The 2015 Civil Rules Package As Transmitted to Congress

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The Duke Amendments

Rule 37(e)

I. Introduction

This Memorandum describes 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] A copy of the text of each of the 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.[3]

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

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[2] Transmittal Memo and Exhibits, April 29, 2015 (collectively referred to as the "Rules Transmittal"), copy at http://www.uscourts.gov/file/document/congress-materials. Citations to the text and Committee notes are to the internally numbered pages of the Memorandum dated September 26, 2014 which commences at (unnumbered) page 45. References to the Rules Committee Report of June, 2014 ("June 2014 RULES REPORT") are from the copy attached as an Appendix to the Standing Committee Report (ST09-2014), copy at http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014.

[3] The amendments "govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." Order, April 29, 2015.

the Committee on Rules of Practice and Procedure of the Judicial Conference (the "Standing Committee").

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."[4] A number of studies, surveys and empirical studies were submitted in advance and Panels discussed the relevant issues.[5]

Key "takeaways" were the need for improved case management, application of the long-ignored principle of "proportionality" and cooperation among parties in discovery.[6] 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."[7]

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, which focused on a replacement for Rule 37(e).[8] 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.[9] 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,[10] which approved the rules on their "consent calendar" and forwarded them to the Supreme Court for its review.[11]

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[4] Minutes, Rules Committee Meeting, April 20-21, 2009, at 30.
[5] Links to the submissions, together with the Conference Agenda, Panelists and Report to the Chief Justice are found at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.
[6] Report to the Chief Justice, September 10, 2010, copy at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil (scroll to Report to Chief Justice).
[7] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010).
[8] 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.
[9] The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules ("2013 PROPOSAL") is found at http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf.
[10] Report of Standing Committee, ST09-2014, *supra*, 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").
[11] *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.[12]

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.[13] 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.[14]

Expansive comments were provided by Lawyers for Civil Justice ("LCJ")[15] and the American Association for Justice ("AAJ," formerly "ATLA").[16] 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 advocacy groups and law firms as well as attorneys and representatives of advocacy groups for individual claimants.

Members of the academic community were also active in their comments during and after the hearings. Commentators from the plaintiffs' bar described the "extremely antipodal responses" as attributable to the lack of merits of the proposals and described doubts expressed by some academics about whether those advocating changes were being candid about their motives.[17]

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

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[12] 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.

[13] Transcripts of the three are available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees.

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

[15] LCJ Comments, August 30, 2013, copy 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.

[16] AAJ Comments, December 19, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372.

[17] 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"), 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.

This Memorandum

The intent of this Memorandum is to illustrate the evolution and impact of the new rules in the context of current case law. We turn first to the proposals loosely described as the "Duke" amendments.

II. The "Duke" Amendments

The Duke Subcommittee was primarily responsible[18] for developing rule-based proposals other than those dealing with pleadings or the replacement for current Rule 37(e).[19] It worked from suggestions floated at the Duke Conference and developed additional ones, which were whittled down as needed.

(1) Cooperation (Rule 1)

Rule 1 speaks of the need to achieve the "just, speedy, and inexpensive determination of every action and proceeding."

It is proposed to amend Rule 1 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.[20]

The Note further observes that "most lawyers and parties cooperate to achieve those ends" and that it is important to discourage "over-use, misuse, and abuse of procedural tools that increase cost and result in delay." It also states that "[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."[21]

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

[18] A separate Rule 84 ("Forms") subcommittee functioned during the relevant period and its recommendations were folded into the Duke proposals as the process evolved.
[19] Minutes, Rules Committee Meeting, November 7-8, 2011 ("Pleading issues have been left on a separate track, and issues relating to preservation and spoliation of discoverable information have been left with the Discovery Subcommittee. This Subcommittee deals with the 'great other'").
[20] Committee Note, 2.
[21] Committee Note, 1-2.

1.[22] The concept was deemed to be "too vague, and thus fraught with the mischief of satellite litigation."[23] A similar attempt was rejected in 1978.[24]

Cooperation in achieving the goals of Rule 1 had been emphasized at the Duke Conference, having assumed prominence as a result of the Sedona Conference® Cooperation Proclamation.[25] It was argued that cooperation could go a long way towards achieving proportional discovery and reducing the need for judicial management. Many local rules[26] and other e-discovery initiatives[27] invoke cooperation as an aspirational standard.

The difficulty with adding "cooperation" to the text of Rule 1 was the possibility of "collateral consequences."[28] It is unclear whether "cooperation" means something more than a willingness to take opportunities to discuss defensible positions in good faith[29] – in short, whether it mandates compromise.[30] Some questioned whether "cooperation" included an obligation to settle on reasonable terms, as considered by a court,[31] and the experience with mandated cooperation is not favorable.[32]

Public Comments

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.[33] Others, however, suggested that "cooperation" should be incorporated in the Rule.[34] The Sedona Conference® was not among them, having concluded that language along the lines of the Committee proposal would be sufficient.[35]

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[22] Duke Subcommittee Conference Call Notes, 9, October 22, 2012), copy at https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf.
[23] *Id.*
[24] 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).
[25] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[26] *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").
[27] *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]).
[28] Minutes, November 2012 Rules Committee Meeting, at lines 616-622.
[29] Gensler, *supra*, at 546 (the correctness of the inference "turn[s] on the definition of cooperation").
[30] *Id*. (the view that cooperation means "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).
[31] Initial Sketch (2012), *supra*, n. 59.
[32] Richard Marcus, Cooperation and Litigation: Thoughts on the American Experience, 61 KANSAS LAW REVIEW 821, 827- 839 (2013)("The Challenges of Mandated Cooperation").
[33] LCJ Comment, *supra*, August 30, 2013, at 20.
[34] Transcript of Testimony, Ariana Tadler, Milberg LLP, February 7, 2014 (personal views of former Chair, Sedona Conference WG1) at 328.
[35] 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").

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.[36] 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."[37]

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

A series of amendments will help ensure that judges "manage [cases] early and actively."[38]

Timing (Service of Process) (Rule 4(m))[39]

The time limits in Rule 4(m) governing the service of process are to be reduced in number from 120 to 90 days. The intent is to "reduce delay at the beginning of litigation."[40] The 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~~.[41]

Default Judgment

The interplay between Rules 54(b), 55(c) and 60(b) is to 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

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[36] 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 at B-13 ("[o]ne concern was this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate").
[37] Committee Note, 2.
[38] June 2014 RULES REPORT, B-12.
[39] For changes to Rule 4(d), see Subsection (7).
[40] Committee Note, 4.
[41] The 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. Rule Transmittal, *supra*, n. 2 (at unnumbered page 129 of 144).

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.[42]

Scheduling Conference

Rule 16(b)(1) will be modified by striking the reference to conducting scheduling conferences by "~~telephone, mail, or other means~~" so as 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."[43]

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 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.[44]

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."[45]

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 ESI, Rule 16(b)(3)(B)(iii) will permit an order to provide for "disclosure, ~~or~~ discovery, or preservation" of ESI.

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[42] Committee Note, 25.
[43] *Id.*, 7 (excluding the use of "mail" as a method of exchanging views).
[44] *Id.*, 8.
[45] *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 premotion conferences to resolve discovery disputes).

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." 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. The Note also opines that "[p]reservation orders may become more common" as a result of the encouragement to address preservation.

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.

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

Rule 26(b)(2)(C)(iii) and its predecessors have long required federal courts to limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit," considering "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues." It is one of three primary limitations on discovery which courts are mandated to apply.[46]

The advent of e-discovery brought new prominence to this "proportionality" requirement. The American College of Trial Lawyers ("ACTL") and the Institute for the Advancement of the American Legal System ("IAALS") conducted a survey of ACTL members which emphasized inadequacies in proportionality implementation and helped prompt the scheduling of the Duke Conference in May 2010.

The ACTL/IAALS Pilot Project Rules,[47] as well as other submissions, provided examples of possible rulemaking approaches to the topic.

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[46] Subdivisions (i) and (ii) of Rule 26(b)(2)(C) require, respectively, that courts limit discovery if the request is "unreasonably cumulative or duplicative" or if the requesting party has had "ample opportunity to obtain the information by discovery."

[47] Pilot Project Rules, ACTL & IAALS (2009), PPR 1.2 (Scope)("the process and costs [must be] proportionate to the amount in controversy and the complexity and importance of the issues") and PPR 10.2 (Discovery)("discovery must . . . comport with the factors of proportionality in PPR 1.2), copy at

Thus, the role of proportionality - and complaints that it had not reached its full potential to reduce discovery costs - played a prominent role in discussions and presentations at the Duke Conference. There was "near-unanimous agreement" that the disposition of civil actions could be improved by advancing, *inter alia*, "proportionality in the use of available procedures."[48]

Competing surveys and opinions were offered on the topic, however, including an FJC survey which suggested that discovery was proportional to the needs of the case in most instances.[49]

After the Conference, the Subcommittee concluded that inclusion of proportionality "as part of Rule 26(b)(1)" might be of some help, since "discovery can run beyond what is reasonable."[50] It ultimately recommended moving the proportionality factors from their current location into Rule 26(b)(1).[51]

The Initial Proposal

Thus, the Committee proposed that Rule 26(b)(1) provide that "[p]arties 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 incorporated list of factors]." Rule 26(b)(2)(C)(iii) was also amended to require courts to limit the frequency or extent of discovery when "the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)."

The initial proposal included substantial deletions from the balance of Rule 26(b)(1). Perhaps the most important was the abrogation of the statement that "[r]elevant information need not be admissible at trial if [it] appears reasonably calculated to lead to admissible evidence," for which a clarifying substitute was provided. Also deleted was the authority to order discovery of any matter "relevant to the subject matter" and the examples of types of discoverable information.

Public Comments

The initial proposal kicked off a firestorm of opposition by plaintiff advocacy groups which viewed it as an unfair attempt to restrict discovery important to

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http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=4509.

[48] June 2014 RULES REPORT, B-5 (describing "widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case"), *see also* The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2d ed., June 2007) , copy at https://thesedonaconference.org/download-pub/81 (Principles 2 and 5).

[49] 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)(a "case-based finding that [discovery] costs are generally proportionate" to client stakes in the litigation).

[50] Minutes, Rules Committee, November 7-9, 2011, 8.

[51] Duke Conference Subcommittee Call Notes, October 22, 2012, 8.

constitutional, civil rights or employment claims. Concerns were expressed that characterizing proportionality as part of the scope of discovery would place the burden of justifying the request as proportional on the requesting party.[52]

The AAJ[53] expressed concern that the change would "fundamentally tilt the scales of justice in favor of well-resourced defendants" because a producing party could "simply refuse reasonable discovery requests" and force requesting parties to "*prove* that the requests are not unduly burdensome or expensive."[54] (emphasis in original).

Witnesses and commentators also challenged the assertion that discovery was typically excessive or out of control. Prof. Arthur Miller, for example, criticized the proposal as erecting "stop signs" to discovery without empirical evidence of a need to do so.[55] He also argued that the original formulation had treated proportionality as a mere "safety valve."

Some comments predicted that the change would trigger a massive increase in assertions of disproportionality and motions to compel, which would increase costs and likely deter filings in federal courts.[56]

The Revised Proposal

After close of the public comment period, the Rules Committee made modifications to the text of the Rule (the considerations are "slightly rearranged and with one addition")[57] and substantially rewrote the Committee Note.

Thus, as revised, Rule 26(b)(1) will permit a party to:

> [O]btain 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.

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[52] Minutes, April 10-11 Rules Meeting, at 3 (lines 108-109) (hereinafter "Minutes"), copy at http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2014#pagemode=bookmarks.
[53] AAJ Comment, *supra*, n. 16, December 19, 2013.
[54] *Id*., at 11.
[55] Prof. Miller has described the inclusion of proportionality in the 1983 rules ("on his watch") as based on merely "impressionistic" evidence of discovery abuse. *See* Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U.L. REV. 286, 354 & n. 261 (April 2013).
[56] Hon. Shira A. Scheindlin Comment, January 13, 2014, at 3.
[57] Committee Note, 17.

Changes in the Text

Two changes were made in the text. First, the "amount in controversy" factor was moved to a secondary position in the rule behind "the importance of the issues at stake in the action." Second, a new factor was added to require consideration of "the parties' relative access to relevant information" in order to deal with information asymmetry. A corresponding addition to the Note states that "the burden of responding to discovery lies heavier on the party who has more information, and properly so."[58]

Changes in the Committee Note

The Committee Note was revised to respond to "quite unintended interpretations of the proportionality proposal that have no basis" in the rule or Note.[59]

The Note explains that the present amendment "restores" the factors to their original place in defining the scope of discovery while "reinforcing" the Rule 26(g) obligation to consider them in making discovery requests, responses or objections. It does not "place on the party seeking discovery the burden of addressing all proportionality concerns." The parties and the court have a "collective responsibility" to consider the proportionality of discovery. Further, the rule is "not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."[60]

It was also pointed out during the Committee discussions that preceded adoption that the proposed revision to Rule 34 "requires that objections be specific."[61]

The Note also expands on the reasons for deletion of "subject matter" jurisdiction. The revised Note explains that "[t]he Committee has been informed" that it "is rarely invoked" and that proportional discovery suffices "given a proper understanding of what is relevant to a claim or defense."[62] A more complete explanation is also given for deleting examples of discoverable information.[63]

Finally, the Note explains deletion of the reference to discovery of relevant but inadmissible information which appears "reasonably calculated" to lead to discovery of admissible information. That phrase has been incorrectly used to describe the scope of

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[58] Committee Note, 21.
[59] Minutes, April 2014 Rules Meeting, at 4-5 (lines 176-177) (quoting Chair of Duke Subcommittee). A substantial part of the Committee Note traces the evolution of proportionality and quotes from the Committee Notes in 1983 and 1993 by way of background. *See* Committee Note, 17-19 & 21-22.
[60] Committee Note, 19.
[61] Minutes, April 2014 Rules Meeting, at 5 (lines 181-184).
[62] 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."
[63] Committee Note, 23 (there is no need to "clutter the long text" with examples which are "deeply entrenched in practice" and are permitted "when relevant and proportional to the needs of the case").

discovery. [64] It was never meant for that purpose; rather, it simply states that the inadmissibility of some evidence – such as hearsay – is not a grounds for withholding otherwise discoverable information.[65]

Assessment

On balance, the revisions appear to be "modest" adjustments which do not make a material change in existing obligations[66] but are ones that should help send "a clear message to the courts and litigants that pretrial discovery is subject to inherent limitations."[67] The burdens of proof involved remain the same as under current practice. While a party seeking discovery must demonstrate a facially relevant showing of proportionality if challenged, the party asserting disproportionality must demonstrate it by specific proof in order to prevail. [68]

By and large, the changes and clarifications appear to have largely muted criticism. The AAJ, for example, has spoken positively of "improvements" while continuing to have issues with the change in the scope.[69] A recent article in Trial, the AAJ magazine, concedes that there is a "mistaken belief that the changes dictate severe limitations on discovery."[70]

However, some critics continue to argue that the scope of discovery has been changed in material and unfair ways.[71] Others argue that the amendments are based on experiences in "atypical" cases and "will motivate withholding or not searching in situations where such behavior did not occur previously."[72]

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[64] Committee Note, 24. *See*, *e.g.* Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co., 297 F.R.D. 99, 102 (S.D. N.Y. Dec. 16, 2013)("To be relevant, the requested documents must at least "appear [ ] reasonably calculated to lead to the discovery of admissible evidence").
[65] Committee Note, 24.
[66] Craig B. Shaffer and Ryan T. Shaffer, Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure, 7 FED. CTS. L. REV. 178, 195 (2013)(the proposal will not "materially change obligations already imposed upon litigants, their counsel, and the court").
[67] Edward D. Cavanagh, The 2015 Amendments to the [FRCP]: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?, 13-APR ANTITRUST SOURCE 1, *9 (April 2014).
[68] 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").
[69] *See* AAJ Employment Rights Newsletter (2014)("[d]ue to your advocacy, the Standing committee unanimously voted to withdraw" the presumptive limits and recommended "improvements to the proposed amendments"), copy at https://www.justice.org/sections/newsletters/articles/aaj-members-influence-changes-federal-rules-civil-procedure.
[70] Altom M. Maglio, Adapting to Amended Federal Discovery Rules, TRIAL, 37, July 2015 ("the actual rule amendments do not support [the] perspective [of severe restrictions on discovery]").
[71] Patricia Moore, The Anti-Plaintiff Pending Amendments, 57, UNIV. OF CINCINNATI L. REV. (Forthcoming)(2015)((proportionality is now an element, not a limit, on the scope; subject matter discovery has been eliminated and the "reasonably calculated" test has been lost), copy at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621895.
[72] Suja A. Thomas and Dawson Price, How Atypical Cases Make Bad Rules, Vol. 15 Nevada Law Journal, 2014-15 (Forthcoming), copy at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563047 (Posted February 15, 2015).

Computer Assisted Review

The Committee Note was revised at the time of the Standing Committee meeting[73] to endorse use of "computer-based methods of searching" information to address proportionality concerns in cases involving large volumes of ESI. The Note states that "[c]ourts and parties should be willing to consider the opportunities" as "reliable means" of doing so become available."[74] This is intended to help reduce "possible proportionality concerns that might arise in ESI-intensive cases."[75] These include, for example, TAR methods ("technology assisted review or predictive coding").[76]

Thus, "at least in big cases," acceptance of TAR methods has meant that "formal document requests are becoming less and less relevant" and are displaced in pretrial conferences by discussions of custodians, sources of ESI and search methods.[77] In some cases, "human only review may become essentially impossible (and arguably inadequate, compared to machine-plus human review)."[78] This has led some courts to use resolution of "categorical document requests" as part of development of a "mutually acceptable ESI search regime."[79]

Impact on Preservation Obligations

Commentators, the Sedona Conference® Principles and emerging case law have acknowledged that proportionality considerations play an important role in assessing the scope of the duty to preserve. It would seem axiomatic, therefore, that to the extent the revised Rule 26(b)(1) limits the scope of discovery, the duty to preserve is similarly restricted. In a recent decision refusing adverse inferences for failure to preserve, for example, a court acknowledged the merit in limiting preservation to material "proportional to the litigation."[80]

The Committee Notes to Rules 26 and 37(e), however, ignore the implications of the changes to Rule 26(b)(1) in regard to preservation scope, despite fact that the Committee Note to the latter does explain that "perfection in preserving all relevant [ESI] is often impossible" and a "factor in evaluating the reasonableness efforts is proportionality."[81]

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[73] Minutes, Standing Committee Meeting, May 29-30, 2014, 4.
[74] Committee Note, 22. *See, e.g.,* Malone v. Kantner, 2015 WL 1470334, at n. 7 (D. Neb. March 31, 2015)(noting that "predictive coding" is being promoted as "not only a more efficient and cost effective method of ESI review, but a more accurate one").
[75] Minutes, Standing Committee, *supra*, 4.
[76] David J. Walton, Litigation and Trial Practice in the Era of Big Data, Litigation, Vol. 41, No. 4, 55 (Summer 2015)
[77] Id., 57.
[78] Steven C. Bennett, E-Discovery: Reasonable Search, Proportionality, Cooperation and Advancing Technology, 30 J. INFO. TECH. & PRIVACY L. 433, 441-442 (Spring 2014).
[79] Fort Worth Employees' Retirement Fund, *supra*, 297 F.R.D. 99, 104-104 (S.D. N.Y. Dec. 16, 2013).
[80] In re Ethicon, Inc., 299 F.R.D. 502, 518 (S.D. W. Va. Feb. 4, 2014)(applying broader scope voluntarily imposed by litigation hold).
[81] Committee Note, 41.

Related State Developments

Both Utah and Minnesota have included explicit consideration of proportionality concerns in their civil rules. Minnesota amended its Rule 1 to require "the process and the costs [of civil actions] are proportionate to the amount in controversy and complexity and importance of the issues" involved.[82] Utah integrated proportionality into the scope of discovery.[83] Pennsylvania also amended its commentary to emphasize that discovery is "governed by a proportionality standard" in order to achieve the "just, speedy and inexpensive" determination of litigation.

(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 36[84] in order to "decrease the cost of civil litigation, making it more accessible for average citizens."[85] An earlier proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.[86]

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;
- Rule 36 (new): No more than 25 requests to admit.

However, the proposals encountered "fierce resistance"[87] on grounds that the present limits worked well and that new ones might have the effect of limiting discovery unnecessarily.[88] 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.[89]

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[82] MN. 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 [as listed]." MN. ST. RCP Rule 26.02(b)(2013).
[83] Utah 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").
[84] 2013 PROPOSAL, *supra*, n. 9 at 300-304, 305 & 310-311 [of 354].
[85] *Id.*, at 268.
[86] *Id.*, at 267.
[87] June 2014 RULES REPORT, B-4 ("[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect").
[88] A detailed CCL Report of May, 2014 summarizes the objections. *See* CCL Preliminary Report on Comments on Proposed Changes to [FRCP], May 12, 2014, 5; copy at http://www.cclfirm.com/files/Report_050914.pdf.
[89] Minutes, April 2014 Rules Committee Meeting, at 7 (lines 307-310).

After review, the Duke Subcommittee recommended[90] and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools. 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).[91]

At the Rules Committee meeting where the withdrawal of the proposal was announced, the hope was expressed 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."[92] 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.[93]

(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").[94] Recent scholarship pegs the costs of search and review as the largest component of discovery costs, at least in larger cases.[95]

While a partial draft along those lines[96] was circulated, the subcommittee was not enthusiastic about cost-shifting and declined 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."[97] 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."

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[90] 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.

[91] *See, e.g.*, Proposed Rule 30(a)(2)("the court must grant leave [for additional depositions] to the extent consistent with Rule 26(b)(1) and (2)").

[92] Minutes, Rules Committee Meeting, April 10-11, 2014, at lines 308-314.

[93] June 2014 RULES REPORT, B-4.

[94] 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).

[95] 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.

[96] 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]"); copy at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012 (beginning at 375 of 644).

[97] Initial Rules Sketches, at 37, as modified after Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.

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."[98] There is well-established Supreme Court support for the statement.[99]

After public comments that the addition to Rule 26(c) would garner "undue weight,"[100] the Note was amended to add that it "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."[101]

Some argued that this prejudged any continuing study of "requester pays" proposals. The Chair of the Subcommittee stated that the work of the Committee will continue, but "it will not be easy."[102] The Committee has recently indicated that it continues to have the 'requester pays' topic on its agenda.[103]

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

It is proposed to amend Rule 34 and 37 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.[104] As the Committee Note observes, it is a "common practice" to produce copies of documents or ESI "rather than simply permitting inspection."[105]

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[98] Committee Note, 25.
[99] 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.
[100] 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").
[101] Committee Note, 25.
[102] Minutes, April 2014 Rules Meeting, 6 (lines 234-238).
[103] 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); copy at http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2015 (scroll to 171-175 of 504).
[104] 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'").
[105] *Id.*, 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. Sept. 17, 2014).

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]."[106]

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."[107] 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."[108] The AAJ, among others, hailed this as an "extremely positive new change" which should substantially reduce stonewalling on the issue.[109]

The requirement is inapplicable when the responding party does not know whether anything has been withheld beyond the search made.[110] 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.[111] 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 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."[112] The phrase "[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]" will appear in place of the current text of Rule 84[113] and the separate list of "Appendix of Forms." Alternative sources of civil procedure forms will be available from a number of sources.[114] At the Supreme Courts' suggestion,[115] the

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[106] Committee Note, 33.
[107] The new language continues to be followed by the current requirement that "[a]n objection to part of a request must specific the part and permit inspection of the rest."
[108] Committee Note, 34.
[109] Arthur Bryant, Access to Justice at Stake with Federal Rule Changes, June 5, 2014, copy at https://www.justice.org/blog/access-justice-stake-federal-rules-changes.
[110] Minutes, April 2014 Rules Meeting, at 7 (lines 276-285).
[111] Committee Note, 34.
[112] See generally, material at Committee Note, 52-57.
[113] It currently states that "the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."
[114] Committee Note, 49.
[115] Memorandum, April 2, 2015, Judicial Conference to Supreme Court, Rules Transmittal, *supra*, n. 2, at 129 of 144.

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.

As the Committee Report put it, it is time "to get out of the forms business."[116] It rejected concerns that abrogation was inappropriate under the Rules Enabling act.[117] 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."[118]

III. Rule 37(e)

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

The Federal Rules do not deal explicitly with preservation and spoliation issues, including pre-litigation failures to preserve. Relief under Rule 37(b) and (d), the most likely applicable rules for spoliation sanctions, is unavailable unless a prior order has been violated.[119] An effort in 2006 to address some issues involving ESI led to current Rule 37(e), which was understood to be only a starting point given the explosion of electronic discovery.[120]

In its current form, Rule 37(e) provides that:

> (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.

The rule addresses only sanctions based on violations of existing rules, leaving it open to courts to avoid its terms by use of inherent authority. The various Federal Circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information, causing confusion and contributing to over-preservation.[121]

At the 2010 Duke Conference, the E-Discovery Panel at the Duke Conference recommended adoption of a uniform national rule spelling out preservation and spoliation

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[116] June 2014 RULES REPORT, B-19.
[117] Excerpt, September 2014 Report of the Judicial Conference, at (unnumbered) page 107 of 144 of Rules Transmittal, *supra*, n. 2.
[118] *Id.*
[119] *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").
[120] According to the June 2014 Rules Report, "[t]he Committee recognized in 2006 that the continuing expansion of ESI might provide reasons to adopt a more detailed rule"). June 2014 RULES REPORT, B-14.
[121] Committee Note, 38 ("[t]hese developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough").

requirements.[122] After the Conference, the Committee concluded that such a rule would be helpful to organizations seeking to understand their obligations, but acknowledge that the "collective angst" behind over-preservation would be difficult to deal with by rule-making.[123]

After the Conference, the Discovery Subcommittee developed several alternative rule proposals which would have explicitly articulated preservation obligations.[124]

The Initial Proposal

After vetting possible alternatives at an October 2011 Mini-Conference, the Committee decided to pursue a "sanctions-only" approach. It concluded that drafting a preservation rule, either "in detail or by simply exhorting reasonable behavior," was too difficult and could "easily be superseded by advances in technology."[125]

The initial Rule 37(e) proposal, as released in 2013, applied to losses of any form of discoverable information which "should have been" preserved, invoking a common law standard.[126] If a breach of duty existed, a court could choose to impose additional discovery, apply "curative measures" or require payment of attorney fees caused by the failure to preserve. No showing of prejudice or culpability was required.

In addition, a court could impose any "sanction" listed in rule 37(b)(2)(A) or "an adverse-inference jury instruction," *but only if* a party's actions caused "substantial prejudice" in the litigation *and* was the result of "willful or bad faith" conduct *or* "irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation. The proposal also included a list of "factors" for courts to consider.[127]

Public Comments

The need for a uniform national rule on culpability to resolve the Federal Circuit split was widely accepted among witnesses at the public hearings, but opinions differed sharply about its optimal content.[128]

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[122] "Elements of a Preservation Rule," E-Discovery Panel, copy 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).

[123] Minutes, Rules Committee Meeting, November 15-16, 2010, 14-16.

[124] Proposed Rule 26.1 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.

[125] Minutes, Rules Committee Meeting, March 22-23, 2012, 15-16.

[126] 2013 PROPOSAL, *supra*, n. 9, Rule 37(e)(1).

[127] *Id*., Rule 37(e)(2)(Factors A-E).

[128] The Reporter has made a valiant and largely successful effort to summarize the content of the testimony and (most) of the written comments. *See* 2013-2014 Public Commentary on Proposed Rule 37(e), in Agenda Book, April 2014 Rules Committee Meeting, beginning at pages 453.

Some witnesses were unequivocal in their support. However, others questioned the efficacy of the listed "factors" in assessing conduct and questioned the use of "willfulness" as the test for a meaningful limitation on sanctions. In some jurisdiction, a party acts "willfully" if it merely acts intentionally - quite apart from the purpose of the action.

The imposition of sanctions based solely on a showing of "irreparable" deprivation also drew criticism as having the potential to "swallow" the rule,[129] prompting some to suggest that it should be dropped and the rule confined to ESI.

There was also opposition to any revisions to current Rule 37(e), given that it had only been adopted in 2006. Some argued that there was no demonstrable need to act since sanctions represented a significant threat only to those who failed to make reasonable and good faith efforts to comply.[130] A prominent District Judge argued that enactment of the proposal would only "encourage[s] sloppy behavior.[131]

Others urged a focus on "curative measures" in the absence of bad faith.[132] It was also noted, however, that a focus on "curative measures" logically required some prior showing of prejudice.[133]

The Revised Proposal

After close of the public comment period, the initial proposal was unceremoniously scrapped in favor of a revised version developed by the Subcommittee and amended shortly before the April 2014 Rules Committee meeting at which it was adopted.[134] As explained by the Subcommittee Chair, the initial proposal was "not the best that we can do."[135]

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[129] The Committee considered (but eventually dropped) conditioning the availability on a minimal showing of "negligent or grossly negligent" conduct. Thomas Y. Allman, Digital Discovery & e-Evidence, 13 DDEE 9, April 25, 2013, copy at http://www.theediscoveryblog.com/wp-content/uploads/2013/06/2013RulePackageBLOOMBERGBAsPublished1.pdf.

[130] Milberg LLP and Hausfeld LLP, E-Discovery Today: The Fault Lies Not in Our Rules, 4 Fed. Cts. L. Rev. 131, 182 (2011).

[131] 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")(Scheindlin, J).

[132] Hon. James C. Francis IV, letter to Rules Committee, 5-6 (January 10, 2014), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_usdc_southern_district_of_new_york__james_francis_1_10_14.pdf (proposing that Rule 37(e) authorize remedies "no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith").

[133] John K. Rabiej, Director, Duke Law Center for Judicial Studies, September 11, 2013 (noting that "it seems a bit odd not to refer to a prejudice standard for a curative measure").

[134] *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/.

[135] Minutes, Rules Committee Meeting, April 10-11, 2014, 12 (lns. 507-508) (quoting Grimm, J.)("hereinafter Minutes, April 2014 Rules Committee Meeting"). A contemporaneous draft copy is at http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2014#pagemode=bookmarks.

The revisions were developed after numerous meetings of the Subcommittee held over several months. It was concluded that the complexities involved warranted confining the rule to losses of ESI, thus leaving other preservation losses to existing case law.[136]

In addition, the potential savings from a reduction in the risk of sanctions (to address over-preservation) were not seen as justifying broad limitations on court discretion.[137] As a result, the heightened culpability standard became a "rifle shot" aimed at *Residential Funding* logic[138] only as to harsh measures with case-terminating potential.

As revised, Rule 37(e) provides:

> [Rule 37](e) 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 Rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used,"[139] thus addressing one of the principal criticisms of current Rule 37(e).[140]

Breach of Duty

Rule 37(e) is applicable to losses of ESI which "should have been preserved." Unless the loss occurred in "anticipation of litigation" then what "should have been preserved" is a matter of business judgment. The rule does not apply when information is lost before a duty to preserve arises.

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[136] Id., at 12 ("[t]he Subcommittee simply could not draft a rule that provided meaningful guidance and at the same time applied fairly to the wide variety of civil cases filed in federal court").
[137] Subcommittee Report, 4 (2014), April 2014 Rules Committee Agenda Book (at 372)(witnesses critical of high costs of preservation were unable to "provide any precise prediction of the amount that would be saved by reducing the fear of sanctions").
[138] Residential Funding Corp v. DeGeorge, 306 F.3d 99, 108 (2nd Cir. Sept. 26, 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).
[139] Committee Note, 38.
[140] An excellent summary of the limitations in the current rule is found in Phillip Favro, The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments (hereinafter "Favro"), 21 RICH. J. L. & TECH. 8, ¶¶ 4-9 (2015).

As is the case today, in order to show a breach of duty, a party seeking redress must demonstrate that the contents of the missing ESI would have been both relevant to the claims or defenses in the action and favorable to it.[141] The framework for analysis will involve the common law, which varies among the Circuits. However, a court may not act to impose any of the remedies authorized unless the loss was caused by a failure to take "reasonable steps," a requirement which itself "embrace[s] a form of 'culpability.'"[142]

Courts will weigh a hybrid of common law and committee guidance, including many of the "factors" listed in the initial proposal, now embedded in the Committee Note. A case by case approach is required without blind adherence to "bright-line" rules,[143] an evolution consistent with the emerging case law.[144] A guiding principle is that the Rule "should not be a strict liability rule that would automatically impose serious sanctions if information is lost."[145]

The Committee Note explains that perfection is not expected in dealing with preservation efforts.[146] Similar tolerance of imperfect accomplishment while taking reasonable steps exists in other contexts.[147] The rule also subsumes the similar Rule 37(e) exemption from sanctions for "routine, good faith" loss of ESI due to information system operations.[148]

Language in the original Committee Note for Rule 37(e)(2006) implied a *per se* approach,[149] however, and some courts see that as justifying use of bright-line standards.[150]

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[141] Automated Solutions v. Paragon Data, 756 F.3d 504, 514 (6th Cir. June 25, 2014)(party seeking sanctions must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction).

[142] Minutes, April 10-11, 2014 (quoting Judge Grimm)(at lines 940-943).

[143] *Compare* Apple v. Samsung, 888 F. Supp.2d 976, 991-992 (N.D. Cal. Aug. 21, 2012) where a district court held that a failure to suspend any applicable policy involving deletion was a per se of breach of duty) with Automated Solutions, *supra*, 756 F3d at 516 (2014)("we have declined to impose bright-line rules, leaving it to a case-by-case determination of whether sanctions are necessary").

[144] *See e.g.*, Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. July 12, 2012)("[we] reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*. *Contra* Pension Comm.").

[145] Minutes, May 2014 Standing Committee Meeting, 6, (Campbell, J.)(the "reasonable steps" language is intended to emphasize rejection of strict liability).

[146] Committee Note, 41 ("[t]his rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection").

[147] Thomas Y. Allman, 'Reasonable Steps': A New Role for a Familiar Concept, December 18, 2014, 14 DDEE 591 (parties that take "reasonable steps" to make compliance programs effective are entitled to benefits under the U.S. Sentencing Guidelines even when efforts fail to prevent breaches).

[148] *See, e.g.*, Federerico v. Lincoln Military Housing, 2014 WL 7447937, at *9-10 (E.D. Va. Dec. 31, 2014)(sanctions for loss of text messages after duty to preserve attached precluded by Rule 37(e) where due to routine operation of serve provider or routine good-faith maintenance of cell phones).

[149] Rules Transmittal, 234 F.R.D. 219, 374 (Adm. Off. U.S. Courts 2006)("intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold'").

[150] *See, e.g.*, Skyline Steel v. Pilepro, 2015 WL 1881114, at *12, n. 8 (S.D. N.Y. April 24, 2015)(citing the 2006 Committee Note in finding breach of duty to preserve ephemeral data ordinarily overwritten within one week in the absence of specific request

That language has been tempered in the revised Committee Note to emphasize that perfection is not required, reflecting an intent to move past the era of *per se* standards.

An important factor is the proportionality of the preservation effort to the issues involved in the litigation,[151] as well as its good faith.[152] As noted in *Cache La Poudre v. Land O'Lakes*,[153] citing to the Sedona Conference® Principles, in the typical case "[r]esponding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving" their own ESI.[154]

Additional Discovery

If a breach of duty to preserve has been identified, the court must first determine whether "additional discovery" could mitigate the prejudice by restoring or replacing the missing ESI before invoking the authority to act under Rule 37(e). The Committee Note flatly states that "[i]f the information is restored or replaced, no further measures should be taken."[155]

This principle has solid roots in the common law. For example, in the *Delta/AirTran Baggage Fee litigation*, the court held that sanctions were not warranted because the parties were afforded the opportunity to depose all relevant Delta employees who may have played a role in the decisions at issue.[156] In the current era of storage of ESI in "common source" locations, shared areas and with email exchanges between multiple senders and recipients, many copies may be retrieved from other sources, including those otherwise "inaccessible."[157]

However, any additional discovery ordered should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.[158]

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[151] Committee Note, 41-42 *See also* The Sedona Conference® Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010)(Public Comment version); [Same] Interim Final version, 14 SEDONA CONF. J. 155 (2013).
[152] Mead v. Travelers, 2014 WL 6832914, at *2 (E.D. Pa. Dec. 4, 2014)(no sanctions based on automatic destruction of notice of intent to cancel where no evidence presented of bad faith conduct).
[153] 244 F.R.D. 614 (D. Colo. March 2, 2007).
[154] *Id*., 628 (citing to the Sedona Conference® Best Practice Recommendations & Principles for Addressing Electronic Document Production (2nd Ed. 2007), 31.
[155] Committee Note, 42. This is akin to results in cases such as In re Pfizer, 288 F.R.D. 297 (S.D. N.Y. Jan. 8, 2013) where "partially inadequate preservation efforts" were cured by additional efforts once other sources were identified. The court noted that although the efforts "may not have been perfect," Pfizer had "endeavored" to meet all its obligations. *Id*. 318.
[156] In re Delta/AirTran Baggage Fee Antitrust Litigation, 770 F. Supp.2d 1299, 1311 (N.D. Ga. Feb. 22, 2011).
[157] 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)
[158] Committee Note, 42.

Subdivision (e)(1)

In the event that "additional discovery" does not restore or replace the missing ESI, Subdivision (e)(1) authorizes a court to order curative measures *only* "upon finding prejudice to another from the loss of information."[159] The rule permits a court to "order measures no greater than necessary to cure the prejudice." The goal is the familiar one of restoring the prejudiced party to the same position it would have been in absent the failure to preserve the missing ESI.[160]

This also reflects the established principle that a failure to establish prejudice precludes a finding of spoliation and entitlement to sanctions.[161] Moreover, a finding of prejudice "does not require the court to adopt measures to cure every possible prejudicial effect."[162] The burden is on the moving party to demonstrate prejudice, unless the court determines otherwise in the exercise of its discretion. The Committee Note observes that placing the burden on moving parties can be fair in some circumstances and not in others.[163]

Courts may choose from a broad range of measures such as those listed in 37(b)(2)(A)[164] or craft a case-specific remedy, such as a monetary award designed to reduce financial prejudice. In most cases, this will mean an award of reasonable expenses, including attorneys' fees, as is common today.[165] It seems unlikely that imposing a "fine" to punish for failure to meet preservation obligations is authorized, since untethered to remediation of prejudice. [166]

The Committee Note explains, however, that it would be inappropriate to strike pleadings or preclude evidence of the "central or only" claim or defense in a case, given the limitations under Subdivision (e)(2). Measures which have the "effect" of the prohibited measures are themselves excluded.[167] In *Haley v. Kolbe & Kolbe Millwork*,[168] for example, a court refused to instruct a jury that a party had "breached their duty to

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[159] Committee Note, 43.
[160] West v. Goodyear Tire & Rubber, 167 F.3d 776, 779 (2nd Cir. 1999)(quoting from Kronisch v. United States, 150 F.3d 112, 126 (2nd Cir. 1998)).
[161] Eli Lilly and Company v. Air Express, 615 F.3d 1305, 1318 (11th Cir. Aug. 23, 2010)(the destroyed evidence must be "relevant to a claim or defense such that the destruction of that evidence resulted in prejudice").
[162] *Id.*, 44.
[163] *Id*., 43 ("[r]equiring the party seeking curative measures to prove prejudice may be reasonable" on other occasions).
[164] Rule 37(b)(2)(A) suggests (i) establishing 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.
[165] *See, e.g.*, Geiger v. Z-Ultimate Self Defense Studios, 2015 WL 176224 (D. Colo. Jan. 13, 2015)(awarding a "monetary sanction" because it was "impossible to fashion a proportional evidentiary sanction to address the spoliation").
[166] *Cf.* Passlogiz v. 2FA Technology, 708 F.Supp.2d 378, 422 (S.D. N.Y. April 27, 2010)(imposing a $10K fine payable to court to punish for failure to institute a litigation hold.)
[167] Committee Note, 44.
[168] 2014 WL 6982330, at *2 (W.D. Wisc. Dec. 10, 2014).

preserve evidence" since while technically not involving an adverse inference, "there would be no purpose [for it] except to invite the jury to draw such an inference."

The rule does not, however, exclude the introduction of evidence of spoliation at trial along with arguments of counsel, subject to jury instructions other than those prohibited by Subdivision (e)(2). According to the Committee Note, an instruction which merely allows a jury to consider spoliation evidence "along with all the other evidence in the case" does "not involve instructing a jury it may draw an adverse inference from loss of information" if it is "no greater than necessary to cure prejudice."[169]

The Chair of the Subcommittee explained to the Committee that the prohibition in Subdivision (e)(2) does not apply at "the other end of the line" where parties may "argue about what inferences the jury should draw from all the evidence about the "favorable or unfavorable character of the lost evidence." Under those circumstances, the court "might instruct the jury" that it is proper to evaluate the loss as suggested by the evidence and arguments."[170]

This appears to embrace the practice of some courts to admit evidence of a failure to preserve and allow arguments by counsel about its implications where proof of requisite level of culpability is lacking to impose an adverse inference.[171] Under the rule, parties will have already shown that a breach of duty – involving both a failure to take reasonable steps (a form of culpability) and actual prejudice – has occurred.

However, use of a permissive adverse inference is not justified by simply labeling it as not intended to "punish," as may be the case in the Second Circuit.[172] Despite advocacy to the contrary,[173] instructions about missing evidence do not restore the evidential balance "except by serendipity."[174] An adverse inference instruction "may tip the balance in ways the lost evidence never would have,"[175] and impose a "heavy penalty for losses" of ESI which "creates powerful incentives to over-preserve, often at great cost."[176]

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[169] Committee Note. 46 (also acknowledging viability of "traditional missing evidence" instructions relating to material a party has "in its possession at the time of trial").
[170] Minutes, April 10-11, 2014 Meeting, at 16 (lines 661-673).
[171] 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").
[172] Mali v. Federal Insurance, 720 F.3d 387, 393 (2nd Cir. 2013) ("[s]uch an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers").
[173] *Cf*. 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)("courts may issue a Mali-type permissive instruction that leaves all factual findings, including whether spoliation occurred, to the jury").
[174] Dale A. Nance, Adverse Inference About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering By Parties to Litigation, 90 BOSTON U. LAW REV. 1089, 1128 (2010)(courts confuse the deterrent and protective functions of sanctions with the almost invariably ephemeral goal of eliminating the unknowable evidential damage from negligent destruction of evidence).
[175] Committee Note, 45.
[176] June 2014 RULES REPORT, B-18.

Courts must, in any event, take care that the probative value of such a practice is not outweighed by the danger of undue prejudice or confusing or misleading the jury.[177] In *Decker v. GE Healthcare*, for example, jury instructions on missing evidence were refused because to do so would give the issue "a lot more importance that it has had in this trial."[178]

Subdivision (e)(2) Limitations

Subdivision (e)(2) limits court authority to impose harsh and potentially case determinative measures by requiring a showing of heightened culpability. 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.[179]

The "intent to deprive" requirement reflects a decision to reject the logic in *Residential Funding* that merely negligent behavior (or even grossly negligent conduct) is sufficient to justify an adverse inference jury instruction.[180] The goal is to achieve a uniform national rule, based on the approach historically used in other Circuits.[181] The *Residential Funding* approach does not supply sufficient indicia of knowledge of the impropriety to constitute an evidentiary admission based on consciousness of guilt.[182]

The Committee Note cautions that such severe measures should not be used if lesser measures would be sufficient to redress the loss. The remedy should fit the wrong, and sanctions should be proportional to the prejudice involved. Severe measures should not be used when the information lost was relatively unimportant or lesser measures would be sufficient to redress the loss.[183]

Intent to Deprive

As revised from the initial proposal, the "intent" requirement is "akin to bad faith, but defined even more precisely."[184] It reflects emerging case law which focuses on the

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[177] 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).
[178] Decker v. GE Healthcare, 770 F.3d 378, 397-98 (6th Cir. Oct. 20, 2014).
[179] Committee Note, 44.
[180] *Id*, 45 (the rule "rejects cases such as Residential Funding Corp.").
[181] *See, e.g.*, Aramburu v. Boeing, 112 F.3d 1398, 1407 (10th Cir. May 5, 1997)("the adverse inference must be predicated on the bad faith of the party destroying the records").
[182] Committee Note, 45 ("negligent or even grossly negligent behavior does not logically support that inference").
[183] Committee Note, 47. *See, e.g.*, Schmid v. Milwaukee Elec. Tool, 13 F.3d 76, 79 (3rd Cir. 1994)(courts should "select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim").
[184] June 2014 RULES REPORT, B-17.

reasons for purposeful action.[185] Some have expressed concern, however, that a showing of reckless or willful conduct will suffice.[186] That is unlikely.[187] A showing of such action merely requires intentional conduct, regardless of the actual intent involved.[188] The requirement of intent to deprive "is the toughest standard to prove that the Advisory Committee could have adopted."[189]

It will remain possible, of course, as in analogous cases involving "bad faith," to infer the presence of an "intent to deprive" where the totality of factual circumstances warrant and direct evidence is lacking.[190] This may be easy in cases of egregious conduct.[191] However, in other cases, it will not be possible when the more logical inference is the party was "disorganized, or distracted, or technically challenged, or overextended."[192] Mere suspicions will not be enough.[193]

Assessment: The Impact of Rule 37(e)

The new rule has been described as "equitable" since, while retaining authority to sanction, in most cases in which there is no proof of intent to deprive, the focus is on "solving the problem, not punishing the malefactor."[194]

When it applies, however, it permits an award of significant measures on a very limited or non-existent finding of culpability, much as is done today.[195] Courts may also

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[185] 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"). The Subcommittee may have adapted that language. Discovery Subcommittee Meeting Notes, March 4, 2014, 2)(the formulation is "very similar to the one used by Judge Rosenthal in Rimkus"). *See also* Micron v. Rambus, 645 F.3d 1311, 1326 (Fed. Cir. May 13, 2011)("advantage-seeking behavior"); Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013)(destruction "for the purpose of hiding adverse information").

[186] Favro, The New ESI Sanctions Framework, supra, 21 RICH. J. L. & TECH. 8, ¶¶ 25-26 (2015)(citing Pension Committee).

[187] As one Committee Member put it in describing the subdivision, "[n]ot even [a] reckless loss will support those measures." Minutes, April 2014 Rules Committee Meeting, 18 (lines 785-786).

[188] Victor Stanley, 269 F.R.D. 497, 530 (D. Md. Sept. 9, 2010)("[c]onduct that is in bad faith must be willful, but . . for willfulness, it is sufficient that the actor intended to destroy the evidence").

[189] Patricia W. Moore, Civil Procedure & Federal Courts Blog, September 12, 2014.

[190] In Weitzman v. School District 89, 2014 WL 4269074, at *3 (N.D. Aug. 29, 2014), the court inferred the existence of bad faith since it was "highly unlikely" that evidence as potentially important to the case was "unknowingly or innocently deleted."

[191] Hosch v. BAE Systems, 2014 WL 1681694, at *5 (E.D. Va. April 24, 2014)(both intentional and in bad faith).

[192] Victor Stanley v. Creative Pipe, *supra*, 269 F.R.D. 497, 526 (D. Md. Sept. 9, 2010)(negligent failure to interrupt automatic deletion does not support an inference that the party believed the evidence harmful).

[193] 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").

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

[195] As one astute in-house observer puts it, "[s]o we will still have a system where mere negligence or human error (viewed with hindsight) may form the basis for very significant sanctions/penalties." (Communication, April 2014, copy on file with author).

permit juries to hear evidence and receive argument about possible inferences from the conduct to address possible prejudice.[196]

However, the rule rejects use of *per se* preservation standards, applied in hindsight, in favor of an assessment of whether the loss was caused by a failure to take "reasonable steps." It is not a barrier that some ESI "slipped through." In *Pension Committee,* in contrast, the court held that anything less than perfection is "likely to result in the destruction of relevant information."[197] This may well provide a *de facto* safe harbor for compliant parties.

It remains to be seen whether courts which have grown accustomed to applying "bright-line" standards will, in fact, react differently.[198] It is now accepted that "no matter what methods [were] employed, an after-the-fact critique can always conclude that a better job could have been done."[199]

Be that as it may, the "intent to deprive" culpability prerequisite will have consequences. It should reduce the reflexive use of adverse inferences where the loss of ESI is the result of negligent or grossly negligent conduct. *Zubulake V,*[200] *Pension Committee*[201] and *Sekisui v. Hart*[202] will no longer authorized the use of adverse inferences under the circumstances described in those cases.

Finally, while the Rule explicitly applies only to losses of ESI, courts should incorporate Rule 37(e) standards where no good reason exists to do otherwise. It makes sense, however, to ignore it in claims based on losses of tangible property where "exceptional circumstances" exist. *Silvestri v. GM* persuasively illustrates the wisdom of excluding such cases from the requirement of heightened culpability "when "the prejudice [to the party seeking relief] is extraordinary, denying it the ability to adequately defend its case."[203]

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[196] *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").

[197] Pension Comm. v. Banc. of Am. Sec., 685 F. Supp.2d 456, 465 (S.D. N.Y. May 28, 2010)(failure to utilize written litigation hold is grossly negligent); *abrogated* by Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. July 10, 2012)(rejecting "the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*").

[198] Some courts already acknowledge the distinction. Malone v. Kantner Ingredients, 2015 WL 1470334, at *3 (D. Neb. March 31, 2015)(refusing to sanction to produce ESI based on mere evidence of mistakes, since the "standard is, after all, reasonableness, not perfection").

[199] Rhoads Industries v. Building Materials Corp., 254 F.R.D. 216, 226 (E.D. Pa. Nov. 14, 2008).

[200] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).

[201] Pension Committee v. Banc of America, *supra,* 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010).

[202] Sekisui American v. Hart, 945 F.Supp.2d 494, 509-510 (S.D. N.Y. Aug. 15, 2013).

[203] 271 F.3d 583, 593 (4th Cir. Nov. 14, 2001)(GM was denied "the only evidence from which it could develop its defenses adequately)

APPENDIX

Approved Rules Text (as transmitted to Congress)

Rule 1 Scope and Purpose

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

Rule 4 Summons

(d) Waiving Service. [NOTE: TEXT OF AMENDED RULE AND THE APPENDED FORMS ARE NOT REPRODUCED HERE]
* * *

Rule 4 Summons

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ ***90*** days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) ***or to service of a notice under Rule 71.1(d)(3)(A).***

Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ ***unless the judge finds good cause for delay the judge must issue it*** within the earlier of ~~120~~ ***90*** days after any

defendant has been served with the complaint or ~~90~~ ***60*** days after any defendant has appeared.

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

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

* * *

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

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, ***including agreements reached under Federal Rule of Evidence 502;***

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

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

(b) DISCOVERY SCOPE AND LIMITS.

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

* * *

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

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

* * *

(c) PROTECTIVE ORDERS.

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

(2) Early Rule 34 Requests.

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

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

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

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

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

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

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

* * *

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

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

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

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

Rule 30 Depositions by Oral Examination

(a) WHEN A DEPOSITION MAY BE TAKEN. * * *

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b***)(1) and*** (2):

(d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)***(1) and*** (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

Rule 31 Depositions by Written Questions

(a) WHEN A DEPOSITION MAY BE TAKEN. * * *

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)***(1) and*** (2):

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

(1) *Number.*
Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)***(1) and*** (2)**.**

Rule 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) PROCEDURE. * * *

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

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served ***or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' first Rule 26(f) conference***. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ***with specificity the grounds for objecting to the request,*** including the reasons. ***The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.***

(C) *Objections*. ***An objection must state whether any responsive materials are being withheld on the basis of that objection.*** An objection to part of a request must specify the part and permit inspection of the rest. . * * *

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

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. * * *

(3) *Specific Motions.* * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an

answer, designation, production, or inspection. This motion may be made if: * * *

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

* * * *

(e) FAILURE TO ~~PROVIDE~~ **PRESERVE** ELECTRONICALLY STORED INFORMATION

~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic system~~. ***If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:***

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Rule 55. Default; Default Judgment

* * *
(c) Setting Aside a Default or a Default Judgment.

The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

* * *

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015.]

* * *

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015.]