidence is not good cause to order same under Rule 26(b)(2)(B)).

requirement and routinely found good cause to authorize discovery.

The consensus of participants at the Duke Conference was that “[t]he previous amendments have not had their desired effect.”<sup>30</sup> Surveys at the Conference made it clear that practitioners believed that proportionality was still lacking in too many cases.<sup>31</sup>

### B. Removal of “Subject Matter” Discovery and “Reasonably Calculated” Reflect a Major Change in the Scope of Discovery

The new Rule 26(b)(1) limits discovery to matters that are “relevant to any party’s claim or defense.” Gone are the days when lawyers could, with a showing of good cause, ask a court for broader discovery of “any matter relevant to the subject matter involved in the action” – that power has been removed from the rule. This change reflects that the proper focus of discovery is on the claims and defenses in the litigation.

In other words, a party requesting discovery should be able to explain how the underlying information is relevant to the issues in the case. As the Committee Note explains, “[p]roportional discovery relevant to any party’s claim or defenses suffices, given a proper understanding of what is relevant to a claim or defense.”<sup>32</sup>

<sup>30</sup> June 2014 Rules Committee Report, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>, at B-8.

<sup>31</sup> *Id.*

<sup>32</sup> Committee Note, 23. (“The distinction between matter relevant to a claim or defense

Similarly, the elimination of the language about efforts “reasonably calculated to lead to the discovery of admissible evidence” reflects an important clarification about the scope of discovery. That phrase was never meant to define the scope of discovery. It simply states that the inadmissibility of some evidence – such as hearsay – is not a grounds for withholding otherwise discoverable information.<sup>33</sup>

However, some courts and lawyers used the prior language to suggest that *any* request that is “reasonably calculated” to lead to something helpful in the litigation is discoverable.<sup>34</sup> Courts have been hopelessly confused by the phrase, with some seeing it as the singularly sufficient test of relevance<sup>35</sup> or as a necessary supplement to such a finding.<sup>36</sup> The amendment eliminates this source of confusion and replaces it with the statement that “[i]nformation within this

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and matter relevant to the subject matter was introduced in 2000”).

<sup>33</sup> As Judge Koeltl explained to the Committee prior to adoption of the rule, “it was not intended [when added in 1946] to expand the scope of discovery” and it is “incorrect” to treat it as expanding or defining the scope of discovery. April 2014 Rules Committee Minutes, 5 (lines 193-201).

<sup>34</sup> *Donahay v. Palm Beach Tours*, 242 F.R.D. 685, 687 (S.D. Fla. 2007) (scope of interrogatory includes matters “conceivably helpful to plaintiff, or reasonably calculated to lead to admissible evidence”).

<sup>35</sup> *EEOC v. Signal International*, 2014 WL 1600378, at \*2 (E.D. La. Apr. 21, 2014) (requiring party to produce evidence because the request at issue is “reasonably calculated to lead to discovery of admissible evidence”).

<sup>36</sup> *Antoninetti v. Chipotle Mexican Grill*, 2011 WL 2003292, at \*2 (S.D. Cal. May 23, 2011) (deposition topics “clearly relevant” and “calculated to lead to the discovery of admissible evidence”).

scope of discovery need not be admissible in evidence to be discoverable.”<sup>37</sup>

### C. The Factors Listed in Rule 26(b)(1) are Designed to Help Courts and Parties Limit the Scope of Discovery

By placing proportionality factors into Rule 26(b)(1), the Committee emphasizes that judges and practitioners should reduce over-discovery. Each factor should be applied in light of that goal; courts should be wary of attempts to use the individual factors in isolation as mechanisms for undermining the purpose of proportionality.

#### I. The “Parties’ Resources” Justifies neither Overbroad Discovery nor Insufficient Discovery

The factor that allows consideration of “the parties’ relative resources” is a pragmatic check on disproportionate discovery; it would be a topsy-turvy reading to interpret this factor to justify needless discovery from a rich party or insufficient discovery from a poor one. As the Committee pointed out in 1983 when it inserted this phrase into the Rules, “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.”<sup>38</sup> The 1983 Committee Note explains 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.”<sup>39</sup>

### 2. Assessing “Relative Access to Relevant Information” does not Allow Disproportionate Discovery

The parties’ “relative access to relevant information” – added to the rule as part of the 2015 amendments – is not meant to open the floodgates in cases where one party holds most of the information. It does not provide an independent reason to allow needless discovery, nor does it add any new considerations to the scope of discovery that were not present prior to the amendments. The Note explains that “[t]he 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).”

Requests for “all” of certain types of information are often overbroad and burdensome, triggering a court’s duty to limit their scope as appropriate. In *Holloway v. Dollar Tree Distribution*,<sup>40</sup> for example, the court limited a series of such requests because the “breadth of this request is not sufficiently justified in light of the amount in controversy and the significance of the discovery to the current issues.”

### 3. The Proportionality Factors are Meant to Reduce, not to Facilitate, “Ancillary Litigation” Over Discovery

Nothing would be more contrary to the intent of the Rules Committee than if

<sup>37</sup> Committee Note, 24.

<sup>38</sup> Committee Note, 22.

<sup>39</sup> *Id.*

<sup>40</sup> 2015 WL 3606326, at \*3 (D. Conn. Jun. 8, 2015).



the amended Rule 26(b)(1) were used to justify ancillary litigation or “discovery on discovery” – one of the main underlying reasons the Committee began its effort to reform the Rule. As evident by the Committee’s Note, the amendment to 26(b)(1) clarifies discovery limitations already present in the Rules since 1983:

Many of the . . . uncertainties [regarding proportionality] 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.<sup>41</sup>

#### D. “Proportionality” Means Discovery Should Fit the Needs of Each Individual Case

The proposal to incorporate proportionality factors into Rule 26(b)(1) was widely opposed by the plaintiffs’ bar as a restriction on discovery. The American Association of Justice (“AAJ”), formerly ATLA,<sup>42</sup> argued that the change would “fundamentally tilt the scales of justice in favor of well-resourced defendants” because a producing party could “simply refuse reasonable discovery requests” and force requesting parties to have to “*prove* that the requests are not unduly burdensome or expensive”<sup>43</sup> (emphasis in original).

<sup>41</sup> Committee Note, 20.

<sup>42</sup> AAJ Comment, December 19, 2013.

<sup>43</sup> *Id.* at 11.

However, the unanimous endorsement of the 2015 Amendments by the Civil Rules Committee, the Committee on Rules of Practice and Procedure, the Judicial Conference and the Supreme Court demonstrate that those criticisms are not convincing. In part, this is because of the clarifying Committee Note. More to the point, it is the nature of proportionality itself, which means discovery tailored to the needs of each case. Former critics now concede that concerns were overblown. A recent article in *Trial*, the AAJ magazine, acknowledges that the belief that the changes dictate severe limitations on discovery are “mistaken.”<sup>44</sup>

Courts and lawyers should resist the simplistic conclusion that large cases justify wide-ranging discovery, and instead apply a more thoughtful analysis that truly takes into account the nature of the claims, the type of evidence needed to prove those claims, the sources of information readily available, the marginal benefit of preserving data beyond those sources and the cost involved in such additional preservation.

#### E. Proportionality does not Establish or Change any “Burden of Proof”

The Committee Note emphasizes that the relocation of the factors into the “scope” rule will not limit proportional discovery nor change the burden of proof involved.<sup>45</sup> The change is “not intended to

<sup>44</sup> Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, *TRIAL*, 37, July 2015 (“the actual rule amendments do not support [the] perspective [of severe restrictions on discovery]”).

<sup>45</sup> Committee Note, 19 (“the change does not place on the party seeking discovery the burden of addressing all proportionality considerations”).

permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”<sup>46</sup>

Proportionality is not a “one-sided” burden, but a discussion to which both parties contribute. A requesting party will address the benefits of the information sought, the responding party will address the burden and expense of complying and both will address the importance of the discovery to the issues.<sup>47</sup> As a Committee Member noted during the Phoenix hearing, only if the factors are in “equipoise” will the burden of proof issue even arise.<sup>48</sup>

Incorporation of proportionality into scope is part of a cultural shift to “proportional discovery.”<sup>49</sup> For example, the states of Minnesota<sup>50</sup> and Utah have both amended their Civil Rules to give added prominence to proportionality in determining the scope of discovery, with Utah adhering closely to the proposal now before Congress.<sup>51</sup>

## F. Proportionality Informs the Duty to Preserve

The principle of proportionality also plays an important role in assessing the scope and emphasis of the duty to preserve, a point acknowledged in the case law<sup>52</sup> and referenced in the Committee Note to revised Rule 37(e). As the Committee Note explains, proportionality is a “factor in evaluating the reasonableness efforts.”<sup>53</sup> While a party may need to provide “specifics” to demonstrate the need if challenged, it may act “reasonably by choosing a less costly form of information preservation.”<sup>54</sup> Moreover, the scope of the duty to preserve does not exceed the scope of the duty to produce under newly defined Rule 26(b)(1)<sup>55</sup> – which also incorporates proportionality factors and emphasizes their role.<sup>56</sup>

<sup>46</sup> *Id.* (“[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discover disputes”).

<sup>47</sup> Testimony by John H. Beisner, Civil Rules Public Hearing Transcript, p. 61 (Jan. 9, 2014), available at <http://www.uscourts.gov/file/9446/download>.

<sup>48</sup> *Id.* at 211 (Hon. John Koeltl).

<sup>49</sup> *Id.* at 215 (Hon. Derek Pullan).

<sup>50</sup> MINN. R. CIV. P. 26.02(b) (Scope and Limits) (eff. July 1, 2013) (“Discovery . . . must comport with the factors of proportionality”).

<sup>51</sup> UTAH R. CIV. P. 26(b)(1) (Discovery Scope in General) (“Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below”); see Philip J. Favro and The Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for*

*Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933 (2012).

<sup>52</sup> *In re Ethicon, Inc.*, 299 F.R.D. 502, 518 (S.D. W.Va. 2014) (acknowledging the merit in limiting preservation to material “proportional to the litigation”).

<sup>53</sup> Committee Note, 41.

<sup>54</sup> Committee Note, 42.

<sup>55</sup> Duke Conference Subcommittee Notes, Jan. 31, 2012, at 8, available in March 2012 Rules Committee Agenda Book at 416 of 644 (“Preservation obligations tie directly to discovery obligations: if new limits are imposed on what can be discovery, the obligation to preserve diminishes accordingly”); *Pippins v. KPMG*, 279 F.R.D. 245, 255 (S.D. N.Y. Feb. 3, 2012) (“[p]reservation and production are necessarily interrelated”).

<sup>56</sup> See Committee Note, 41 (“Another factor in evaluating the reasonableness of preservation efforts is proportionality”).

### III. Cost Allocation

The 2015 Amendments include a change to Rule 26(c)(1)(B) which acknowledges that a protective order issued to protect a party from undue burden and expense may specify “the allocation of expenses” incurred “for the disclosure or discovery.”<sup>57</sup> This was introduced by the Rules Committee along with other changes to “promote the responsible use of discovery proportional to the needs of the case.”<sup>58</sup>

#### A. The Amendment to Rule 26(c)(1)(B) Reaffirms the Courts' Ability To Shift Costs

Courts already have discretion to craft appropriate incentives to focus discovery to the specific issues presented in individual cases, including the allocation of expenses. This includes the authority to order “cost shifting as part of enforcing proportionality limits.”<sup>59</sup> This amendment is intended to “ensure” that courts and parties will consider cost allocation as an alternative to “denying requested discovery or ordering it” despite the risk of “imposing undue burdens and expense.”<sup>60</sup>

As the Committee Note states:

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.<sup>61</sup>

Clarifying courts' power in this regard is important because allocation of costs is a key mechanism by which courts and lawyers can focus discovery on information that is most important to the parties' claims and defenses – in other words, proportionality. It also confirms that “requester pays” rulings are likely to become more common as courts enforce “proportional discovery.”

#### B. Determining Whether a Requester Should Share in the Expense of Discovery Is Important to Proportionality and Cooperation

A key motivation behind the 2015 Amendments was to encourage courts and parties to manage discovery more actively so that cases may be determined on the merits at the lowest cost and in the least burdensome manner possible. As the Rules Committee knew, the inconvenient truth of the Rules is that costs and expenses of discovery have turned out to be far greater than was assumed at the time the basic default rule was developed.<sup>62</sup>

<sup>57</sup> Revised Rule 26(c)(1)(B).

<sup>58</sup> 2013 PROPOSAL, 264 (also proposing to “tighten the presumptive limits” on numbers of depositions and interrogatories and add limits on the number of requests for admission; proposals dropped after Public comments).

<sup>59</sup> *FDIC v. Brudnicki*, 291 F.R.D. 669, 676 (N.D. Fla. 2013) (“as part of the enforcement of proportionality limits”).

<sup>60</sup> June 2014 Rules Committee Report, B-10.

<sup>61</sup> <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>, p. b-44-45.

<sup>62</sup> Initial Rules Sketches, at 24-24 (“[n]one of these sketches” address the concern that discovery rules were adopted without “the slightest inkling of the expenses that would become involved as the practice evolved”), available in June 2012 Standing Committee Agenda Book.

Requiring requesting parties to share the costs of discovery is a common sense and self-executing management mechanism that incentivizes efficient discovery.<sup>63</sup> The proposed amendment to Rule 26(c) explicitly acknowledges the authority of courts to do so to address undue burden or costs.<sup>64</sup> The benefits are obvious. It encourages each party to tailor its discovery requests by placing the cost-benefit decision on the party fashioning the request, and it provides an automatic disincentive to request overbroad discovery. A party making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it.

In light of the emphasis on proportionality in the 2015 Amendments, and the impact of the high cost on our judicial process, courts and parties should look towards cost-sharing where appropriate. The hallmark of proportionality is tailoring discovery to the needs of each case. The newly amended rule affirms courts' ability to customize cost allocation for each individual case – and to avoid it in the rare cases where access to justice is threatened or where information is “not symmetrically available.”<sup>65</sup>

<sup>63</sup> LCJ Comment, *The Un-American Rule*, April 1, 2013, available at [http://www.lcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_the\\_un-american\\_rule\\_\\_040113.pdf](http://www.lcj.com/uploads/3/8/0/5/38050985/lcj_comment_the_un-american_rule__040113.pdf).

<sup>64</sup> Rule 26(c)(1)(B) (“[the court may] specify terms, including time and place or the allocation of expenses, for the disclosure or discovery”). LCJ suggested that Rules 26 and 45 should be amended to make the reasonable costs of preserving, collecting, reviewing and producing information the responsibility of requesting parties (“requester pays”) White Paper *supra* note 3, at 55-60 (also recommending amendment to Rule 54(d) to same effect).

<sup>65</sup> Duke Conference, Mini-Conference Notes, October 8, 2012, at 32 (“[d]rafting a balanced rule presents ‘a huge number of challenges. But

A rule requiring a requester to pay some or all of the expenses resulting from its requests would also encourage practical cooperation among the parties. It gives both parties an incentive to work together to obtain discovery needed to resolve the merits of the case in the cheapest, quickest way possible. It also reduces the volume of discovery and allows the courts to carry out their duty of deciding cases on the merits.

The Chair of the Subcommittee has recently indicated that it continues to have the ‘requester pays’ topic on its agenda.<sup>66</sup>

#### IV. Preservation and Sanctions

The Rules Committee’s purpose in re-writing Rule 37(e) was twofold: (1) to provide a consistent national standard for preservation sanctions, and (2) to reject the case law that allowed courts to impose sanctions for inadvertent loss or negligent but harmless loss of ESI. Rule 37(e) achieves this purpose by providing a safe harbor for reasonable conduct and by limiting the remedial sanctions to addressing prejudice by means “no greater than necessary” and, if the sanctions are potentially case-terminating, by requiring a showing of “intent to deprive.”

it is well worth the effort”). The Notes are available at p. 309 of the Agenda Book for the November, 2012 meeting of the Rules Committee, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf>.

<sup>66</sup> May 2, 2015 Report of the Rules Committee, 27 (noting that “[t]he Discovery Subcommittee continues to have the ‘requester pays’ topic on its agenda” and outlining questions involved in further information gathering efforts), available at pp. 171-175, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2015>.

### A. No Sanctions unless Information “Should have been Preserved”

The replacement for existing Rule 37(e) applies only to losses of ESI, not to losses of other forms of “discoverable information.”<sup>67</sup> Moreover, it applies only when there has been a loss of ESI that “should have been preserved.” Determining when this is the case relies on the common law for the most part, but revised rule also establishes a safe harbor from unfair sanctions for losses occurring despite a party’s taking reasonable steps to preserve relevant information.<sup>68</sup>

#### I. “Reasonable Anticipation”

A threshold question for the application of Rule 37(e) is when the duty to preserve is triggered. As the Note explains, case law establishes “that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable,” and “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.”<sup>69</sup>

Because courts examine this question only in hindsight, it is important to keep the context in mind; the rule says “...information that should have been preserved *in the anticipation of litigation*”

(emphasis added).<sup>70</sup> Unless the loss occurred in “anticipation of litigation” then what “should have been preserved” is a matter of business judgment, not legal judgment. There must be a “credible” probability of involvement in litigation, not a “boundless, endless” duty to unknown plaintiffs or trial courts in unforeseen litigation.<sup>71</sup>

If the loss did occur in “anticipation of litigation,” the question of what “should have been preserved” requires a showing of the relevance of the contents. The missing evidence must be shown to have been both relevant and favorable to the party claiming prejudice from its loss. A party must adduce sufficient evidence to infer that the destroyed or unavailable information would have been of the nature alleged.<sup>72</sup> In *Siggers v. Campbell*, for example, a court refused to find that the mere delay in implementation of a litigation hold was sanctionable absent a showing that

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<sup>70</sup> *Id.* at 39 (“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”).

<sup>71</sup> Lawrence S. Ebner, *A Federal District Court’s Inverted View of Litigation Holds*, DRI FOR THE DEFENSE, July 2015 14, at 16.

<sup>72</sup> *Yoder & Frey Auctioneers v. Equipment-Facts*, 774 F.3d 1065, 1070-1071 (6th Cir. 2014) (sanction not warranted for loss of digital copy where insufficient showing of the contents of missing evidence).

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<sup>67</sup> The Rules Committee’s purpose was to avoid complications inherent in the “irreparable deprivation” exception in the initial proposal based on *Silvestri v. GM*, 271 F.3d 583, 593 (4th Cir. 2001) (allowing sanctions without required showing of culpability); see June 2014 Committee Report, B-16.

<sup>68</sup> Revised Rule 37(e).

<sup>69</sup> Committee Note, 39 (emphasis supplied).

relevant and responsive information had existed and was destroyed.<sup>73</sup>

## 2. No Sanctions for “Reasonable” Behavior

### a. The Rule Rejects a *per se* Approach

The guiding principle for the Committee in drafting Rule 37(e) was that it “should not be a strict liability rule that would automatically impose serious sanctions if information is lost.”<sup>74</sup> The revised rule recognizes that “documents are [often] not retained or are destroyed in good faith.”<sup>75</sup> It is “improper to infer nefarious intent or bad faith from what appear to be ordinary discovery errors.”<sup>76</sup>

The new rule rejects the dicta in *Pension Committee*<sup>77</sup> to the effect that anything less than perfection is “likely to

<sup>73</sup> 2014 WL 4978655, at \*3 (E.D. Mich. Oct. 6, 2014) (“[t]here is no evidence that [the party] intentionally destroyed any relevant document”).

<sup>74</sup> Minutes, May 2014 Standing Committee Meeting, 6 (the other principles were (1) to resolve the circuit split on culpability standard; (2) preserve ample trial court discretion to deal with loss of information; (3) but limited to ESI), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST05-2014-min.pdf>.

<sup>75</sup> *Mead v. Travelers*, 2014 WL 6832914, at \*2 (E.D. Pa. Dec. 4, 2014) (denying sanctions for spoliation based on automatic destruction of notice of intent to cancel where no evidence presented of bad faith conduct).

<sup>76</sup> *Malone v. Kantner Ingredients*, 2015 WL 1470334, at \*3 (D. Neb. Mar. 31, 2015) (refusing to sanction to produce ESI based on mere evidence of mistakes, since the “standard is, after all, reasonableness, not perfection”).

<sup>77</sup> *Pension Committee*, 685 F. Supp.2d 456, 478 (S.D.N.Y. 2010).

result in the destruction of relevant information.”<sup>78</sup> As the Sixth Circuit put it in *Automated Solutions v. Paragon Data Systems*, “[t]here is reason to doubt *Pension Committee*’s persuasive effect.”<sup>79</sup> In *Chin v. Port Authority*,<sup>80</sup> the Second Circuit expressly rejected the holding that the failure to put a litigation hold into place was sanctionable standing by itself. As the court put it, “[w]e reject the notion that a failure to institute a ‘litigation hold’ constitutes gross negligence *per se*.”<sup>81</sup>

A classic example is the treatment of the claims in *Advantor Systems v. DRS*,<sup>82</sup> where a party sought sanctions for the deletion and reuse of a laptop, arguing that it contained relevant ESI. The court refused to speculate that relevant ESI was destroyed holding that sanctions were not warranted although it was “mystifying” that the laptop was not preserved. It should be clear to courts and lawyers that the mere loss of ESI, in and of itself, is insufficient grounds for sanctions without further analysis.

### b. “Reasonable Steps” Preclude Sanctions

Rule 37(e) precludes sanctions, even where ESI was lost, unless the court finds that a party failed to take “reasonable steps” to preserve it. The Note states that the rule is “inapplicable when the loss of

<sup>78</sup> *Id.* at 465; 480 (it is “fair to presume [that] responsive documents were lost or destroyed”).

<sup>79</sup> *Automated Solutions v. Paragon Data*, 756 F.3d 504, 516 (6th Cir. 2014).

<sup>80</sup> 685 F.3d 135 (2nd Cir. 2012).

<sup>81</sup> *Id.* at 162.

<sup>82</sup> 2015 WL 403308, at \*8 (M.D. Fla. Jan. 28, 2015).

information occurs despite the party's reasonable steps to preserve."<sup>83</sup> Absent sufficient proof that reasonable steps were not taken, there is no entitlement to any relief under the rule – thus providing a *de facto* safe harbor for reasonable behavior.

The Note states: “[t]his rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection.”<sup>84</sup> In other words, the new rule specifically rejects sanctions based on nothing more than *per se* negligence because ESI was not preserved in lock-step with the bright-line preferences specified by some courts. A broader, case-by-case approach is called for, taking into account all of the relevant considerations.

The Rule effectively adopts the *Rimkus* standard: “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards.”<sup>85</sup> The rule does not require adherence to the “best” or most burdensome preservation practices.<sup>86</sup> A “party may act reasonably by choosing

a less costly form of information preservation.”<sup>87</sup>

The practical impact of “reasonable steps” can be illustrated contrasting the decision in *Zest v. Implant Direct Manufacturing*.<sup>88</sup> before and after the adoption of the new rule. In that case, a party, well aware of its preservation obligations, saved emails it believed to be relevant after a duty to preserve attached, but overlooked some which were later secured from third parties. The court found that the party “should have put in place a litigation hold,” and authorized an adverse inference instruction even though it was “unsure” that emails were destroyed intentionally.

Had the proposed rule been in effect, the court in *Zest* would have examined the steps undertaken, including their proportionality to the litigation, under the “reasonable steps” standard. Sanctions would not be automatic just because some ESI was lost. In *EEOC v. Chipotle Mexican Grill*,<sup>89</sup> for example, a court refused to treat the erasure of a surveillance video as destroyed with a culpable state of mind absent a showing of knowing dereliction, citing existing Rule 37(e).<sup>90</sup>

Courts should look to other well-known frameworks used to analyze reasonable conduct when examining whether a party undertook “reasonable steps” pursuant to

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<sup>83</sup> Committee Note, 41.

<sup>84</sup> *Id.*

<sup>85</sup> *Rimkus Consulting Grp. Inc. v. Cammarata*, 688 F. Supp.2d 598, 613 (S.D. Tex. 2010) (emphasis in original).

<sup>86</sup> Marc Resnick, *What is “Reasonable Conduct,”* July 11, 2011 (reasonable practices are not “best practices,” but ones that are considered to be common, acceptable, decent practices), available at <http://iieblogs.org/2011/07/22/what-is-reasonable-conduct/>.

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<sup>87</sup> Committee Note, 42.

<sup>88</sup> 2013 WL 6159177 (S.D. Cal. Nov. 25, 2013).

<sup>89</sup> 2015 WL 1472217, at \*9 (D. Mass. Mar. 30, 2015).

<sup>90</sup> The current rule, whose coverage is subsumed in the new rule, provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system”.

the new rule. Other examples of “reasonable steps” exist in compliance contexts analogous to the duty to preserve such as the Business Judgment Rule.<sup>91</sup> In the corporate compliance context, for example, an entity that takes “reasonable steps” to ensure that its compliance programs are “generally effective” may benefit even though it may “fail[] to prevent or detect” a criminal offense.<sup>92</sup> The Rules Committee was well aware of that analogy.<sup>93</sup>

### c. “Reasonable” Behavior is Informed by the Business Judgment Rule

Businesses maintain information management systems, including policies dealing with the retention of ESI, to promote operational efficiencies, not to facilitate litigation discovery. This is appropriate. In *Managed Care Solutions v. Essent Healthcare*,<sup>94</sup> for example, the court rejected a challenge to the automatic deletion of emails based on the contention that there could be no reasonable basis for such a policy. As noted in *Cache La Poudre v. Land O’Lakes*,<sup>95</sup> in the typical case “[r]esponding parties are best situated to evaluate the procedures, methodologies

and technologies appropriate for preserving” their own ESI.<sup>96</sup>

This deferential approach is inherent in the revised Rule 37(e), which subsumes the current rule barring sanctions for “routine, good faith” deletion of ESI by “information systems.” The Note explains:

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.”<sup>97</sup>

Accordingly, blanket challenges to those policies should be assessed by the business judgment rule, which provides a legal presumption barring “second guessing” of good faith business decisions. Under the business judgment rule, a party is entitled to a presumption that decisions in operating compliance programs are made (1) in good faith (2) on an informed basis and (3) in a manner that is reasonably believed to be in the best interests of the corporation.<sup>98</sup>

<sup>91</sup> Thomas Y. Allman, *‘Reasonable Steps’: A New Role for a Familiar Concept*, December 18, 2014, 14 DDEE 591.

<sup>92</sup> USCG GUIDELINES MANUAL, §8B2.1, Para. (b)(it does not necessarily mean that the program is not effective).

<sup>93</sup> See discussion (between Judges Woods and Rosenthal) as recorded in the Minutes of the Rules Committee immediately after the Duke Conference at Minutes, Meeting of November 15-16, at lines 687-690 (“compliance programs should count in favor of a spoliator”).

<sup>94</sup> 736 F. Supp.2d 1317, 1326 (S.D. Fla. 2010).

<sup>95</sup> 244 F.R.D. 614 (D. Colo. 2007).

<sup>96</sup> *Id.* at 628 (citing to the SEDONA CONFERENCE® BEST PRACTICE RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, 31 (2d Ed. 2007)).

<sup>97</sup> Committee Note, 45.

<sup>98</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).



Unless this presumption is rebutted, courts will not substitute their own notions of what is or is not sound business judgment.<sup>99</sup> In *United States v. Kitsap Physicians Service*, for example, the Ninth Circuit emphasized that it is not sound legal policy to require indefinite retention of data that a business deems unnecessary to retain and denied sanctions where information was not retained.<sup>100</sup>

Thus, choices about when to interrupt a system to assure compliance with preservation obligations is a question of “business judgment,” and only an “utter failure to attempt to assure a reasonable . . . [approach] will establish the lack of good faith.”<sup>101</sup> As the Supreme Court of Delaware has noted, general compliance efforts “must be reasonable, not perfect.”<sup>102</sup> “[T]here is a vast difference between an inadequate or flawed effort . . . and a conscious disregard for those duties.”<sup>103</sup> Instead of questioning whether a party “did everything that they (arguably) should have done,” the proper inquiry is “whether [they] utterly failed to attempt” to meet their responsibilities.<sup>104</sup>

<sup>99</sup> *Espinoza v. Dimon*, 790 F.3d 125, 130 (2nd Cir. 2015) (“Importantly, ‘[t]he ultimate conclusion of the [board] . . . is *not* subject to judicial review’”) (emphasis in quoted original).

<sup>100</sup> 314 F.3d 995, 1001 (9th Cir. 2002) (to do so “would be unfair a a matter of legal policy to [entities] who generate enormous quantities of records”).

<sup>101</sup> *In re Caremark Int’l Derivative Litigation*, 698 A.2d 959, 970 (Del. 1996).

<sup>102</sup> *Lyondell Chemical v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (citing *Paramount Communications v. Time*, 571 A2d 1140, 1151 (Del. 1989)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Applying a deferential business judgment standard also helps incentivize parties to act reasonably by assuring those that do so that they will not be harshly sanctioned. This addresses concerns about unfair “over-preservation.” In that context, a “reasonable, good faith attempt at implementing [preservation obligations]” should satisfy the responsibility to meet the duty to preserve.<sup>105</sup>

### 3. No Sanctions where Additional Discovery can Restore or Replace the Lost ESI

The Rules Committee categorically rejected the idea that a party could be sanctioned where an ability exists to restore or replace the loss of ESI from other or equivalent sources.<sup>106</sup> The duty to preserve applies only to “unique, relevant evidence” that is lost.<sup>107</sup>

Because ESI typically exists in multiple locations, loss from one source is likely harmless if substitute information can be found elsewhere.<sup>108</sup> Modern information systems are often rife with multiple originals and duplicates of ESI, despite a

<sup>105</sup> See Stephen Funk, *Commentary, In re Caremark Derivative Litigation*, 22 DEL. J. CORP. L. 311, 320 (1997) (the exemption helps address the need to encourage service of qualified corporate officials).

<sup>106</sup> *Alexce v. Shinseki*, 447 Fed. Appx. 175, 178 (Fed. Cir. 2011) (“[t]here is no force to the argument that the destruction of duplicative materials constitutes spoliation” since its destruction does not present the risk of denying access to relevant information).

<sup>107</sup> *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003) (a party need not retain “multiple identical copies”).

<sup>108</sup> Committee Note, 39.

claim that a party failed to preserve relevant ESI.<sup>109</sup>

Rule 37(e) requires courts to seek discovery of substitute information for the lost ESI before concluding that a breach has occurred. Measures could include discovery from additional custodians<sup>110</sup> or “from sources that would ordinarily be considered inaccessible.”<sup>111</sup> In the *Delta/AirTran Baggage Fee* litigation, the court held that even if some relevant documents had been destroyed, the resulting prejudice was mitigated because the parties were afforded the opportunity to depose all relevant Delta employees who may have played a role in the decisions at issue.<sup>112</sup>

As the Committee Note explains, “[i]f the information is restored or replaced, no further measures should be taken.”<sup>113</sup> This reflects current case law. In *Siani v. State University*, the court refused to find sanctionable the failure to institute a litigation hold on deleted emails where

<sup>109</sup> See FED. R. EVID. 1001(d) “For electronically stored information, ‘original’ means any printout — or other output readable by sight — if it accurately reflects the information”; and FED. R. EVID. 1001(e) “A ‘duplicate’ means a counterpart produced by... electronic, or other equivalent process or technique that accurately reproduces the original.”

<sup>110</sup> *Lofton v. Verizon Wireless*, 2015 WL 3805194, at \*9 (N.D. Cal. Jun. 18, 2015) (“courts often decline to impose sanctions for spoliation where the documents withheld are unlikely to materially[sic] affect the outcome of the case, insofar as other evidence exists to provide the same information”).

<sup>111</sup> Committee Note, 42.

<sup>112</sup> *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 770 F. Supp.2d 1299, 1311 (N.D. Ga. 2011) (denying motion for spoliation sanctions).

<sup>113</sup> Committee Note, 42.

“defendants produced all the same emails [from other] officials who did not delete them.”<sup>114</sup>

However, “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.”<sup>115</sup>

## B. Curative Measures should be no “Greater than Necessary to Cure the Prejudice”

Assuming that a court finds the lost ESI “should have been preserved” and after exhausting the possibility of “additional discovery, Subsection (e)(1) *then, and only then*, authorizes a court to impose curative measures which are “no greater” than necessary to address any prejudice resulting from the missing ESI.

A broad range of measures is available to do so, subject to a number of important limitations.

First, the goal is to cure – not punish – and the rule “does not require the court to adopt measures to cure every possible prejudicial effect.”<sup>116</sup> Moreover, any measure of the type to which Subsection (e)(2) applies – adverse inference findings or jury instructions, dismissals and case-terminating equivalents – are available to remediate

<sup>114</sup> 7 F. Supp.3d 304, 331-332 (E.D.N.Y. 2014).

<sup>115</sup> Committee Note, 42.

<sup>116</sup> Committee Note, 44.

prejudice only if it is shown to have been motivated by an “intent to deprive another party of the information’s use in the litigation.” Thus, *Zubulake V*,<sup>117</sup> *Pension Committee*<sup>118</sup> and *Sekisui v. Hart*<sup>119</sup> are no longer valid precedent for the imposition of permissive adverse inferences under the circumstances described in those cases.

### C. Prejudice is Required for all Rule 37(e) Measures

The new Rule 37(e) emphasizes that courts seeking to impose measures or sanctions should not do so if the loss of ESI had no material effect on the case. In other words, prejudice is a prerequisite to any remedy, just as it is today.<sup>120</sup> In *Vincente v. Prescott*, for example, the then-Chair of the Rules Committee refused to impose measures to address “inadequate” preservation efforts where there was a “complete lack of prejudice.”<sup>121</sup> “[A] court should never impose spoliation sanctions of any sort unless there has been a showing – inferential or otherwise – that the movant has suffered prejudice.”<sup>122</sup> Subsection (e)(1) was changed

<sup>117</sup> *Zubulake v. UBS Warburg* (“*Zubulake V*”), 229 F.R.D. 422, 439-440 (S.D.N.Y. 2004).

<sup>118</sup> *Pension Committee*, 685 F. Supp.2d at 496-497.

<sup>119</sup> *Sekisui American v. Hart*, 945 F. Supp.2d 494, 509-510 (S.D.N.Y. 2013).

<sup>120</sup> See, e.g., *Eli Lilly and Company v. Air Express*, 615 F.3d 1305, 1318 (11th Cir. 2010) (a party must “establish . . . that the destroyed evidence was relevant to a claim or defense *such that the destruction of that evidence resulted in prejudice*”) (emphasis added).

<sup>121</sup> 2014 WL 3939277, at \*10-111 (D. Ariz. Aug. 13, 2014).

<sup>122</sup> *In re Pfizer Inc. Securities Litigation*, 288 F.R.D. 297, 316 (S.D.N.Y. 2013) (collecting cases).

following comments to focus explicitly on addressing prejudice.

While Subsection (e)(2) does not include a specific requirement of prejudice, it is implicit in the requirement of proof of “intent to deprive.” As the Note explains, the subsection “necessarily includes an evaluation of the information’s importance in the litigation.”<sup>123</sup> According to the Note, “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.”<sup>124</sup>

### D. Harsh Sanctions are Allowed Only under the “Intent to Deprive” Standard

Under Subdivision (e)(2), a party must have “acted with the intent to deprive another party of the information’s use in the litigation”<sup>125</sup> before a court may: (1) presume that lost ESI was unfavorable or (2) instruct a jury that it “may or must presume” that lost ESI was unfavorable or (3) dismiss the action or enter a default judgment.<sup>126</sup>

<sup>123</sup> Committee Note, 43.

<sup>124</sup> Committee Note, 47.

<sup>125</sup> The Subcommittee was influenced by the jury instruction in *Rimkus Consulting v. Cammarata*, 688 F. Supp.2d 598, 647 (S.D. Tex. 2010) (adverse inference permissible only if “the jury finds that the defendants deleted emails to prevent their use in litigation”). See Discovery Subcommittee Meeting Notes, March 4, 2014, 2) (the formulation is “very similar to the one used by Judge Rosenthal in *Rimkus*”).

<sup>126</sup> Committee Note, 44.

This requirement rejects the logic in *Residential Funding*<sup>127</sup> that harsh sanctions such as an adverse inference may be justified by merely showing that the conduct leading to the loss of ESI involved negligent or grossly negligent conduct.

Merely negligent behavior (or even grossly negligent conduct) does not supply sufficient indicia of knowledge of the impropriety to constitute an evidentiary admission based on consciousness of guilt.<sup>128</sup> As then-Circuit Judge Breyer explained in the seminal case of *Nation-Wide Check Corp. v. Forest Hills Distributors*,<sup>129</sup> a person with notice of the relevance of the information “is more likely to have been threatened by” it than someone without that notice.

A finding of spoliation sufficient to justify harsh measures under Rule 37(e) requires consciousness of guilt similar to the requirements in other Circuits, such as “intentional destruction of evidence indicating a desire to suppress the truth”<sup>130</sup> or

of destruction “for the purpose of hiding adverse information.”<sup>131</sup>

### I. The “Intent to Deprive” Standard is not Satisfied by Reckless or Willful Conduct

A proof of “intent to deprive” is not satisfied by merely showing that otherwise intentional conduct can be described as “reckless” or “willful.” The Rules Committee’s intent is to require conduct “akin to bad faith, but [which is] defined even more precisely.”<sup>132</sup> While the standard requires intentionality, it is not alone sufficient. Mere suspicions about “intent to deprive” are not enough.<sup>133</sup> The mere failure to suspend routine destruction practices, for example, does “not suggest an intent to deprive [the opposing party]” of evidence.<sup>134</sup>

In cases involving the “bad faith” standard, courts do not lightly infer that conduct was undertaken for the prohibited purpose.<sup>135</sup> The language chosen for the

<sup>127</sup> *Residential Funding Corp v. DeGeorge*, 306 F.3d 99, 108 (2nd Cir. 2002) (the culpable state of mind factor is satisfied by a showing that the evidence was destroyed “knowingly, even if without intent to [breach a duty to preserve it] or *negligently*”) (emphasis in original).

<sup>128</sup> Committee Note, 45 (“negligent or even grossly negligent behavior does not logically support that inference”).

<sup>129</sup> 692 F.2d 214, 218 (1st Cir. 1982) (describing the “evidentiary rationale for adverse inferences as based on the “common sense observation” described in the text).

<sup>130</sup> *Greyhound Lines v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007).

<sup>131</sup> *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013) (affirming denial of adverse inference where no showing of the requisite requirement of bad faith).

<sup>132</sup> June 2014 Rules Committee Report, B-17.

<sup>133</sup> *Sherwin-Williams v. JB Collision Services*, 2015 WL 4077732, at \*4 (S.D. Cal. Jul. 6, 2015) (“suspicion notwithstanding” the court “cannot conclude that [the party] acted with intentional bad faith”).

<sup>134</sup> *Herrmann v. Rain Link*, 2013 WL 4028759, at \*3 (D. Kan. Aug. 7, 2013) (destruction pursuant to routine practices does not demonstrate intentional conduct which bars obligation to show prejudice).

<sup>135</sup> See, e.g., *Malibu Media v. Harrison*, 2014 WL 7366624, at \*8 (S.D. Ind. Dec. 24, 2014) (refusing to infer that destruction was intended to hid adverse information in light of credible denial by party); *accord McCauley v. Board of Commissioners*, 603 Fed. Appx. 730, 736 (10th

revised rule invokes the “historical rationale for adverse inferences” under which conduct must be shown to have been for the purpose of hiding adverse information, not merely intentional conduct.<sup>136</sup> The significance of the chosen language should not be overlooked. The requirement of a specific intent to deprive “is the toughest standard to prove that the Advisory Committee could have adopted.”<sup>137</sup>

## 2. Lesser Measures may be Appropriate even where a Court Finds an “Intent to Deprive”

Even when a court finds that the “intent to deprive” standard is satisfied, it need not make use of the harsh sanctions listed in Subdivision (e)(2). In fact, the Rules Committee specifically contemplated that subsection (1) measures should be utilized rather than harsh sanctions in cases where the loss, although intentional, can be ameliorated or does not cause measurable harm to the case.

The Committee Note states: “[f]inding 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.”<sup>138</sup>

## E. No Sanctions Based on Inherent or Other Authority

Unlike the current rule it replaces, the new Rule 37(e) is the sole source of federal judicial authority related to sanctions for the loss of ESI.<sup>139</sup> As the Note explains, because the rule “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,” the rule “therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.”<sup>140</sup>

While an independent regulatory requirement may require certain information to be preserved, courts should not rely on those provisions under a Rule 37(e) analysis. As the Note states: “[t]he 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.”<sup>141</sup> Accordingly, even if the duty to preserve arises from a court order under

Cir. 2015) (affirming refusal to infer that bad  
<sup>136</sup> *Id.* (citing *Aramuru v. Boeing*, 112 F.3d 1398, 1407 (10th Cir. 1997)).

<sup>137</sup> Patricia W. Moore, *Civil Procedure & Federal Courts Blog*, September 12, 2014.

<sup>138</sup> Committee Note, 47.

<sup>139</sup> A summary of the limitations in the current rule is found in Phillip Favro, *The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments*, 21 RICH. J. L. & TECH. 8, ¶¶ 4-9 (2015).

<sup>140</sup> Committee Note, 38.

<sup>141</sup> Committee Note, 40.

Rule 37(b), a court should apply the limitations under Rule 37(e) as a matter of guidance. This makes sense given that it specifically applies to failures to “pre-serve,” as opposed to Rule 37(b)’s more generic failures to “provide or permit discovery.” In other words, the specific takes precedence over the general in such a case.

## V. Rule 1 and Cooperation

The FRCP amendments include a change to Rule 1 that would require the Federal Rules to 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.”

### A. Rule 1 Continues To Be Aspirational

The amendment to Rule 1 comports with the purpose of Rule 1, which is to provide an aspirational goal to all participants in the legal system. It is not intended to change any particular duty or burden. In fact, the Note observes that “most lawyers and parties cooperate” and “effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.” The Note also stresses that “discussions of the 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.”<sup>142</sup>

While previous Notes have explained that lawyers have a responsibility, as officers of the court, to help further the goals of the rule, that has been understood to operate in

an aspirational sense,<sup>143</sup> much like local rules and guidelines to that effect.<sup>144</sup>

### B. No New Duty

It is clear from the Rules Committee’s deliberations that the amendment to Rule 1 was not intended to create any new duty. The Committee considered, and deleted, a further proposed addition to create an affirmative duty requiring parties “to achieve these ends.”<sup>145</sup> The Committee dropped that language because of concerns over the “collateral consequences” of its inclusion.<sup>146</sup> Lawyers for Civil Justice articulated the reason: a duty to cooperate is an “untested concept” that would have added “one more point on which parties can disagree and blame the other when it is to their advantage.”<sup>147</sup>

The decision not to add a duty comports with earlier Committee intent. As early as 1978, the Rules Committee rejected an attempt to authorize sanctions for a failure to comply with a “duty to

<sup>143</sup> Committee Note, Rule 1 (1993) (“[a]s officers of the court, attorneys share this responsibility [under Rule 1] with the judge to whom the case is assigned).

<sup>144</sup> Cf., Local Rule 26.4, Southern and Eastern District of N.Y.

<sup>145</sup> See Duke Subcommittee Initial Sketch for Rule 1, March, 2012, at 42, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012>. The stated intent was to establish “cooperation among the parties as one of the aspirational goals identified in Rule 1.” *Id.* at 8.

<sup>146</sup> Minutes, November 2, 2012 Meeting, at lines 616-622.

<sup>147</sup> LCJ Comment, *The Need for Meaningful Rule Amendments*, June 5, 2012, at 4; available at [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_duke\\_proposals\\_060512.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_duke_proposals_060512.pdf).

<sup>142</sup> Committee Note, 1-2.

cooperate” into the Federal Rules.<sup>148</sup> Similarly, the Duke Subcommittee and the full Committee resisted suggestions by one Committee Member<sup>149</sup> to incorporate such a duty in Rules 1, 16, 26 or 26(g).<sup>150</sup>

### C. No Independent Basis for Sanctions

The Committee also clarified that the amendment to Rule 1 was not meant to provide any new basis for sanctions. It added language to the Rules Committee's draft Note to clarify that the amendment to Rule 1 was not a basis for sanctions for a failure to cooperate.<sup>151</sup> The Note states that “[t]his [rule] amendment does not create a new or independent source of sanctions” and “neither does it abridge the scope of any other of these rules.”<sup>152</sup>

## VI. Conclusion

The 2015 Amendments involve important and meaningful reforms, which reflect the tremendous efforts the Rules Committee made to craft them carefully and with fairness to all parties. Proposed Rule 26(b)(1), by moving the existing proportionality standard into the scope of discovery, will help courts and parties focus on the information that matters to claims and defenses. Proposed Rule 37(e) holds the promise of providing a uniform national standard that will clarify a complicated area of law and, in doing so, allow a more rational approach to data management and discovery. However, the amendments will successfully reform the problems associated with over-discovery and preservation only if courts and lawyers work to implement them as intended.

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<sup>148</sup> Steven S. Gensler, *Some Thoughts on the Lawyer's E-Volving Duties in Discovery*, 36 N. KY. L. REV. 521, 547 (2009) (language authorizing sanctions for failure to have cooperated in framing an appropriate discovery plan).

<sup>149</sup> Minutes, Rules Committee Mtg., November 15-16, 2010, at lines 1148-1149 (“Judge Grimm has suggested changes that would codify the importance of cooperation”).

<sup>150</sup> The Duke Conference Subcommittee noted that while there “is no substantive requirement to cooperate in the Rule” it “could be incorporated in Rules 16, 26(b), (f), and (g) and emphasized by amending Rule 1.” Conference Subcommittee Agenda, March 2011, at 3-4; Agenda Book for April 2011 Meeting.

<sup>151</sup> June 2014 Rules Committee Report, B-13 (“[o]ne concern was this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate”).

<sup>152</sup> *Id.* at B-22.