

The 2015 Civil Rules Package As Transmitted to Congress

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The Duke Amendments

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I. Introduction

This Memorandum provides an overview of the “package” of amendments to the Federal Rules of Civil Procedure which were collectively forwarded to Congress by the Supreme Court on April 29, 2015.² The text of the individual proposals is included in the Appendix to this Paper. The amendments will become effective on December 1, 2015 if Congress does not adopt legislation to reject, modify, or defer them.

Background

The amendments transmitted to Congress culminated a four-year effort by the Civil Rules Advisory Committee (the “Rules Committee”) operating under the supervision of the Committee on Rules of Practice and Procedure of the Judicial Conference (the “Standing Committee”).

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² The final text and Committee Notes were transmitted to Congress with other materials (hereinafter “Rules Transmittal”), available at <http://www.uscourts.gov/file/document/congress-materials>. The amendments will “govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending” upon going into effect. *Id.*

The process began with the 2010 Conference on Civil Litigation held by the Rules Committee at the Duke Law School (the “Duke Conference”). The Conference was held in response to concerns about the “costs of litigation, especially discovery and e-discovery.”³ A number of studies, surveys and empirical studies were submitted in advance and Panels discussed the relevant issues.⁴

Key “takeaways” from the Duke Conference were the need for improved case management, a more focused application of the long-ignored principle of “proportionality” and enhanced cooperation among parties in discovery.⁵ In addition, an E-Discovery Panel “reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.”⁶

The Rules Committee divided the task of developing individual rule proposals between the “Duke” Subcommittee, chaired by the Hon. John Koeltl, and the Discovery Subcommittee, subsequently chaired by the Hon. Paul Grimm. The Discovery Subcommittee focused on a replacement for Rule 37(e)⁷ and took a separate developmental path. Both subcommittees vetted alternative draft rule proposals at “mini-conferences.”

An initial “package” of the proposals resulting from these efforts was released for public comment in August 2013.⁸ After a robust public comment period, the subcommittees recommended revisions which were adopted by the Rules Committee at its April, 2014 meeting in Portland, Oregon. The Standing Committee unanimously approved the revised proposals at its May 29, 2014 meeting.

The revised proposals were then submitted with recommendations for approval to the Judicial Conference,⁹ which approved the rules on their “consent calendar” and forwarded them to the Supreme Court for its review.¹⁰

³ Minutes, Rules Committee Meeting, April 20-21, 2009, at 30.

⁴ Links to the submissions, together with the Conference Agenda, Panelists and Report to the Chief Justice are available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil>.

⁵ Report to the Chief Justice, September 10, 2010, available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (scroll to Report to Chief Justice).

⁶ John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 544 (2010).

⁷ The Discovery Subcommittee work was initially led by Judge David Campbell prior to his becoming Chair of the Rules Committee after Judge Mark Kravitz became Chair of the Standing Committee in November, 2011.

⁸ The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules (“2013 PROPOSAL”) are available at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>.

⁹ Report of Standing Committee, ST09-2014, available at *supra*, n. 2, 17 (recommending approval of “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”).

¹⁰ See Minutes, Rules Committee Meeting, October 30, 2014, 2.

The Supreme Court adopted the proposed amendments without change and forwarded the full package to Congress after having suggested certain minor changes in several Committee Notes.¹¹

Hearings and Public Comments

The Rules Committee conducted Public Hearings on the initial proposals in late 2013 and early 2014 that involved 120 testifying witnesses.¹² The first hearing was held by the Committee in Washington, D.C. on November 7, 2013 and was followed by a second hearing on January 9, 2014 in Phoenix and a third and final hearing on February 7, 2014 at the Dallas (DFW) airport. In addition, the Committee received over 2300 written comments.¹³ The Agenda Book for the May 2014 Standing Committee meeting summarizes the comments under rule-based topic headings.

Lawyers for Civil Justice (“LCJ”)¹⁴ and the American Association for Justice (“AAJ,” formerly “ATLA”)¹⁵ provided expansive comments. The AAJ urged rejection of rules that added proportionality factors to the scope of discovery, imposed reduced presumptive limits and “made sanctions less likely in instances of spoliation,” whereas LCJ supported limiting sanctions, adding proportionality to the scope of discovery, acknowledging cost-allocation and making reductions in presumptive numerical limits on use of discovery devices.

Individual comments were submitted by representatives of corporate entities and affiliated defense advocacy groups, as well as various law firms and individual practitioners. Similarly, individuals and groups typically representing individual claimants and plaintiff advocacy groups were very active in both submitting comments and testifying at the public hearings. Individual Members of the academic community testified and submitted written comments.¹⁶

In addition, the Federal Magistrate Judges Association (“FMJA”), the Association of Corporate Counsel (“ACC”), the Department of Justice (“DOJ”), the Sedona

¹¹ The changes suggested by the Supreme Court involved the Committee Notes for Rules 4 and 84 and in regard to the Abrogation of the Appendix of Forms.

¹² Transcripts of the three hearings are available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees>.

¹³ The written comments are archived at <http://www.regulations.gov#!docketDetail;D=USC-RULES-CV-2013-0002>.

¹⁴ LCJ Comments, August 30, 2013, available at <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0267>, as supplemented. LCJ a coalition of defense trial lawyer organizations, law firms and corporations.

¹⁵ AAJ Comments, December 19, 2013, available at <http://www.regulations.gov#!documentDetail;D=USC-RULES-CV-2013-0002-0372>.

¹⁶ See also Henry J. Kelston, *FRCP Discovery Amendments Prove Highly Controversial*, Law360, February 27, 2014 (quoting views of Professors Carrington and Miller and arguing that others shared the views but declined to express them “as a matter of discretion”), available at <http://www.law360.com/articles/512821/frcp-discovery-amendments-prove-highly-controversial>.

Conference[®] WG1 Steering Committee (“Sedona”) and a cross-section of state bar associations also dealt comprehensively with the proposals.

Post Revision Commentary

Most recent commentary has focused on the revisions to Rule 26(b)(1) and Rule 37(e). Former critics have generally accepted the revisions¹⁷ although some continue to be critical of both the amendment process and the impact of some of the changes.¹⁸ Rule 26 has been extensively discussed in a forthcoming article by a jurist¹⁹ and the Duke Center for Judicial Studies has developed *Guidelines and Practices* relating to it.²⁰ Revised Rule 37(e) has been positively addressed in most,²¹ but not all,²² such comments.

II. The “Duke” Amendments

The Duke Subcommittee was primarily responsible for developing rule-based proposals other than those dealing with pleadings or the replacement for current Rule 37(e). The Subcommittee worked from suggestions floated at the Duke Conference and developed additional ones, which were whittled down as needed. We turn first to the proposals loosely described as the “Duke” amendments.

(1) Cooperation (Rule 1)

It is proposed to amend Rule 1, which speaks of the need to achieve the “just, speedy, and inexpensive determination of every action and proceeding” so as to require that it be “construed, ~~and~~ administered and employed by the court and the parties to secure” its goals. The Committee Note provides that “the parties share the responsibility to employ the rules” in that matter.²³

¹⁷ John W. Griffin Jr., *A Voice for Injured Plaintiffs*, August 2015 TRIAL (“[w]hile the new rules do not exactly level the playing field for parties with limited resources, our clients have at least avoided being at a grossly unfair disadvantage”).

¹⁸ See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the [FRCP] and the Pro-Defendant Composition of the Federal Rulemaking Committees* (hereinafter “*Anti-Plaintiff Pending Amendments*”), UNIV. OF CINTI. L. REV. (Forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621895.

¹⁹ Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. ____ (forthcoming 2015)(copy on file with author).

²⁰ *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality* (Duke Law School Center for Judicial Studies (Final Version)(copy on file with author). The “final” version will be posted on the Duke Law Center website, <https://law.duke.edu/judicialstudies/research/> and published in 99 JUDICATURE No. 3, ____ (Winter 2015).

²¹ Phillip Favro, *The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments*, 21 RICH. J. L. & TECH. 8, ¶¶ 4-9 (2015); see also ABA Litigation News, Summer 2014, 18, *Less is More: Proposed Rule 37(e) Strikes the Right Balance*.

²² Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1315 (2014).

²³ Committee Note, 2, available at *supra*, n. 2.

The Note further observes that “most lawyers and parties cooperate to achieve those ends” and that “[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.”²⁴

Cooperation

The Subcommittee considered but ultimately refused to recommend that Rule 1 should be amended to require that parties “should cooperate” to achieve the goals of Rule 1.²⁵ The concept was deemed to be “too vague, and thus fraught with the mischief of satellite litigation.”²⁶ A similar attempt was rejected in 1978.²⁷

Participants at the Duke Conference had emphasized the role of cooperation in achieving the goals of Rule 1 reflecting the prominence achieved as a result of the Sedona Conference® Cooperation Proclamation.²⁸ It was argued that cooperation could go a long way towards achieving proportional discovery and reducing the need for judicial management. Many local rules²⁹ and other e-discovery initiatives³⁰ invoke cooperation as an aspirational standard. Courts assessing disagreements about sharing aspects of preservation and production practices routinely invoke the standard.³¹

The difficulty with adding “cooperation” to the text of Rule 1 was the possibility of “collateral consequences.”³² It was argued that it was unclear whether “cooperation” means something more than a willingness to take opportunities to discuss defensible positions in good faith³³ – in short, whether it mandates compromise.³⁴ Some questioned whether “cooperation” included an obligation to settle on reasonable terms suggested by courts, given that the experience with mandated cooperation has not been favorable.³⁵

Public Comments

²⁴ Committee Note, 1-2.

²⁵ Duke Subcommittee Conference Call Notes, 9, October 22, 2012), available at https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf.

²⁶ *Id.*

²⁷ Steven S. Gensler, *Some Thoughts on the Lawyer’s E-Volving Duties in Discovery*, 36 N. KY. L. REV. 521, 547 (2009)(language was proposed in 1978 authorizing sanctions for failure to have cooperated in framing an appropriate discovery plan).

²⁸ The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).

²⁹ *See, e.g.*, Local Rule 26.4, Southern and Eastern District of N.Y. (the expectation of cooperation of counsel must be “consistent with the interests of their clients”).

³⁰ *See* [MODEL] STIPULATED ORDER (N.D. CAL), ¶ 2, (“[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation]).

³¹ *See, e.g.*, *Burd v. Ford Motor Company*, 2015 WL 4137915, at *8 (S.D. West Va. July 8, 2015)(rejecting “generic objections to ‘discovery on discovery’ and requiring discovery of preservation detail and search terms and identities of custodians, citing Sedona Conference® Cooperation Proclamation).

³² Minutes, November 2012 Rules Committee Meeting, at lines 616-622.

³³ Gensler, *supra*, at 546 (the correctness of the inference “turn[s] on the definition of cooperation”).

³⁴ *Id.* (the view that cooperation involves “a willingness to move off of defensible positions – to compromise – in an effort to reach agreement” is not what Rules 26(f), 26(c) or 37(a) actually demand).

³⁵ Richard Marcus, *Cooperation and Litigation: Thoughts on the American Experience*, 61 KANSAS LAW REVIEW 821, 827- 839 (2013)(“The Challenges of Mandated Cooperation”).

Concerns were raised during the public comment period about the references to “cooperation” in the Committee Note, especially as to the “proper balance” between cooperative actions and the professional requirements of effective representation.³⁶ The Sedona Conference® expressed the view that language along the lines of the Committee proposal would be sufficient.³⁷ Others, however, suggested that “cooperation” should be incorporated in the Rule.³⁸

Revised Committee Note

At the May 2014 Standing Committee meeting, it was announced that the Committee Note would be amended to clarify that the change to the rule was not intended to serve as a basis for sanctions for a failure to cooperate.³⁹ The final version of the Note adds that “[t]his amendment does not create a new or independent source of sanctions” and “neither does it abridge the scope of any other of these rules.”⁴⁰

State Amendments

Effective July 1, 2015, Colorado has amended its Rule 1 of its civil rules to also required that the rule be “employed by the court and parties” to secure the just, speedy, and inexpensive determination of every actions. Minnesota earlier added a requirement to its Rule 1 that courts and parties must assure that “the process and the costs are proportional to the amount in controversy and the complexity and important of the issues.”⁴¹

(2) Case Management (Rules 4(m), 16, 26, 34, 55)

A series of amendments have been proposed to help ensure that judges manage their cases early and actively. They include the following.

Timing (Service of Process) (Rule 4(m))⁴²

The time limits in Rule 4(m) governing the service of process will be reduced from 120 to 90 days. The intent is to “reduce delay at the beginning of litigation.”⁴³ The

³⁶ LCJ Comment, *supra*, August 30, 2013, at 20.

³⁷ Letter, Sedona Conference® to Hon. David Campbell, October 3, 2012 (suggesting that the rules “should be construed, complied with, and administered to secure the just, speedy and inexpensive determination”).

³⁸ Transcript of Testimony, Ariana Tadler, Milberg LLP, February 7, 2014 (personal views of former Chair, Sedona Conference WG1) at 328.

³⁹ Minutes, Standing Committee Meeting, May 29-30, 2014, at 5 (“[t]he added language would make it clear that the change was not intended to create a new source for sanctions motions”); see *also* June 2014 RULES REPORT, available *supra* at n. 2, II (C)(“[o]ne concern [expressed in public comments] was this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate”).

⁴⁰ Committee Note, 2.

⁴¹ Minn. R. Civ. P. 1 (2013)(listing factors to be considered in making a proportionality assessment)..

⁴² For changes to Rule 4(d), see Subsection (7)(Forms (Rules 4(d), 84, Appendix of Forms).

⁴³ Committee Note, 4.

subdivision does not apply to service in a foreign country “or to service of a notice under Rule 71.1(d)(3)(A).” In response to a request by the Supreme Court, the Note no longer makes the observation that shortening the presumptive time for service will increase the occasions to extend the time “for good cause.”⁴⁴

Default Judgment

The interplay between Rules 54(b), 55(c) and 60(b) will be clarified by inserting the word “final” in front of the reference to default judgment in Rule 55(c).

Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2) (“Early Rule 34 Requests”)) will allow delivery of discovery requests prior to the “meet and confer” required by Rule 26(f). The response time will not commence, however, until after the first Rule 26(f) conference. Rule 34(b)(2)(A) will be amended as to the time to respond “if the request was delivered under 26(d)(2) – within 30 days after the parties’ first Rule 26(f) conference.”

The Committee Note explains that this relaxation of the existing “discovery moratorium” is “designed to facilitate focused discussion during the Rule 26(f) Conference,” since discussion may produce changes in the requests.⁴⁵

Scheduling Conference

Rule 16(b)(1) will be modified by striking the reference to conducting scheduling conferences by “~~telephone, mail, or other means~~” to encourage direct discussions among the parties and the Court. The Rule will merely refer to the duty to issue a scheduling order after consulting “at a scheduling conference.” The Committee Note observes that the conference may be held “in person, by telephone, or by more sophisticated electronic means” and “is more effective if the court and parties engage in direct simultaneous communication.”⁴⁶

Scheduling Orders: Timing

In the absence of “good cause for delay” a judge will be required by an amendment to Rule 16(b)(2) to issue the scheduling order no later than 90 days after any defendant has been served or 60 days after any appearance of a defendant, down from 120 and 90 days, respectively, in the current rule. The Committee Note provides that in some cases, parties

⁴⁴ An April 3, 2015 Memorandum from the Judicial Conference to the Supreme Court acknowledged receipt of the request and approval of the change without explaining the reason for doing so. See Memo, available *supra*, n. 2.

⁴⁵ Committee Note, 25.

⁴⁶ *Id.*, 7 (excluding the use of “mail” as a method of exchanging views).

may need “extra time” to establish “meaningful collaboration” between counsel and the people who may provide the information needed to participate in a useful way.⁴⁷

Scheduling Orders: Pre-motion Conferences

Rule 16(b)(3)(B) (“Contents of the Order”) will be amended in subsection (v) to permit a court to “direct that before moving for an order relating to discovery the movant must request a conference with the court.” The Committee Note explains that “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion.”⁴⁸

Scheduling Orders: Preservation

In parallel with changes to Rule 26(f)(3)(C) requiring that parties state their views on “disclosure, ~~or~~ discovery, or preservation” of electronically stored information (ESI), Rule 16(b)(3)(B)(iii) will permit an order to provide for “disclosure, ~~or~~ discovery, or preservation” of ESI.

The Committee Note to Rule 16 observes that “[p]arallel amendments of Rule 37(e) [will] recognize that a duty to preserve discoverable information may arise before an action is filed.”⁴⁹ The Note to Rule 37(e) states that “promptly seeking judicial guidance about the extent of reasonable preservation may be important” if the parties cannot reach agreement about preservation issues. It also opines that “[p]reservation orders may become more common” as a result of the encouragement to address preservation.⁵⁰

Scheduling Orders: FRE 502 Orders

In parallel to changes in Rule 26(f)(3)(D) requiring parties to discuss whether to seek orders “under Federal Rules of Evidence 502” regarding privilege waiver, Rule 16(b)(3)(B)(iii)(iv) will permit an order to include agreements dealing with asserting claims of privilege or of protection as trial-preparation materials, “including agreements reached under Federal Rule of Evidence 502.”

Sequence of Discovery

The unrestricted sequence of discovery specified under Rule 26(d)(3) will apply unless “the parties stipulate or” the court orders otherwise, and the requirement that a party act “on motion” is stricken.

⁴⁷ *Id.*, 8.

⁴⁸ *Id.*, 9. See also Steven S. Gensler and Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 861 (2013)(noting that many have moved to a system of pre-motion conferences to resolve discovery disputes).

⁴⁹ Committee Note, 8.

⁵⁰ Committee Note, 40.

(3) Scope of Discovery/ Proportionality (Rule 26(b))

The 2015 Amendments will revise Rule 26(b)(1) to state that parties may obtain discovery of nonprivileged matter “that is relevant to any party’s claim or defense and proportional to the needs of the case, considering [a re-arranged and slightly modified list of the current proportionality factors from Rule 26(b)(2)(C)(iii)].” As amended, Rule 26(b)(1) will provide:

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. [Deleted material not reproduced]

Rule 26(b)(2)(C) will also be amended to provide that:

(C) When required. On motion or on its own, the court must limit the frequency or extent of discovery when “[iii] ~~the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1).~~”

The Revised Proposal

Despite intense criticism of the initial proposal⁵¹ during the public comment period, the Rules Committee was convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery with some modifications would improve the rules governing discovery.⁵² The Committee Note emphasizes that the amendment “restores” the proportionality factors to their original place in Rule 26(b)(1) while “reinforcing” the Rule 26(g) obligations.⁵³

Only minor modifications were made in the text after the public comments. First, the “amount in controversy” factor was moved to a secondary position behind “the importance of the issues at stake in the action” and, second, a factor was added requiring that “the parties’ relative access to relevant information” be taken into account. The Committee Note explains that considerations dealing with information asymmetry were already implicit in the Rules and that “the burden of responding to discovery “lies heavier on the party who has more information, and properly so.”⁵⁴

⁵¹ 2013 PROPOSAL, *supra* n. 8, at 289-290.

⁵² June 2014 RULES REPORT, *supra* n. 2, at II(A)(2)(a).

⁵³ Committee Note, 19.

⁵⁴ Committee Note, 21.

The Committee deleted the authority to order discovery of matter “relevant to the subject matter.” The Note explains that “subject matter” discovery has been “rarely invoked”⁵⁵ and that proportional discovery suffices “given a proper understanding of what is relevant to a claim or defense.”⁵⁶

Also deleted is the statement that relevant information need not be admissible if “reasonably calculated to lead to the discovery of admissible evidence,” which is replaced by the statement that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.” The Note explains that the deleted language has been improperly used to suggest that anything is fair game in discovery.⁵⁷ However, nonprivileged information not admissible in evidence remains discoverable so long as it is otherwise within the scope of discovery.⁵⁸ Finally, amended Rule 26(b)(1) no longer contains examples of discoverable information.

The Committee Note deals with what the Committee felt were “quite unintended” interpretations of the proportionality proposal.⁵⁹ It stresses that the rule does not “place on the party seeking discovery the burden of addressing all proportionality concerns.” Further, a party may not “refuse discovery simply by making a boilerplate objection that it is not proportional.”⁶⁰

Background

The principle of “proportionality” has been a limitation on the scope of discovery under Rule 26(b)(1) since 1983.⁶¹ After the 2010 Duke Litigation Conference, however, it was concluded that “discovery in civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality,” as enforced through active case

⁵⁵ 192 F.R.D. 340, 388 (2000) (“[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action”). Up to that point, Rule 26(b)(1) had permitted discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of [either party]” and gave examples. *Id.*

⁵⁶ Committee Note, 23. The Note explains that the examples used to justify inclusion of “subject matter” jurisdiction in 2000 would “not [be] foreclosed by the amendments.”

⁵⁷ June 2014 RULES REPORT, *supra* n. 2, at II (a)(2)(d) (“[s]ome 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”).

⁵⁸ Committee Note, 24.

⁵⁹ April 2014 Rules Committee Minutes at 4-5 (lines 176-177) (quoting Chair of Duke Subcommittee).

⁶⁰ Committee Note, 19.

⁶¹ Rule 26(b)[(Discovery Scope and Limits)], subsection (1)(iii)(discovery shall be limited if the court determines that it 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 state in the litigation”). 97 F.R.D. 165, 215 (1983) The Committee Note described this as intended to limit “disproportionate” discovery of matters which were “otherwise proper subjects of inquiry.”

management.⁶² An FJC survey of closed cases⁶³ had suggested that for a great many cases discovery was proportional to the needs of the case, but discovery intensive cases have often presented problems. A number of surveys documented dissatisfaction with excessive costs of discovery, in part because of inadequate attention paid to proportionality limitations.⁶⁴ As one commentator put it, there is a significant subset of cases which involve complex facts, high stakes and contentious behavior where the proportionality concept “has not taken root.”⁶⁵

Moreover, the role of proportionality principles in discovery is not limited to Rule 26(b)(1). A similar invocation exists in Rule 26(g) relating to discovery filings signed by an attorney.⁶⁶ In 2006, the Committee adopted Rule 26(b)(2)(B) dealing with discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden of cost. That provision was also made subject to the “limitations of Rule 26(b)(2)(C).”⁶⁷

The Subcommittee assigned to consider rulemaking alternatives looked at a variety of options before settling on a recommendation to provide more emphasis on proportionality in “defining the scope of discovery” in Rule 26(b)(1).⁶⁸ Ultimately, the Rules Committee concluded that it would be best to transfer the entire list of proportionality considerations from the existing rule to Rule 26(b)(1) to provide suitably nuanced guidance.⁶⁹

It was that approach which was released for public comment in August 2013 and unleashed a firestorm of opposition.⁷⁰ The AAJ⁷¹ argued, for example, that a producing party could “simply refuse reasonable discovery requests” and force requesting parties to

⁶² June 2014 RULES REPORT, available *supra* at n. 2, II(A)(2)(a).

⁶³ Emery G. Lee III and Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 765, 773-774 (2010) (“[discovery] costs are generally proportionate” to client stakes in the litigation).

⁶⁴ Critics downplay the significance of discovery intensive cases for rulemaking purposes. *See, e.g.*, Suja A. Thomas and Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process* (hereinafter “*Atypical Cases*”), Vol. 15 NEVADA LAW JOURNAL, 2014-15 (Forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563047.

⁶⁵ Edward D. Cavanaugh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?* (hereinafter “*Meaningful Containment*”), 13-APR ANTITRUST SOURCE 1, *5 (April 2014).

⁶⁶ Rule 26(g)[Signing Disclosures and Discovery Requests, Responses and Objections] at (1)(B)(iii)(the signature by an attorney is a certification that the filing 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”).

⁶⁷ Rule 26(b)(2)(B). 234 F.R.D. 219, 335 (2006).

⁶⁸ November 2011 Rules Committee Minutes at 8 (quoting Chair of Subcommittee).

⁶⁹ *See* Duke Conference Subcommittee Call Notes, October 22, 2012, *supra* n. 23, at 5- 6 (“adding the [listed] factors to explain what ‘proportional’ means relieves the risk of uncertain meaning”).

⁷⁰ A forty-five page summary of the Public Comments on the transfer of proportionality factors to Rule 26(b)(1) was prepared for Committee use by the Reporter of the Rules Committee. *See* copy at https://law.duke.edu/sites/default/files/centers/judicialstudies/iii_summary_public_comments.pdf.

⁷¹ AAJ Comment, *supra* n. 15, December 19, 2013.

“*prove* that the requests are not unduly burdensome or expensive.”⁷² Supporters, on the other hand, stressed the need to address concerns that the proportionality standard was not invoked enough.⁷³

Impact

Most observers agree that the revisions to Rule 26(b)(1) do not alter existing discovery obligations.⁷⁴ As a recent article noted, it is a “mistaken belief that the changes dictate severe limitations on discovery.”⁷⁵ The amended rule merely “sets the outer boundaries of permissible discovery.”⁷⁶ The intent of the Committee is to more rigorously enforce those limits⁷⁷ and expectations are high in some quarters that “discovery costs can be contained.”⁷⁸ Some commentators are convinced that the combined effect of the changes to the rule will “significantly limit discovery.”⁷⁹

During the Public Hearings, the Chair of the Duke Subcommittee famously observed that it is up to the judge, with input from the parties, to “consider all of these factors” before making a decision to “allow or limit or expand the discovery.” In the courts view, “the burden of proof only has an effect if everything is in equipoise, which it seldom is.”⁸⁰

The Committee Note explains that “[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.”⁸¹

⁷² *Id.*, at 11 (emphasis in original).

⁷³ Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality* (hereinafter “*Applying Proportionality*”), 16 SEDONA CONF. J. ____ (forthcoming 2015), at 11- 13 (copy on file with author).

⁷⁴ See, e.g., Guideline 1, *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality* (hereinafter “*Guidelines and Practices*”) (Duke Law School Center for Judicial Studies (Final Version on File with Author)) (“[t]he Rule 26(b)(1) amendments . . . do not alter the parties’ existing discovery obligations or create new burdens”). The “final” version [September 2015] will be posted on the Duke Law Center website, <https://law.duke.edu/judicialstudies/research/> and published in 99 JUDICATURE No. 3, ____ (Winter 2015).

⁷⁵ Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, July 2015 TRIAL, 37 (“the actual rule amendments do not support [the] perspective [of severe restrictions on discovery]”).

⁷⁶ *Applying Proportionality*, at 19.

⁷⁷ Draft Committee Note, 2013 PROPOSAL, *supra* n. 8, at 296 (“[t]he scope of discovery is changed . . . to limit the scope of discovery to what is proportional to the needs of the case.”).

⁷⁸ Cavanagh, *Meaningful Containment*, *supra* n. 65, 13- APR ANTITRUST SOURCE 1, *9.

⁷⁹ See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the [FRCP] and the Pro-Defendant Composition of the Federal Rulemaking Committees* (hereinafter “*Anti-Plaintiff Pending Amendments*”), UNIV. OF CINTL. L. REV. (Forthcoming)(June 2015) at 30 – 38 (detailed rebuttal and criticism of origins of, need for and impact of the combined effect of the changes to Rule 26(b)(1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621895).

⁸⁰ Hon. John Koeltl, Transcript, January 9, 2014 (Phoenix Hearings), at 211).

⁸¹ Committee Note, 20.

The Duke Law Center has launched an ambitious effort to achieve consensus recommendations on “useful, practical, and concrete implementing procedures and practices.”⁸² The resulting Duke *Guidelines and Principles* provide commentary on each of the factors and advocate various practices to be employed, such as ongoing and meaningful discovery planning, based on use of pretrial orders, stipulated facts and focused discovery to guide decisions about discovery.⁸³ Others observers have emphasized use of phased discovery to focus on most important and accessible information and deferring expensive discovery while avoiding unnecessary costs.⁸⁴

Discovery Motions

A party seeking to compel a discovery response under Rule 37(a) over relevancy objections bears an initial burden to show facial relevancy. Once shown, the burden shifts to the non-movant to justify its objection.⁸⁵ The same logic should apply to motions to compel when an objection is based on a lack of proportionality. Thus, except for discovery requests which are “transparently disproportionate in the context of a particular case,”⁸⁶ the objecting party must come forward with facts “typically in the form of an affidavit” which shows how the requested discovery is inconsistent with Rule 26(b)(1) or violates opposing counsel’s certification obligations under Rule 26(g).⁸⁷

The failure of a requesting party to frame discovery requests that are “facially relevant and proportional” may defeat a motion to compel⁸⁸ or waive the necessity of showing good cause under Rule 26(c) to secure a protective order.⁸⁹

Some have expressed concerns about an upsurge in premature motions based on allegations of disproportionality.⁹⁰ However, it is equally likely that parties and their attorneys will, consistent with Rule 26(g), self-regulate discovery requests so that such objections will be unnecessary. As Judge Schaffer has noted, “[f]ocused and precisely

⁸² *Guidelines and Practices*”(Duke Law School Center for Judicial Studies September 2015), 99 JUDICATURE No. 3, ___ (Forthcoming Winter 2015), supra n. 74.

⁸³ *Id.*, Section II (Practices), 9-19.

⁸⁴ Schaffer, *Applying Proportionality*, supra n. 73, at 44-51.

⁸⁵ See e.g., *Folger v. Medicalodges*, 2013 WL 6244155, *2 (D. Kan. Dec. 3, 2013) (“once facial relevance is established, the burden shifts to the party resisting discovery”). The Duke Subcommittee concluded that a party protesting that a request is too burdensome to be proportional will “have to explain what the burden is and why it is not proportional.” March 3, 2014, Notes, at 51 (April 2014 Agenda Book, 132 of 580).

⁸⁶ Schaffer, *Applying Proportionality*, supra n. 73, at 21 (noting by analogy the cases applying a “facially objectionable” standard when requests are “overly broad or seek information that does not appear relevant”).

⁸⁷ *Id.* at 24.

⁸⁸ *Id.* at 22.

⁸⁹ *Id.* at 25. The party seeking a protective order for good cause must ordinarily make a particularized showing, supported by affidavits or other detailed explanations as to the extent of the burden or expense.

⁹⁰ Cf. BloombergBNA eDiscovery Resource Center (Proportionality), July 31, 2015, quoting Hon. Shira Scheindlin at ABA Panel, Chicago (“I hope judges will be tough about allowing motions”).

drafted discovery requests may actually preempt challenges framed in terms of proportionality.”⁹¹

State Developments

Some states have adopted measures to emphasize proportionality in discovery. Utah has integrated proportionality into the scope of discovery, placing the burden of demonstrating it on the party seeking discovery.⁹² Minnesota requires that “the process and the costs” be “proportionate to the amount in controversy and complexity and importance of the issues” involved.⁹³ The new Illinois proportionality provision⁹⁴ is coupled with a Committee Note emphasizing that certain categories of ESI are not normally discoverable as a result.⁹⁵

Preservation

The scope of preservation and production are closely linked.⁹⁶ As limits are imposed on what can be discovered, “the obligation to preserve diminishes accordingly.”⁹⁷ The Duke *Guidelines and Practices* suggest that applying proportionality to preservation is an important part of achieving overall discovery proportionality.⁹⁸ Amended Rule 37(e)⁹⁹ advocates use of proportionality considerations when determining if “reasonable steps” have been taken, echoing earlier comments in the Sedona Conference® *Commentary on Proportionality*.¹⁰⁰

Some have argued that requiring discovery to be “proportional to the needs of the case” will cause a party not to preserve discoverable information in situations where such

⁹¹ Shaffer, *Applying Proportionality*, at 33.

⁹² URCP Rule 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 also* URCP Rule 37(b)(2)(“[i]f the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional”) and Philip Favro and Hon. Derek Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV.933, 947 (2012).

⁹³ MINN. ST. RCP Rule 1 (2013). The scope of discovery is limited to “matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [list].” MINN. ST. RCP Rule 26.02(b)(2013).

⁹⁴ IL. R S CT . 201(c)(3).

⁹⁵ *Id.*, Committee Note (2014).

⁹⁶ *Pippins v. KPMG*, 279 F.R.D. 245, 255 (S.D. N.Y. Feb. 3, 2012)(“proportionality is necessarily a factor in determining a party’s preservation obligations;” *accord*, *In re Ethicon, Inc.*, 299 F.R.D. 502, 518 (S.D. W. Va. Feb. 4, 2014).

⁹⁷ Duke Conference Subcommittee Notes, Jan. 31 2012 at 8, available in March 2012 Rules Committee Agenda Book at 416 of 644.

⁹⁸ *Commentary to Practice 9*, Duke *Guidelines and Practices*, at 18.

⁹⁹ Committee Note, 41 (“a factor in evaluating the reasonableness of efforts is proportionality”).

¹⁰⁰ The Sedona Conference® *Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 162 (2013)(pre-litigation preservation decisions should be evaluated “in light of both the proportionality factors set forth in Rule 26(b)(2)(C) and the preserving party’s good faith and reasonableness”).

behavior did not occur previously.”¹⁰¹ This seems unlikely. The “self-designation” of information to be preserved is a normal feature of party-managed discovery¹⁰² and a party unilaterally limit its responses to what it considers proportional at its peril.¹⁰³ Parties must undertake reasonable steps to preserve and it is tricky to apply proportionality concerns, especially in the pre-litigation context.¹⁰⁴

The 2006 Committee Note to 26(b)(2)(B), dealing with inaccessible sources of ESI, provides stated that whether a party is required to preserve such sources depends on the circumstances of each case and it is “often useful for the parties to discuss” the issue early in the case.¹⁰⁵ Similar logic applies to preservation of ESI which a party deems disproportional to the needs of the case.

Rules 16(b) and 26(f) have been amended as part of the 2015 Package to facilitate early discussions about preservation. Local rules and sample protocols also encourage or mandate such discussion.¹⁰⁶ Moreover, under Rule 26(g), requesting parties must also tailor their preservation demands to what is at stake in the case.¹⁰⁷ Transparency and cooperation by both parties is crucial.¹⁰⁸

Computer Assisted Review

The Committee Note endorses use of “computer-based methods of searching” as a form of proportionality designed to reduce the burden or expense of producing ESI.¹⁰⁹ This explicit endorsement - added during review by the Standing Committee¹¹⁰ - encourages courts and parties to consider use of “reliable means” of searching ESI by electronically enabled means.¹¹¹

¹⁰¹ Thomas & Price, *Atypical Cases*, *supra*, 13 (criticizing revised Rule 26(b)(1) because “[u]nder the new rule, a party can choose not to search or produce documents that they deem ‘not proportional to the needs of the case’”).

¹⁰² *See, e.g.*, Rules Committee Report (2006), 234 F.R.D. 219, 333 (2006)(all party-managed discovery and privilege invocation rests on “self-designation” to some extent).

¹⁰³ April 2014 Minutes, *supra* n. 63, at 7 (lines 273 -276)(Judge Koeltl).

¹⁰⁴ *Orbit One Communications v. Numerex*, 271 F.R.D. 429, 436 n. 10 (S.D. N.Y. 2010)(“[p]roportionality is particularly tricky in the context of [advanced planning for] preservation” because it is “highly elastic” and “cannot be assumed to create a safe harbor”).

¹⁰⁵ Rule 26 Committee Note (2006), 234 F.R.D. 219, 337 (2006).

¹⁰⁶ *See also* Committee Comments (2014), IL. R S CT . 201(c)(3)(invoking Seventh Circuit E-Discovery Principle 2.04(d)).

¹⁰⁷ The initial Draft Committee Note for Rule 37(e) made the point that “prospective litigants who call for preservation efforts by others” should keep proportionality principles [in Rule 26(b)(1) in mind. Draft Committee Note, Rule 37(e), 2013 PROPOSAL, *supra* n. 8, at 327 of 354.

¹⁰⁸ *Burd v. Ford Motor Company*, 2015 WL 4137915, at *8 (S.D. West Va. July 8, 2015)(“common sense dictates” that information be shared regarding “the universe of potentially relevant documents being preserved, and those that no longer exist”).

¹⁰⁹ Committee Note,

¹¹⁰ Minutes, Standing Committee Meeting, May 29-30, 2014, 4.

¹¹¹ Committee Note, 22. *See, e.g.*, *Malone v. Kantner*, 2015 WL 1470334, at n. 7 (D. Neb. March 31, 2015)(“predictive coding” is being promoted as “not only a more efficient and cost effective method of ESI review, but a more accurate one”).

The Duke *Guidelines and Practices* concede that it is “generally not appropriate for the judge” to order a party to “purchase or use” a specific technology or method, but suggest that a judge “may” consider whether a party has been unreasonable in choosing a particular method or technology.¹¹² They also caution, however, that “parties and judges should not limit themselves in advance to any particular technology or approach to using it.”¹¹³

The case law “recognizes that manual search costs can be devastating, so reasonable technological search and production efforts” may need to be considered.¹¹⁴ Some courts use targeted resolution of “categorical document requests” as part of a process of encouraging a “mutually acceptable ESI search regime.”¹¹⁵

(4) Presumptive Limits (Rules 30, 31, 33 and 36)

The initial package included amendments which lowered the presumptive limits on the use of discovery devices in Rules 30, 31, 33 and 36¹¹⁶ in order to “decrease the cost of civil litigation, making it more accessible for average citizens.”¹¹⁷ An earlier proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.¹¹⁸

The proposed changes would have included the following

- Rule 30: From 10 oral depositions to 5, with a deposition limited to one day of 6 hours, down from 7 hours;
- Rule 31: From 10 written depositions to 5;
- Rule 33: From 25 interrogatories to 15; and
- Rule 36 (new): No more than 25 requests to admit.

However, the proposals encountered “fierce resistance”¹¹⁹ on grounds that the present limits worked well and that new ones might have the effect of limiting discovery unnecessarily. The opposition came from the organized bar as well as from testimony and comments from individual lawyers and included concerns that courts might view the presumptive numbers as hard ceilings. If so, any failure to agree on reasonable limits could result in motion practice.¹²⁰

¹¹² Commentary to Guideline 5, *Guidelines and Practices*, at 9.

¹¹³ Commentary to Practice Point 10, *Guidelines and Practices*, at 19 (“[t]he parties and the judge should consider using technology to help achieve proportional discovery”).

¹¹⁴ *FDIC v. Bowden*, 2014 WL 2548137, at *7 & *13 (S.D. Ga. June 6, 2014)(ordering parties to “consider the use of predictive coding” in the event parties are unable to agree on ESI protocol).

¹¹⁵ *Ft. Worth Employees’ Retirement Fund v. J.P. Morgan*, 297 F.R.D. 99, 104 (S.D. N.Y. Dec. 16, 2013).

¹¹⁶ 2013 PROPOSAL, *supra* n. 8 at 300-304, 305 & 310-311 [of 354].

¹¹⁷ *Id.*, at 268.

¹¹⁸ *Id.*, at 267.

¹¹⁹ June 2014 RULES REPORT, available *supra*, n. 2 at II (A)(1)(“[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect”).

¹²⁰ April 2014 Minutes, *supra* n. 63, at 7 (lines 307-310).

After review, the Duke Subcommittee recommended¹²¹ and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools. The Chair of the Duke Subcommittee noted that “[s]uch widespread and forceful opposition deserves respect.”¹²²

The Committee has expressed the hope that most parties “will continue to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially, and if need be, as the case unfolds.”¹²³ The Committee expects that it will be possible to “promote the goals of proportionality and effective case management through other proposed rule changes” without raising the concerns spawned by the new presumptive limits.¹²⁴

Accordingly, the only proposed changes to Rules 30, 31 and 33 are individual cross-references to the addition of “proportionality” factors to Rule 26(b)(1). Thus, for example, Proposed Rule 30(a)(2) (“the court must grant leave [for additional depositions] to the extent consistent with Rule 26(b)(1) and (2)”).

(5) Cost Allocation (Rule 26(c))

At the Duke Conference, some suggested that Rules 26 and 45 should be amended to make the reasonable costs of preserving, collecting, reviewing and producing electronic and paper documents the responsibility of requesting parties (“requester party pays”).¹²⁵ Recent scholarship based on surveys of actual case expenditures indicated that the costs of search and review as the largest component of discovery costs, at least in larger cases.¹²⁶

While a partial draft along those lines¹²⁷ was circulated, the Subcommittee was not enthusiastic about cost-shifting and declined to propose adoption of new rules. Instead, it was agreed that a proposal making cost-shifting a more “prominent feature of Rule 26(c) should go forward.”¹²⁸ Accordingly, Rule 26(c)(1)(B) will be amended so that a protective order issued for good cause may specify terms, “including time and place or the allocation of expenses, for the disclosure or discovery.”

¹²¹ The Duke Subcommittee Report is in the April 2014 Rules Committee Meeting Agenda Book, copy at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>.

¹²² April 2014 Minutes, at lines 466-467.

¹²³ *Id.* (at lines 467-470).

¹²⁴ June 2014 RULES REPORT, available *supra*, n. 2 at II (A)(1).

¹²⁵ LCJ Comment, Reshaping the Rules of Civil Procedure for the 21st Century, May 2, 2010, at 55-60 (also recommending amendment to Rule 54(d) to same effect).

¹²⁶ 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), copy at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

¹²⁷ Duke Conference Subcommittee Rules Sketches, at 17-19, Agenda Materials for Rules Committee Meeting, March 22-23, 2012 (requiring a requesting party to “bear part or all of the expenses reasonably incurred in responding [to a discovery request]”); available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012> (beginning at 375 of 644).

¹²⁸ Initial Rules Sketches, at 37, as modified after Mini-Conference.

The Committee Note explains that the “[a]uthority to enter such orders [shifting costs] is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.”¹²⁹ There is well-established Supreme Court support for the statement.¹³⁰

After objections by witnesses on behalf of AAJ that the addition to Rule 26(c) would garner “undue weight,”¹³¹ the Note was amended to add that the change “does not mean that cost-shifting should become a common practice” and that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”¹³²

Some argued that this prejudged any continuing study of “requester pays” proposals. The Chair of the Subcommittee has stated that the work of the Committee will continue, but “it will not be easy.”¹³³

The Committee recently indicated that it continues to have the ‘requester pays’ topic on its agenda.¹³⁴

(6) Production Requests/Objections (Rule 34, 37)

Rule 34 and 37 will be amended to facilitate requests for and production of discoverable information and to clarify some aspects of current discovery practices.

The changes include:

First, Rule 34(b)(2)(B) will be modified to confirm that a “responding party may state that it will produce copies of documents or of [ESI] instead of permitting inspection.” Rule 37(a)(3)(B)(iv) will also be changed to authorize motions to compel for *both* failures to permitting inspection and failures to produce.¹³⁵ As the Committee Note observes, it is

¹²⁹ Committee Note, 25.

¹³⁰ June 2014 RULES REPORT (4. RULE 26(C)(1): Allocation of Expenses) (citing *Oppenheimer Fund v. Sanders*, 437 U.S. 340,358 (1978), Rules Transmittal, *supra*, n. 2.

¹³¹ AAJ Comments, *supra*, n. 16, December 19, 2013, at 17-18 (noting that “AAJ does not object to the Committee’s proposed change to Rule 26(c)(1)(B) per se” but suggesting amended Committee Note); *cf.* LCJ Comment, *supra*, n. 15, August 30, 2013, at 19-20 (endorsing proposal as “a small step towards our larger vision of reform”).

¹³² Committee Note, 25.

¹³³ April 2014 Minutes, *supra* n. 63, at 6 (lines 234-238).

¹³⁴ 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 <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2015> (scroll to 171-175 of 504).

¹³⁵ Committee Note, 38 (“[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling ‘production, or inspection’”).

a “common practice” to produce copies of documents or ESI “rather than simply permitting inspection.”¹³⁶

Rule 34 (b)(2)(B) will also be amended to require that if production is elected, it must be completed no later than the time specified “in the request or another reasonable time specified in the response.”

Second, Rule 34(b)(2)(B) will require that an objection to a discovery request must state “an objection with specificity the grounds for objecting to the request, including the reasons.” The Committee Note explains that “if the objection [such as over-breadth] recognizes that some part of the request is appropriate, the objection should state the scope that is not [objectionable].”¹³⁷

Third, Rule 34(b)(2)(C) will require that any objection must state “whether any responsive materials are being withheld on the basis of [an] objection.”¹³⁸ This is intended to “end the confusion” when a producing party states several objections but still produces information. A producing party need not provide a detailed description or log but must “alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion.”¹³⁹ The AAJ, among others, hailed this as an “extremely positive new change” which should substantially reduce stonewalling on the issue.¹⁴⁰

The requirement is inapplicable when the responding party does not know whether anything has been withheld beyond the search made.¹⁴¹ In that case, 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” on the basis of the objection.¹⁴² The parties should discuss the response and if they cannot resolve the issue, seek a court order.

(7) Forms (Rules 4(d), 84, Appendix of Forms)

Rule 84 currently states that “the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” In parallel to other aspects of potential rules reforms, and in response to the relative lack of use of the forms, the Rules Committee concluded that it is time “to get out of the forms business.”¹⁴³

¹³⁶ Committee Note, 34 (“the response to the request must state that copies will be produced”). For a useful summary of the contrasts in the discovery process between former and current contexts, *see* Anderson Living Trust v. WPX Energy Production, 298 F.R.D. 514, 521-527 (D. Mass. 2014).

¹³⁷ Committee Note, 33.

¹³⁸ The new language continues to be followed by the current requirement that “[a]n objection to part of a request must specify the part and permit inspection of the rest.”

¹³⁹ Committee Note, 34.

¹⁴⁰ Arthur Bryant, *Access to Justice at Stake with Federal Rule Changes*, June 5, 2014, available at <https://www.justice.org/blog/access-justice-stake-federal-rules-changes>.

¹⁴¹ April 2014 Minutes, *supra* n. 63, at 7 (lines 276-285).

¹⁴² Committee Note, 34.

¹⁴³ June 2014 RULES REPORT, available *supra*, n. 2, IV (Abrogation of Rule 84).

As a result, both Rule 84 and the Appendix of Forms appended to the Civil Rules will be abrogated, although certain of the forms will be integrated into Rule 4(d). Thus, Rule 4(d) will incorporate the forms “appended to this Rule 4.”¹⁴⁴ The phrase “[Abrogated (Apr. , 2015, eff. Dec. 1, 2015).]” will appear in place of the current text of Rule 84 and the separate list of “Appendix of Forms.”

Alternative sources of civil procedure forms will be available from a number of sources.¹⁴⁵ At the Supreme Courts’ suggestion,¹⁴⁶ the reference to the Administrative Office in the Note was expanded to include reference to websites of district courts and local law libraries as potential sources.

The Committee rejected concerns that abrogation was inappropriate under the Rules Enabling act.¹⁴⁷ The expanded Note also states that the “abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”¹⁴⁸

III. Rule 37(e)

(8) Failure to Preserve/Spoilation (Rule 37(e))

After December 1, 2015, an amended Rule 37(e) will provide an overlay on the common law of spoliation designed to resolve the Federal Circuit court disagreement about the appropriate link between severe measures and culpability for losses of ESI. The revised rule maintains court discretion to deal with ESI losses which cause prejudice but “does not attempt to create a new duty to preserve.”¹⁴⁹

The rule also introduces several modifications to the traditional analysis of spoliation, thus requiring courts to apply a hybrid mixture of existing case law and rule-based guidance.

Background

The Federal Rules have not heretofore dealt extensively with preservation and spoliation issues, including pre-litigation failures to preserve. Remedies for violations of the duty to preserve under Rule 37(b), for example, are unavailable unless a prior order has been violated.¹⁵⁰ An effort in 2006 to address certain aspects of spoliation of ESI led to

¹⁴⁴ See generally, material at Committee Note, 52-57.

¹⁴⁵ Committee Note, 49.

¹⁴⁶ Memorandum, April 2, 2015, Judicial Conference to Supreme Court, Rules Transmittal, *supra*, n. 2, at 129 of 144.

¹⁴⁷ Excerpt, September 2014 Report of the Judicial Conference, at (unnumbered) page 107 of 144 of Rules Transmittal, *supra*, n. 2.

¹⁴⁸ *Id.*

¹⁴⁹ Committee Note, 39.

¹⁵⁰ *Cf.* *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 72 (S.D. N.Y. 1991)(acts of spoliation prior to issuance of discovery orders violate Rule 37(b) because the inability to comply is “self-inflicted”).

current Rule 37(e),¹⁵¹ which addresses only sanctions issued “under these rules,” leaving it open to courts to avoid its limitations by the exercise of inherent authority under *Chambers v. NASCO*.¹⁵²

After the 2010 Duke Conference, the Discovery Subcommittee was assigned the task of developing alternative rule proposals, including ones that articulated preservation obligations.¹⁵³ The E-Discovery Panel at the Conference had recommended enactment of a new rule which included provisions governing the trigger, duration and nature of the obligation as well as the consequences of a failure to act.¹⁵⁴

The Rules Committee ultimately concluded, after vetting several alternatives in a Mini-Conference in 2011,¹⁵⁵ that drafting a detailed preservation component was too difficult and could “easily be superseded by advances in technology.”¹⁵⁶ Accordingly, it concentrated on a “sanctions-only” approach to the problem.

The Committee initially considered amending existing Rule 37(e) but concluded that it should be replaced with a more comprehensive approach. The Committee expressed concerns about the excessive costs associated with efforts to accommodate significantly different standards for imposing sanctions or curative measures for failures to preserve.¹⁵⁷

The Initial Proposal

A proposal for a revised Rule 37(e) (the “Initial Proposal”) was released for public comment in August, 2013.¹⁵⁸ A copy is reproduced in the Appendix. It applied to spoliation of any discoverable information which “should have been” preserved and

¹⁵¹ Rule 37(e). Failure to Provide 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.

¹⁵² Phillip Favro, *The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments*, 21 RICH. J. L. & TECH. 8, ¶¶ 4-9 (2015).

¹⁵³ Proposed Rule 26.1 (2011) provided that parties should take “actions that are reasonable” considering proportionality, but “presumptively” excluded certain forms of information [ESI] and limited the scope of the duty to a reasonable number of key custodians. Compliance with those requirements would have barred sanctions even if discoverable information was lost. See Memo for Mini-Conference Participants, September 9, 2011, 1-13, copy at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/dallas>.

¹⁵⁴ The Panel “reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.” John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010). See Elements of a Preservation Rule,” E-Discovery Panel, available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (scroll to “Elements of A Preservation Rule).

¹⁵⁵ For copies of the comments and proposals assessed, see <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/dallas>.

¹⁵⁶ Minutes, Rules Committee Meeting, March 22-23, 2012, 15-16.

¹⁵⁷ Committee Note, 38 (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions “if a court finds [a party] did not do enough”).

¹⁵⁸ 2013 PROPOSAL, *supra* n. 8, at 314-317 of 354.

included a list of non-exclusive “factors” for courts to consider in assessing the conduct of parties.¹⁵⁹

Under the Initial Proposal, a court could require “additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney’s fees caused by the failure.” No threshold showing of culpable conduct or prejudicial impact was required.

A court could also impose “sanctions” such as those listed in Rule 37(b)(2)(A) or “an adverse-inference jury instruction” *only if* a party’s actions caused “substantial prejudice” in the litigation *and* were “willful or in bad faith” *or* “irreparably deprived” a party of any “meaningful” ability to present or defend against claims in the litigation.

Public Comments

The initial proposal met with a mixed reception.¹⁶⁰ While commentators accepted the need for a uniform national rule dealing with spoliation, some opposed stricter culpability standards as an unwarranted restriction on court discretion.¹⁶¹ A prominent District Judge argued that enactment of the proposal would only “encourage[s] sloppy behavior.”¹⁶²

Members of the defense and corporate counsel bar generally supported the proposal, but questioned the details, such as the requirement of “willfulness” as a limitation on spoliation sanctions and the overlap of curative measures with sanctions. Concerns were expressed that the curative measures provision, as written, was “a strict liability standard [which was not] explicitly required to be proportional to the harm caused.”¹⁶³

Others criticized the authority to sanction based on a showing of “irreparable” prejudice. The concern was that without also requiring culpability, the exception might “swallow” the other provisions limiting use of harsh sanctions, prompting suggestions that the exception be dropped and the rule confined to ESI. The Committee had considered, but rejected, conditioning the availability of such relief under the exception on a minimal showing of “negligent or grossly negligent” conduct.

¹⁵⁹ Rule 37(e)(2)(Factors A-E). Reasonable conduct and proportionality concerns were mentioned as key factors in determining if there had been a breach of duty. In addition, parties should consult in “good faith” about the scope of preservation” and seek court “guidance” on “any unresolved disputes about preserving discoverable information.

¹⁶⁰ An eighty-one page Summary of Comments on Rule 37(e)(August 2013) is found in the Agenda Book for the May 2014 Standing Committee Meeting, at 331. Individual written comments are archived under the numbers referenced in the Summary at <http://www.regulations.gov/#!docketDetail:D=USC-RULES-CV-2013-0002>.

¹⁶¹ Milberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 4 FED. CTS. L. REV. 131, 182 (2011).

¹⁶² *Sekisui American v. Hart*, 945 F.Supp.2d 494, 504, n.51 (S.D. N.Y. Aug. 15, 2013)(the proposed rule “creates perverse incentives”)(Scheidlin, J).

¹⁶³ Gibson Dunn, 2014 Mid-Year Electronic Discovery Update (July 16, 2014), <http://www.gibsondunn.com/publications/pages/2014-Mid-Year-Electronic-Discovery-Update.aspx>.

Some urged that any revision should focus on “curative measures” with remedies “no more severe than that necessary to cure any prejudice” unless the court found that the party had acted in bad faith.¹⁶⁴ It was also noted, however, that use of curative measures necessarily implied a prior showing of prejudice.¹⁶⁵ Others questioned the efficacy of the listed “factors” and suggested that they be dropped or modified.

The Revised Proposal

After the close of the public comment period, the Subcommittee developed a revised version of Rule 37(e) that applies only to ESI.¹⁶⁶

It provides:

Failure to ~~Produce~~ Preserve Electronically Stored Information. 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.

The revised rule forecloses reliance on inherent authority or the inconsistent application of other rules or statutory provisions for failures to preserve ESI.¹⁶⁷ The principles of Rule 37(e) may, of course be usefully employed in disputes involving loss of discoverable information in other forms. However, the exclusion of coverage of tangible property losses preserves the flexibility of courts to deviate from limits on harsh measures where culpability is low.¹⁶⁸

¹⁶⁴ Hon. James C. Francis IV, letter to Rules Committee, 5-6 (January 10, 2014).

¹⁶⁵ John K. Rabiej, Director, Duke Law Center for Judicial Studies, September 11, 2013.

¹⁶⁶ See Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014, copy at <http://www.bna.com/advisory-committee-makes-n17179889550/>.

¹⁶⁷ Cf. *HM Electronics v. R.F. Technologies*, 2015 WL 4714908, at * 30 (S.D. Cal. Aug. 7, 2015)(“[t]he new Rule 37 and its Advisory Committee Notes [sic] do not address the interplay of subsection (b) with subsection (e) [of Rule 37]”).

¹⁶⁸ Committee Note, 38. See, e.g., *Silvestri v. GM*, 271 F.3d 583, 593 (4th Cir. Nov. 14, 2001)(manufacturer not required to defend tangible property defect case because of spoliation of the only evidence from which it could develop its defenses despite fact that spoliator engaged in only minimal misconduct).

“Reasonable Steps”

The rule applies only to circumstances where ESI which “should have been preserved” is “lost” because of a failure by a party to take “reasonable steps” and cannot be restored or replaced through additional discovery. A duty to preserve must have attached at the time of loss of relevant and discoverable ESI. The rule and the Committee Note makes it clear that this timing is determined by whether litigation was anticipated or commenced at that time.¹⁶⁹

The “reasonable steps” requirement was added shortly before the final approval of the revised rule by the Committee.¹⁷⁰ It subsumes and replaces the “culpable mind” requirement¹⁷¹ typically required as a precondition to spoliation sanctions.¹⁷²

This is a significant change. Spoliation sanctions are no longer automatically available under case law holding requiring that a particular preservation practice be followed or because some ESI has been lost.¹⁷³ Perfection is not required.¹⁷⁴ This brings preservation assessment in line with other aspects of the Federal Rules. The fact that mistakes may have been made “does not warrant imposing sanctions” since the standard is “reasonableness, not perfection.”¹⁷⁵

Courts are thus not bound by case law like *Pension Committee*¹⁷⁶ which imposed sanctions for mere failure to follow its list of “contemporary standards.” In *Chin v. Port*

¹⁶⁹ Committee Note 39 (“Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonable foreseeable. Rule 37(e) is based on this common-law duty”).

¹⁷⁰ See Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014 (“Rule 37(e) Revised Again”), available at <http://www.bna.com/advisory-committee-makes-n17179889550/>.

¹⁷¹ Judge Grimm, when explaining the change to the Committee, noted that the reasonable steps requirement “embrace[s] a form of culpability” and is intended to “encourage reasonable preservation behavior.” Minutes, April 2014 Rules Committee Meeting, at 22 (lines 891-892) and 23 (line 943).

¹⁷² *Zubulake IV*, *supra*, 220 F.R.D. at 220 (a party seeking adverse inference or other sanctions based on spoliation must establish “(1) that party having control over the evidence had an obligation to preserve at time it was destroyed; (2) that the records were destroyed ‘with a culpable state of mind’ and (3) that the destroyed evidence was ‘relevant’ to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense”).

¹⁷³ Minutes, May 2014 Standing Committee Meeting, 6, (Campbell, J.)(the revised proposal “should not be a strict liability rule” when information is lost). The *Zubulake* decision had held that any failure to use a litigation hold was at least negligent and thus remediable by sanctions under Second Circuit principles. *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 220 (S.D. N.Y. 2003)(“*Zubulake IV*”)(“[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent”).

¹⁷⁴ Committee Note, 41 (“[t]his rule recognizes that ‘reasonable steps’ to preserve suffice; it does not call for perfection”).

¹⁷⁵ *Malone v. Kantner Ingredients*, 2015 WL 1470334, at *3 (D. Neb. March 31, 2005)(“the Federal Rules do not demand perfection”).

¹⁷⁶ *Pension Comm. v. Banc. of Am. Sec.*, 685 F. Supp.2d 456, 471-472, 479 (S.D. N.Y. 2010); *abrogated* by *Chin v. Port Authority*, 685 F.3d 135, 162 (2nd Cir. 2012).

Authority,¹⁷⁷ the Second Circuit rejected the notion that a failure to institute a “litigation hold” constitutes gross negligence *per se* and held that “the better approach” was to consider the failure to adopt good preservation practices as one factor in the determination of whether sanctions should issue. *In Automated Solutions v. Paragon Data Systems*,¹⁷⁸ the Sixth Circuit joined the Second Circuit in endorsing a case-by-case approach and declining to “impose bright-line rules” under *Pension Committee*.

The Committee Note acknowledges that a “factor in evaluating the reasonableness of preservation efforts is proportionality.”¹⁷⁹ A party “may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms”¹⁸⁰ and good faith plays an important role where routine operations are involved.¹⁸¹ Parties who “demonstrate that they acted thoughtfully, reasonably, and in good faith in preserving or attempting to preserve” should be entitled to a presumption of having taken “reasonable steps.”¹⁸²

It may well be reasonable, depending on the circumstances,¹⁸³ for a party to delay imposing litigation holds,¹⁸⁴ or to fail to interrupt auto-deletion functions,¹⁸⁵ or to ignore inaccessible or ephemeral ESI unlikely to be sought in discovery¹⁸⁶ or to continue the routine recycling of laptops after employee departures.

Satisfaction of a “reasonable steps” requirement despite imperfections in result are recognized in analogous compliance contexts.¹⁸⁷ Parties attempting to preserve,

¹⁷⁷ Chin, *supra* (citing to Orbit Communications [271 F.R.D 429, 441 (S.D.N.Y. 2010)]).

¹⁷⁸ 756 F.3d 504, 515 (6th Cir. June 25, 2014).

¹⁷⁹ Committee Note, 41. See also “Preservation” at section (3), *supra* [Scope of Discovery/Proportionality (Rule 26(b))].

¹⁸⁰ Committee Note, 42. See also Committee Note, 41 (“parties (including governmental parties) may have limited staff and resources to devote to these efforts”).

¹⁸¹ Committee Note, 41 (“As under the current rule [37(e)], 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”).

¹⁸² Principle 1, The Sedona Conference® *Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 162 (2013) (“The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation”).

¹⁸³ BloombergBNA eDiscovery Resource Center (Proportionality), July 31, 2015 (quoting Hon. Shira Scheindlin to the effect that individual judges may have a different view of what constitutes ‘reasonable steps’ to preserve information); see also Committee Note, 41 (a court should be “sensitive” to the party’s sophistication with regard to litigation in evaluating preservation efforts and information may not be in the party’s control).

¹⁸⁴ *Siggers v. Campbell*, 2014 WL 4978655, at *3 (E.D. Mich. Oct. 6, 2014)(failure to implement litigation hold until four years after suit filed).

¹⁸⁵ *Mead v. Travelers*, 2014 WL 6832914, at *2 (E.D. Pa. Dec. 4, 2014)(failure to interrupt auto-destruction of notice of intent to cancel).

¹⁸⁶ *Paice LLC v. Hyundai Motor Company*, 2015 WL 4984198 (D. Md. Aug. 18, 2015)(denying sanctions for deleting raw data not normally retained).

¹⁸⁷ USCG Guidelines Manual, §8B2.1, Para.(b)(compliance program requiring “reasonable steps” is satisfied even though it may fail to prevent or detect violations). The Rules Committee was aware of the analogy and regarded it as informative. See Minutes, November 2010 Rules Committee Meeting, at lines 687-690.

especially in the pre-litigation context, are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving their own ESI.¹⁸⁸

“Restore or Replace”

However, before imposing *any* measures,¹⁸⁹ even if reasonable steps were *not* taken, a court must first determine whether the lost ESI can be restored or replaced through additional discovery.¹⁹⁰ This was explained by the Committee as “attempting first to cure the loss.”¹⁹¹ It does so by removing the need to deal with prejudice, real or imagined. Thus, “[i]f the information is restored or replaced, no further measures should be taken.” This is especially important in an era where email is exchanged between multiple senders and copies may be found in shared locations.¹⁹²

The additional effort may involve discovery from custodians not earlier searched or from sources that would ordinarily be considered inaccessible. The authority to order discovery stems from Rules 16 and 26 and the Committee Note pointedly cites to amended Rule 26(c)(1)(B) which acknowledges the authority to “allocate” any associated expenses.¹⁹³

The Committee Note points out, however, that any additional discovery required should be “proportional” to the importance of the lost ESI and that substantial measures should not be employed to restore or replace marginally relevant or duplicative information.¹⁹⁴

Subdivision (e)(1): Addressing Prejudice

If threshold requirements are met, subdivision (e)(1) authorizes a court to order curative measures “upon finding prejudice to another party from the loss of information.” The focus is on “solving the problem, not punishing the malefactor.”¹⁹⁵ It preserves a broad range of measures to cure prejudice for the “negligent or grossly negligent” loss of ESI but

¹⁸⁸ *Cache La Poudre v. Land O’Lakes*, 244 F.R.D. 614, 628 (D. Colo. 2007)(citing to Principle Six of the Sedona Conference® Best Practice Recommendations & Principles for Addressing Electronic Document Production (2nd Ed. 2007), at 31.

¹⁸⁹ The rule eschews references to “sanctions,” reflecting the sensitivity to the ambiguous line between “curative measures” and sanctions which was criticized in regard to the Initial Proposal (*see* Appendix).

¹⁹⁰ Committee Note, 42 (“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”).

¹⁹¹ Minutes, *supra*, April 2014 Rules Committee Meeting, at 23 (line 943-945).

¹⁹² *In re Ethicon*, 299 F.R.D. 502, 523 (S.D. W. Va. Feb. 4, 2014)(describing alternative sources of ESI other than “custodial files,” which consist of hard copy documents and ESI collected from personal computers).

¹⁹³ Committee Note, 42.

¹⁹⁴ *Id.*

¹⁹⁵ ABA Litigation News, Summer 2014, 18, *Less is More: Proposed Rule 37(e) Strikes the Right Balance*.

limits the most severe measures to instances of intentional loss as defined by subsection (e)(2).¹⁹⁶

Prejudice involves losses of ESI which “impair[s] the ability to go to trial” or “threatens to interfere with the rightful decision of the case.”¹⁹⁷ The allocation of the burden of “proving or disproving prejudice” is left to the discretion of the judge.¹⁹⁸ According to the Committee Report, “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.”¹⁹⁹

The Committee Note observes that when it is difficult to determine the content of missing ESI, placing the burden on moving parties to demonstrate prejudice can be fair in some circumstances and not in others.²⁰⁰ As in the case of establishing relevance, however, “conjecture does not constitute evidence.”²⁰¹

Courts may choose from a broad range of measures provided they are “no greater than necessary to cure the prejudice.”²⁰² This may include “forbidding the party that failed to preserve information from putting on certain evidence” or excluding a specific item of evidence to “offset prejudice caused by failure to preserve other evidence.”²⁰³ The Note also mentions submittal of evidence and argument to the jury regarding the failure to preserve and “instructions to assist in its evaluation of such evidence, other than instructions to which subdivision (e)(2) applies,”²⁰⁴ if no greater than necessary to cure prejudice.²⁰⁵

¹⁹⁶ Committee Note, 45. See also John W. Griffin Jr., *A Voice for Injured Plaintiffs*, August 2015 TRIAL, 20 & 22 (“[i]n the end, the committee preserved the rights of district court judges to remedy the negligent spoliation of evidence”).

¹⁹⁷ *Burton v. Walgreen*, 2015 WL 4228854, at *3 (D. Nev. July 10, 2015)(failure to preserve did not “prejudice plaintiff’s ability to prove causation”).

¹⁹⁸ Committee Note, at 43.

¹⁹⁹ June 2014 RULES REPORT, *supra* n. 2, at III (D).

²⁰⁰ Committee Note, 43 (the content may be fairly evident or there may be enough information from other sources to meet the needs of the parties).

²⁰¹ *Yoder & Frey Auctioneers v. EquipmentFacts*, 774 F.3d 1065, 1071 (6th Cir. 2014)(affirming denial of sanction request for failure to show relevance of missing ESI to contested issues).

²⁰² Rule 37(b)(2)(A), for example, refers to the (i) establishing of designated facts as established; (ii) precluding support of claims or defenses or introduction of evidence; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing the action in whole or in part; (vi) rendering default judgment; or treating failure to obey an order as contempt of court.

²⁰³ Committee Note, 44. See, e.g., *Jones v. Bremen High School*, 2010 WL 2106640, at *9-10 (N.D. Ill. 2010)(refusing to impose adverse inference since no showing of purposeful destruction but precluding arguments to jury based on absence of emails for period of inadequate preservation as well as costs of preparation of motion for sanctions to “remedy plaintiff’s prejudice”).

²⁰⁴ *Id.*

²⁰⁵ Committee Note, 46. See, e.g., *Russell v. U. of Texas*, 234 Fed. Appx. 195, 208 (5th Cir. June 28, 2007) (“the jury heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit”).

The Committee Note is silent, however, on authority to shift attorney fees to “cure” prejudice under subsection (e)(1). The significance of the silence is unclear, given its inclusion in earlier drafts of the revised rule.²⁰⁶ Some courts appear to fees shifting is routinely available as a form of monetary sanction and the silence may reflect the fact that the remedy is so common as to not warrant further mention.²⁰⁷ It may also, however, reflect historic concerns about fee-shifting in the absence of a showing of bad faith.²⁰⁸

In any event, care must be taken, however, that measures imposed under subdivision (e)(1) do not have the same effect of measures listed in subdivision (e)(2) without a finding of “intent to deprive another party of the lost information’s use in the litigation.”²⁰⁹ The Note cautions that the authority to do so “does not require the court” to cure every possible prejudicial effect and “[m]uch is entrusted to the court’s discretion.”²¹⁰

It would be inappropriate to preclude a party from offering any evidence in support of the “central or only claim or defense in the case” because of the cabining of such case-dispositive measures without a subdivision (e)(2) culpability finding.²¹¹

Subdivision (e)(2): Cabining Harsh Measures

Subdivision (e)(2) limits court authority to impose harsh and potentially case determinative measures by requiring a showing of specific intent. A party must have “acted with the intent to deprive another party of the information’s use in the litigation” 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.

The purpose of subsection (e)(2) is to achieve a uniform and predictable national rule, akin to the approach historically used in some Circuits,²¹² in order to help reduce the *in terrorem* effect of the threat of harsh sanctions for unintentional spoliation. Thus, after Subdivision (e)(2) goes into effect, case law which permissive and mandatory adverse

²⁰⁶ See Proposed Rule 37(e), Subcommittee Report (circa March 2014) at 15-16, 2014 Rules Committee Agenda Book, 383-384 of 580 (“measures no greater than necessary to cure the loss of information, including . . . ordering the party to pay the reasonable expenses caused by the loss, including attorney’s fee”). The draft Note described such expenses as relating to discovery efforts relating to the failure to preserve. *Id.* at 19.

²⁰⁷ Discovery Subcommittee Minutes, March 4, 2014, 4 (“we could leave it alone [even though it does not cure prejudice]” since it is a “commonplace measure”).

²⁰⁸ See, e.g., *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991)(attorney fees are available only when “a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons”).

²⁰⁹ Committee Note, 40.

²¹⁰ Committee Note, 44.

²¹¹ *Id.*

²¹² See *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013)(destruction “for the purpose of hiding adverse information”).

inferences without a heightened showing of intentional conduct will no longer be good law.²¹³

The subdivision does not explicitly require a showing of prejudice as is the case in subdivision (e)(1). The Committee Note explains that prejudice may be inferred from the enhanced culpability showing.²¹⁴ As discussed below (*See* “Prejudice”), however, it is clear that prejudice remains an important threshold requirement of the authority to issue case-dispositive measures.

Even when the requisite “intent to deprive” exists, however, “[t]he remedy should fit the wrong.” The least onerous sanction corresponding to the culpability and prejudice suffered should be employed. The Committee Note cautions that severe measures should not be used if lesser measures would be sufficient to redress the loss.²¹⁵

Intent to Deprive

Subdivision (e)(2) rejects the logic in *Residential Funding*²¹⁶ that a showing of negligent preservation behavior (or even grossly negligent conduct) is a sufficient showing of intent to justify an adverse inference jury instruction.²¹⁷ The Rules Committee concluded that negligent or grossly negligent conduct does not supply sufficient indicia of knowledge of an impropriety to constitute an evidentiary admission based on consciousness of guilt.²¹⁸ It is not present when a party is “disorganized, or distracted, or technically challenged, or overextended.”²¹⁹

Accordingly, a showing of proof of intent to deprive” requires evidence of purposeful conduct to deprive the other party of relevant and discoverable evidence.²²⁰ A

²¹³ Examples of rulings from a random sample of 2013 decisions include: *Gatto v. United Air Lines*, 2013 WL 1285285, at *4 (D.N.J. 2013)(court not persuaded that evidence was “intentionally suppressed”); *Food Services v. Carrington*, 2013 WL 4507593, at *21 (D. Ariz. 2013)(adverse inference imposed even if party “did not intend to deprive an opposing party of relevant evidence”); *Zest IP Holdings v. Implant Direct Mfg*, 2013 WL 6159177, at n.6 & *9 (“unsure” if party acted intentionally but was “at least” negligent); *Montoya v. Orange Co. Sheriff’s Dept.*, 2013 WL 6705992, at *13 (C.D. Cal. Dec. 19, 2013)(“no suggestion of bad faith or deliberate destruction of evidence”).

²¹⁴ Committee Note, 47

²¹⁵ Committee Note, 47.

²¹⁶ *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). The court adopted the logic that it made “little difference” to the party that did not have access to the information whether it was done “willfully or negligently.” *Id.* at 108.

²¹⁷ Committee Note, 45 (the rule “rejects cases such as *Residential Funding Corp.*”).

²¹⁸ Committee Note, 45 (“negligent or even grossly negligent behavior does not logically support that inference”).

²¹⁹ *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 526 (D. Md. Sept. 9, 2010).

²²⁰ *Rimkus Consulting v. Cammarata*, 688 F. Supp.2d, 598, 647 (S.D. Tex. Feb. 19, 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*”).

finding of reckless²²¹ or willful conduct is not enough²²² since neither requires an intent to deprive another party of the evidence.²²³ As one observer has pointed out, it “is the toughest standard to prove that the Advisory Committee could have adopted.”²²⁴

A finding of “intent to deprive” may be made by the court or the jury²²⁵ and may be inferred where the totality of the circumstances warrant such a finding. However, courts should not merely change their characterization of the underlying conduct to conform to the new rule.²²⁶

Jury Instructions

Subsection (e)(2) limits the use of jury instructions in the absence of “intent to deprive” when the instruction “directs or permits the jury to infer” that lost ESI was unfavorable to the party that lost it.²²⁷ According to the Committee Note, however, absent such an pointed instruction, courts may permit juries to hear spoliation evidence and receive the functional equivalent of a permissive instruction through competing arguments by counsel.²²⁸

This reflects existing practice in many courts. Some interpret the Committee Note as encouraging use of juries to make all factual findings, including whether spoliation has occurred and whether the missing ESI was unfavorable.²²⁹ However, “[o]nce a jury is informed that evidence has been destroyed, the jury’s perception of the spoliator may be unalterably changed.”²³⁰ An adverse inference instruction “may tip the balance in ways

²²¹ As one Committee Member put it “[n]ot even [a] reckless loss will support those measures.” Minutes, April 2014 Rules Committee Meeting, 18 (lines 785-786).

²²² *Sherwin-Williams v. JB Collision Services*, 2015 WL 4077732, at *4 (S.D. Cal. July 6, 2015)(“suspicion notwithstanding” the court “cannot conclude that [the party] acted with intentional bad faith”).

²²³ *Victor Stanley, supra*, 269 F.R.D. at 530 (to find “willfulness,” it is sufficient that the actor merely intended to destroy the evidence”).

²²⁴ Patricia W. Moore, *Civil Procedure & Federal Courts Blog*, September 12, 2014.

²²⁵ Committee Note, 47 (the jury must first find that the party acted with the intent to deprive another party of the information’s use in the litigation).

²²⁶ *See, e.g., HM Electronics v. R.F. Technologies, supra*, 2015 WL 4714908, at *12 & *30 (S.D. Cal. Aug. 7, 2015)(acknowledging that the new Rule does not require perfection but imposing adverse inference because “even if [revised Rule 37(e) applied] the Court would reach the same result”).

²²⁷ Committee Note, 46.

²²⁸ *See, e.g., Savage v. City of Lewisburg, Tenn.*, 2014 WL 6827329, at *3 (M.D. Tenn. Dec. 3, 2014)(“Plaintiff may argue that the jury should infer that the unavailable audio recordings contain evidence that Plaintiff’s fellow patrol officers failed to provide her adequate backup assistance after she filed sexual harassment complaints”).

²²⁹ Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 *FORDHAM L. REV.* 1299, 1315 (2014)(the rule does not prohibit a “Mali-type permissive instruction [*Mali v. Federal Insurance*, 720 F.3d 387 (2nd Cir. 2013)] that leaves all factual findings, including whether spoliation occurred, to the jury”).

²³⁰ *Gorelick et al., Destruction of Evidence §. 2.4* (2014)(“DSTEVID s 2.4).

the lost evidence never would have”²³¹ and impose a “heavy penalty for losses” of ESI, creating “powerful incentives to over-preserve, often at great cost.”²³²

Courts must be especially vigilant, therefore, to ensure that engaging the jury does not unduly prejudice²³³ or distort the trial on the merits.²³⁴ FRE 403 cautions that exclusion of evidence is necessary where there is a danger of undue prejudice, confusing the issues and misleading the jury. In *Decker v. GE Healthcare*, for example, instructions were refused because to do so would give the issue “a lot more importance that it has had in this trial.”²³⁵

The experience in the recent *Actos* litigation illustrates the risks when a jury is given carte blanche. The jury was allowed “to hear all evidence and argument establishing and bearing on the good or bad faith” of a party’s conduct²³⁶ and was subsequently instructed that in considering punitive damages, it should consider “the degree of concealment or covering up of the wrongdoing.”²³⁷ It was also instructed that “spoliation occurred in this case” and that it was “free to infer [missing] documents and files would have been helpful” to the plaintiffs.²³⁸

The jury subsequently entered an award of compensatory damages of about \$1.5M and punitive damages of \$9B (later reduced to \$37M). In post-trial proceedings, the court held that it had not authorized the jury to sanction the parties via punitive damages although “[t]he jury was free to make its own inferences.”²³⁹

In contrast, the Texas Supreme Court held in *Brookshire Brothers v. Aldridge*²⁴⁰ that it was reversible error to introduce evidence of spoliation that was unrelated to the issues of the case.²⁴¹ It announced that when spoliation is at issue in Texas, the judge, not the jury, must determine if a party has spoliated evidence and, if so, the appropriate remedy.²⁴²

²³¹ Committee Note, 45.

²³² June 2014 RULES REPORT, *supra*, at III (E).

²³³ *Haley v. Kolbe & Kolbe Millwork*, 2014 WL 6982330, at *2 (W.D. Wisc. Dec. 10, 2014)(refusing to instruct a jury that a party had “breached their duty to preserve evidence” because “there would be no purpose [for it] except to invite the jury to draw such an [adverse] inference”).

²³⁴ GORELICK ET AL., DESTRUCTION OF EVIDENCE § 2.4 (2014) (“DSTEVID s 2.4”) (Once “a jury is informed [by the court] that evidence has been destroyed, the jury’s perception of the spoliator may be unalterably changed,” regardless of the intent of the Court).

²³⁵ *Decker v. GE Healthcare*, 770 F.3d 378, 397-98 (6th Cir. Oct. 20, 2014).

²³⁶ *In re Actos (Pioglitazone) Products Liability Litigation (“In re Actos”)*, 2014 WL 2872299 at *38 (W.D. La. Jan. 30, 2014)(filed June 23, 2014).

²³⁷ *In re Actos*, 2014 WL 5461859, at *2 (W.D. La. Oct. 27, 2014).

²³⁸ *In re Actos*, 2014 WL 2921653, at n. 2 (W.D. La. June 23, 2014).

²³⁹ *In re Actos*, 2014 WL 4364832, at *45 (W.D. La. Sept. 2, 2014)(refusing post-trial relief); *see also* *In re Actos*, *supra*, 2014 WL 5461859, at *55 (modifying punitive damages to \$28M against Takeda and \$9M against Lilly “to send a message” for “seriously reprehensible behavior”).

²⁴⁰ 57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9, 2014 WL 2994435 (S.C. Tex. July 3, 2014)(remanding for a new trial after jury verdict where the jury was allowed to hear evidence and argument about failure to preserve video footage and permitted to decide if spoliation occurred).

²⁴¹ *Id.* *29.

²⁴² *Id.* *20.

Prejudice

Subdivision (e)(2) cabins authority to impose severe measures under subdivision (e)(1) without mentioning the role of prejudice. The Committee Note provides, however, that prejudice may be inferred from the enhanced culpability showing and that no further showing is required.²⁴³ The apparent intent is to authorize use of harsh measures as punishment or a deterrent even if no prejudice exists.²⁴⁴

Some see this as a “change in the law,” since “[u]nder preexisting law, spoliation sanctions – especially the three most severe sanctions listed in subdivision (e)(2) – could issue only on a showing of prejudice.²⁴⁵ However, it is conceivable that subsection (e)(2) does not mention prejudice because it only addresses the existing Federal Circuit split on culpability, not all the elements needed to impose the measures.

The Standing Committee Report to the Judicial Conference,²⁴⁶ for example, describes the rule as “eliminating the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI.”²⁴⁷

It is possible that the underlying prejudice requirement highlighted in (e)(1) applies to all Rule 37(e) measures, as is the case under current case law.²⁴⁸ It is satisfied by a rebuttable presumption/inference when a party acts with “intent to deprive.” A spoliator who is completely successful in destroying all evidence of the contents of the missing ESI will be unable to overcome such a presumption/inference.

²⁴³ Committee Note, 47 (“the finding of intent required . . . can support not only an inference that the lost information was unfavorable to the party that intentionally lost 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.”)

²⁴⁴ The Committee sought to avoid the risk of “rewarding a party who has destroyed evidence so successfully that it leaves no evidence of its content.” Thomas Allman, *Standing Committee Oks Federal Discovery Amendments*, Law Technology News (Online), June 2, 2104 (available on LEXIS NEXIS), at 4 (according to discussion at Standing Committee Meeting of May 29, 2014, the authority to act under subsection (e)(2) is in “addition” to that of subdivision (e)(1) and is neither an “alternative” to nor a “subset” of it).

²⁴⁵ Greg Joseph, *New Law of Electronic Spoliation – Rule 37(e)*, 99 JUDICATURE __ (Forthcoming Winter 2015) (copy on file with author), at 18 (but noting a similar result in *Enmon v. Prospect Capital Corp.*, 675 F.3d 138 (2nd Cir. 2012).

²⁴⁶ *Id.* at 4.

²⁴⁷ Summary of the Report of the Standing Committee, ST09-2014, 16, reproduced in Rules Transmittal, *supra* n. 2

²⁴⁸ *Vicente v. Prescott, City of*, 2014 WL 3939277, at *10-11 (D. Ariz. Aug. 13, 2014)(refusing to consider sanctions where a “complete lack of prejudice” existed despite the fact that “preservation efforts were inadequate”).

APPENDIX
(Original Rule 37(e) Proposal 2013)

**Rule 37. Failure to Make Disclosures or to Cooperate in
Discovery; Sanctions**

* * * * *

~~(e) FAILURE TO PROVIDE 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 system,~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

(1) *Curative measures; sanctions.* If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b) (2) (A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the a claims in the litigation.

(2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good-faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

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