The 2015 Civil Rules Package As Transmitted to Congress
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The “Duke” Amendments

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I. Introduction

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

Background

The amendments resulted from a four-year effort by the Civil Rules Advisory Committee (the “Rules Committee”) operating under the supervision of the Committee on Rules of Practice and Procedure of the Judicial Conference (the “Standing Committee”). Those Committees are charged with undertaking a “continuous study of the operation and effect” of the rules and making recommendations for changes or additions. Under the Rules Enabling Act, the Supreme Court has the power to prescribe

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such general rules of practice and procedure as do not abridge, enlarge or modify substantive rights.³

The process leading to the proposals began with a Conference on Civil Litigation held by the Rules Committee at the Duke Law School (the “Duke Conference”) over two days in May 2010. The initial decision to hold the Conference reflected a desire to seek answers to issues such as whether “whether discovery really is out of control.”⁴

The Conference received empirical research and surveys and involved discussions by participants and Panels members drawn from judicial, practitioner and academic bases.⁵ The submissions remain available on a dedicated website.⁶ A comprehensive Report on the Conference was made to the Chief Justice.

Key “takeaways” were the need for improved case management, a more focused application of the long-ignored principle of “proportionality” and enhanced cooperation among parties in discovery.⁷ 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.”⁸

The task of developing individual rule proposals was divided between a “Duke” Subcommittee chaired by the Hon. John Koeltl and the Discovery Subcommittee, chaired by the Hon. Paul Grimm.⁹ Both subcommittees vetted alternative draft rule proposals at “mini-conferences.” Although potential reform of notice pleading requirements highlighted by the Supreme Court decisions in Twombly¹⁰ and Iqbal¹¹ were discussed at the Duke Conference, the Rules Committee ultimately decided to treat that subject separately.¹²

⁴ Minutes, Rules Committee Meeting, November 17-18, 2008, at 17-18.
⁵ Minutes, Rules Committee Meeting, April 20-21, 2009, at 30.
⁸ John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010).
⁹ 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.
¹² Compare Report to the Chief Justice, supra, at 5-7 (“Pleading”) with Minutes, November 2011 Rules Committee Meeting, at 3 (“[p]leading issues have been left on a separate track”).
An initial “package” of proposals resulting from these efforts was released for public comment in August 2013.\footnote{The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules (hereinafter “2013 PROPOSAL,” supra, n. 13 at ___ of 354), available at http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf.}

Hearings and Public Comments

The response to the initial proposals was robust, delivered at three public hearings with 120 witnesses\footnote{Transcripts of the three hearings are available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees.} and through a total of over 2300 written comments.\footnote{The written comments are archived at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.}

Individual comments were submitted on behalf of the defense and corporate community by individuals as well as various law firms. Similarly, individuals and groups typically representing individual claimants and plaintiff advocacy groups were very active in submitting comments and testifying at the public hearings. Individual Members of the academic community also testified and submitted written comments.\footnote{See also Henry J. Kelston, FRCP Discovery Amendments Prove Highly Controversial, Law360, February 27, 2014 (quoting critical views of Professors Carrington and Miller and opinion that others shared the views but declined to express them “as a matter of discretion”), available at http://www.law360.com/articles/512821/frcp-discovery-amendments-prove-highly-controversial.}


In addition, the Federal Magistrate Judges Association (“FMJA”), the Association of Corporate Counsel (“ACC”), the Department of Justice (“DOJ”), the Sedona Conference® WG1 Steering Committee (“Sedona”) and a cross-section of state bar associations also dealt comprehensively with the proposals.

The Final Rules Package

After close of the public comment period, the Duke and Discovery subcommittees recommended a number of proposed revisions which were adopted by the Rules
Committee at its April, 2014 meeting in Portland, Oregon. In the case of Rule 37(e), last minute revisions necessitated drafting a new Committee Note. The Minutes of the April meeting are notable for their detailed discussion of the intent of the revised terms.\(^{19}\) The Standing Committee subsequently approved the revised proposals and submitted them for approval to the Judicial Conference, together with a June 2014 Rules Committee Report (included as Appendix B).\(^{20}\)

The Judicial Conference approved the full package and forwarded it to the Supreme Court.\(^{21}\) The Supreme Court adopted the proposed amendments, with minor changes in Committee Notes, and forwarded them to Congress on April 29, 2015.\(^{22}\)

**Comments on Revisions**

The revised form of Rule 37(e) has been positively addressed in most,\(^{23}\) but not all,\(^{24}\) published comments. The same is also true as to the changes to Rule 26(b)(1).\(^{25}\) There has been an outpouring of publications dealing with the practical implications of proportionality by the Duke Center for Judicial Studies,\(^{26}\) a member of the Rules Committee\(^{27}\) and others.\(^{28}\)

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\(^{20}\) Appendix B to Report of Standing Committee, ST09-2014, available (without pagination) in Rules Transmittal, infra n. 23 and also at http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014 (with pagination as Appendix B). The Report is also available as a standalone copy at a link on the page citing the full ST09-2014 (which contains other reports).

\(^{21}\) See Minutes, Rules Committee Meeting, October 30, 2014, 2.

\(^{22}\) The transmittal (“Rules Transmittal”) is available at http://www.uscourts.gov/file/document/congress-materials. The amendments will “govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending” upon going into effect. Id.


\(^{25}\) John W. Griffin Jr., *A Voice for Injured Plaintiffs*, August 2015 TRIAL (“[w]hile the new rules do not exactly level the playing field for parties with limited resources, our clients have at least avoided being at a grossly unfair disadvantage”).


One academic critic remains uniformly opposed to the rulemaking process followed and to most of the results.  

II. The “Duke” Amendments

The Duke Subcommittee was primarily responsible for developing rule-based proposals other than those dealing with pleadings or the replacement for current Rule 37(e). We turn first to those proposals.

(1) Cooperation (Rule 1)

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

The Note further observes that “most lawyers and parties cooperate to achieve those ends” and that “[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.” The Committee Report submitted to the Supreme Court (and Congress) asserts that “the change to Rule 1 will encourage parties to cooperate in achieving the just, speedy, and inexpensive resolution of every action.”

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.

The final version of the Note states 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.”

Background

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29 See, e.g., Patricia W. Hatamyar Moore, The Anti-Plaintiff Pending Amendments to the [FRCP] and the Pro-Defendant Composition of the Federal Rulemaking Committees (hereinafter “Anti-Plaintiff Pending Amendments”), 83 U. CIN. L. REV. 1083 (Summer 2015).
30 Committee Note, 2, available at supra, n. 2 (hereinafter “Committee Note, ___”).
31 Committee Note, 1-2.
32 June 2014 RULES REPORT, available supra at n. 2, II (D).
33 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”).
34 Committee Note, 2.
Participants at the 2010 Duke Conference emphasized the role of cooperation in achieving the goals of Rule 1. The Subcommittee Committee considered amending Rule 1 to explicitly require that parties “should cooperate” to achieve the goals of Rule 1. However, this was deemed to be “too vague, and thus fraught with the mischief of satellite litigation.” A similar attempt to require party cooperation in Rule 37 had been rejected in 1978.

The emphasis on cooperation can be partially attributable to the advocacy of the Sedona Conference® Cooperation Proclamation, which has received substantial judicial emphasis and is reflected in numerous lower court opinions. Many local rules and initiatives invoke cooperation as an aspirational standard.

Most public comment accepted the proposed change to Rule 1 as sufficient and opposition, to the extent given, was to the reference to it in the Committee Note. Commentators had noted uncertainty as to whether “cooperation” mandates compromise. The experience with mandated cooperation has not been favorable.

Concerns were expressed about the need for a proper balance between cooperative actions and the professional requirements of effective representation, raising the risk of attempts to impose sanctions as a tactic in civil cases. Representatives of The Sedona Conference® expressed the view that language along the lines of the Committee proposal would be sufficient.

Others, however, continued to suggest that “cooperation” should be incorporated in the Rule.

36 Id.
37 Steven S. Gensler, Some Thoughts on the Lawyer’s E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 547 (2009)(the reference to “Cooperation” was left in the title even when [what is now Rule 37(g)] was modified to require a party to “participate in good faith”).
38 The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
39 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”).
40 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]”).
41 Gensler, supra, at 546 (the view that cooperation involves “a willingness to move off of defensible positions – to compromise – in an effort to reach agreement” is not what Rules 26(f), 26(c) or 37(a) actually demand).
43 See Report to Standing Committee, May 2, 2014, at 16 (the civil rules provide procedural requirements while rules of professional responsibility add requirements of their use; complicating these provisions by a “vague concept of ‘cooperation’ may invite confusion and ill-founded attempts to seek sanctions).
44 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”).
State Amendments

Effective July 1, 2015, Colorado has amended its Rule 1 to require that the rule be “employed by the court and parties” to secure the just, speedy, and inexpensive determination of every actions.

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

Case management changes include:

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

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

Default Judgment

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

Discovery Requests Prior to Meet and Confer

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

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

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45 For changes to Rule 4(d), see Subsection (7)( Forms (Rules 4(d), 84, Appendix of Forms).
46 Committee Note, 4.
47 An April 3, 2015 Memorandum from the Judicial Conference to the Supreme Court acknowledged receipt of the request and approval of the change without explaining the reason for doing so. See Memo, available supra, n. 2.
48 Committee Note, 25.
Scheduling Conference

Rule 16(b)(1) will be modified by striking the reference to conducting scheduling conferences by “telephone, mail, or other means” to encourage direct exchanges among the parties and the Court. The Rule will merely refer to consultation “at a scheduling conference.” The Committee Note observes, however, 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.”49

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.50

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.”51

Scheduling Orders: Preservation

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

The Committee Note to Rule 16 observes that “[p]arallel amendments of Rule 37(e) [will] recognize that a duty to preserve discoverable information may arise before an action is filed.”52 The Note to Rule 37(e) states that “promptly seeking judicial guidance about the extent of reasonable preservation may be important” if the parties cannot reach agreement about preservation issues. It also opines that “[p]reservation

49 Id., 7 (excluding the use of “mail” as a method of exchanging views).
50 Id., 8.
51 Id., 9. See also Steven S. Gensler and Lee H. Rosenthal, The Reappearing Judge, 61 U. KAN. L. REV. 849, 861 (2013)(noting that many have moved to a system of pre-motion conferences to resolve discovery disputes).
52 Committee Note, 8.
orders may become more common” as a result of the encouragement to address preservation.53

**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))**

The 2015 Amendments will revise Rule 26(b)(1) to state that parties may obtain discovery of nonprivileged matter “that is relevant to any party’s claim or defense and proportional to the needs of the case, considering [a re-arranged and slightly modified list of the current proportionality factors from Rule 26(b)(2)(C)(iii)].”54 As amended, Rule 26(b)(1) will provide:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The authority to order discovery of matter “relevant to the subject matter” has been deleted from Rule 26(b)(1). The Note explains that “subject matter” discovery has

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53 Committee Note, 40.
54 After public comments, the Committee moved “amount in controversy” factor to a secondary position behind “the importance of the issues at stake in the action” and added a new factor to address the parties’ relative access to relevant information.
been “rarely invoked” and that proportional discovery suffices “given a proper understanding of what is relevant to a claim or defense.”

Also deleted is the statement that relevant information need not be admissible if “reasonably calculated to lead to the discovery of admissible evidence,” which is replaced by the statement that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.” The Committee concluded that the deleted language has been improperly used to suggest that anything is fair game in discovery. Information not admissible in evidence remains discoverable if within the scope of discovery.

In addition, Rule 26(b)(1) no longer contains examples of discoverable information, although they are still discoverable, and a cross reference to proportionality considerations (now moved from Rule 26(b)(2)(C) into the subsection) is deleted as redundant.

Rule 26(b)(2)(C) is amended to provide that:

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

Background

The scope of discovery under Rule 26(b)(1) has been subject to “proportionality limitations” since 1983. At the same time it was amended to address disproportionate discovery, a similar limitation was added by a Rule 26(g) relating to certifications by counsel of discovery requests and responses. However, for many years, these changes “created only a ripple in the case law.”

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55 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.”
56 June 2014 RULES REPORT, supra n. 2, at II (a)(2)(d) (“[s]ome even disregard the reference to admissibility, suggesting that any inquiry ‘reasonably calculated’ to lead to something helpful in the litigation is fair game in discovery. The proposed amendment will eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information”).
57 Committee Note, 24.
58 Committee Note, 23 (such discovery is so “deeply entrenched in practice” that it need not be listed).
59 Rule 26(b)(Discovery Scope and Limits), subsection (1)(iii)(discovery shall be limited if the court determines that it is “unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at state in the litigation”). See 97 F.R.D. 165, 215 (1983). The Committee Note described this as intended to limit “disproportionate” discovery of matters which were “otherwise proper subjects of inquiry.” Id.
60 Rule 26(g)(signing of discovery documents by counsel certifies that they are not “unreasonable or unduly burdensome, given the needs of the case [etc]”).
61 Richard L. Marcus, Discovery Containment Redux, 39 B.C.L. REV. 747, 773-774 (1998) (the addition of proportionality and the certification requirements have not made a significant contribution).
By the time of the 2010 Duke Litigation Conference, this was no longer acceptable. A FJC survey had suggested that for most cases discovery was proportional to the needs of the case, various surveys documented dissatisfaction with discovery in a significant subset of cases. The Rules Committee concluded that an “increased emphasis on proportionality,” as enforced through active case management, was needed to achieve the goals of Rule 1.

After exploring possible alternatives at a Mini-Conference the Committee decided to move the proportionality factors from their current location into Rule 26(b)(1). However, this recommendation unleashed a firestorm of opposition when released for public comment, perhaps fueled by the statement in the Draft Note that the scope of discovery would be “changed.” Substantial objections were raised to what many saw as a restriction on discovery in asymmetric litigation. To some, this represented an unfair change, lacking any empirical basis which was imposed by acquiescence to the defense bar.

Others concerns were identified. The AAJ argued, for example, that a producing party could “simply refuse reasonable discovery requests” and force requesting parties to “prove that the requests are not unduly burdensome or expensive.” Some argued that “[u]nder the new rule, a party can choose not to search for or produce documents that they deem ‘not proportional to the needs of the case.’”

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65 See Amended Initial Sketch (undated), at 20; as modified after the October 8, 2012 Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.
66 Minutes, Subcommittee Conference Call, October 22, 2012, at 5-6 (“adding the [listed] factors to explain what ‘proportional’ means relieves the risk of uncertain meaning”), available at https://law.duke.edu/sites/default/files/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf.
67 Draft Committee Note, 2013 PROPOSAL, supra n. 8, at 296 (“[t]he scope of discovery is changed . . . to limit the scope of discovery to what is proportional to the needs of the case.’’).
68 A forty-five page summary of the Public Comments on the transfer of proportionality factors to Rule 26(b)(1) was prepared for Committee use by the Reporter of the Rules Committee. See copy at https://law.duke.edu/sites/default/files/centers/judicialstudies/iii_summary_public_comments.pdf.
69 AAJ Comment, supra n. 15, December 19, 2013.
70 Id., at 11 (emphasis in original).
Responses to Criticism

The Committee responded vigorously to what it felt were “quite unintended” interpretations of its proportionality proposal. It dropped the reference to “changes” in the scope of discovery in the Committee Note, which now states that information is discoverable if it is “relevant to any party’s claim or defense and is proportional to the needs of the case.” The Note emphasizes that the amendment simply “restores” the proportionality considerations to their original place in Rule 26(b)(1) and does not “place on the party seeking discovery the burden of addressing all proportionality concerns.”

Most, but not all, observers agree that the revisions to Rule 26(b)(1) do not alter existing discovery obligations or the burden of proof. As a recent article explained, it is a “mistaken belief that the changes dictate severe limitations on discovery.” Parties are expected to address proportionality concerns themselves, but if disputes are brought before the court, “the parties’ responsibilities would remain as they have been since 1983.” The parties each provide information uniquely in their possession to the court, which then is expected to reach a “case-specific determination of the appropriate scope of discovery.”

During the Public Hearings, the Chair of the Duke Subcommittee famously observed that it is up to the judge, with input from the parties, to “consider all of these factors” before making a decision to “allow or limit or expand the discovery.” In the courts view, “the burden of proof only has an effect if everything is in equipoise, which it seldom is.” The purpose of the amendment is to place renewed emphasis on proportionality by emphasizing active case management and individual party and counsel responsibility.

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72 April 2014 Rules Committee Minutes at 4-5 (lines 176-177) (quoting Chair of Duke Subcommittee).
73 Committee Note, 17.
74 Committee Note, 19.
75 Committee Note, 19.
76 Cf. Fabio Arcilia, Jr., Plausibility Pleadings as Misprescription, 80 BROOK. L. REV. 1487, 1525 (2015) (the change in locus will “make it harder for a party to obtain discovery” because a party will no longer be able to “presumptively access discovery” by merely establishing relevancy and overcoming any privilege objection); accord, Patricia W. Hatamyar Moore, The Anti-Plaintiff Pending Amendments to the [FRCP] and the Pro-Defendant Composition of the Federal Rulemaking Committees (hereinafter “Anti-Plaintiff Pending Amendments”), 83 U. CIN. L. REV. 10831115 (Summer 2015) (“proportionality will limit, for the first time, the defined scope of discovery “in general””).
77 Altom M. Maglio, Adapting to Amended Federal Discovery Rules, July 2015 TRIAL, 37 (“the actual rule amendments do not support [the] perspective [of severe restrictions on discovery]”).
78 Committee Note, 20.
79 Id. (the party requesting discovery “may have little information about the burden or expense of responding” but the producing party may have little information about the importance of the discovery “as understood” by the requesting parties).
80 Hon. John Koeltl, Transcript, January 9, 2014 (Phoenix Hearings), at 211).
Further, a party may not “refuse discovery simply by making a boilerplate objection that it is not proportional.”\(^{81}\) A party may not act unilaterally based on proportionality concerns as to otherwise relevant information.\(^{82}\) Thus, except for discovery requests which are “transparently disproportionate in the context of a particular case,”\(^{83}\) the objecting party must come forward with facts “typically in the form of an affidavit” which shows how the requested discovery is inconsistent with Rule 26(b)(1).\(^{84}\)

**Discovery Filings (Rule 26(g))**

The 2015 Amendments do not change the existing obligation under Rule 26(g) to apply proportionality considerations in discovery filings.\(^{85}\) The 2015 Committee Note states that the changes to Rule 26(b)(1) are intended to “reinforce” Rule 26(g) obligations by requiring “parties to consider these factors in making discovery requests, responses, or objections.”\(^{86}\) While the Committee did not see fit to conform the list of proportionality factors in Rule 26(g) to those in Rule 26(b)(1), most commentators treat them as identical.\(^{87}\)

Under Rule 26(g), added to the Civil Rules in 1983 as a counterpart to Rule 11, a party or counsel signing discovery filings thereby certifies, *inter alia*, that the content of the filing is proportional to the needs of the case.\(^{88}\) The certification is based on a belief formed “after a reasonable inquiry,” which has been interpreted as requiring a degree of oversight by counsel of its client despite the equally obvious point that counsel may rely upon its client when reasonable to do so.

Counsel (and the party for whom it signs) may be sanctioned under Rule 26(g)(3) if a “certification violates this rule without substantial justification.” Sanctions have been imposed on counsel for evasive\(^{89}\) or incomplete or misleading responses to discovery requests.\(^{90}\) However, “[c]ounsel for the requesting *and* producing parties are

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81 Committee Note, 19.
82 April 2014 Minutes, *supra* n. 63, at 7 (lines 273-276)(Judge Koeltl)(“a party [cannot] unilaterally decide to limit its responses to what it considers proportional”).
83 Hon. Craig B. Shaffer, The “Burdens” of Applying Proportionality (hereinafter “Applying Proportionality”), 16 SEDONA CONF. J. ___ (forthcoming 2015), at 21 (copy on file with author)(noting cases applying a “facially objectionable” standard when requests are “overly broad or seek information that does not appear relevant”).
84 Id. at 24.
85 See Minutes, April 2014 Rules Committee Meeting, at 5 (lines 193-194)(“Rule 26(g) now makes proportionality an obligation of both the party that requests discovery and the party that responds”).
86 Committee Note, 19.
87 Shaffer, *Applying Proportionality*, 11 (“comparable proportionality factors currently are found in Rule 26(g)”).
88 Rule 26(g)(1)(B)(iii)(“neither unreasonable nor unduly burdensome or expensive, considering the needs of the case [etc.]”). The Rule also bars discovery filings “interposed for an improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation.” *Id.* (B)(ii).
89 Witt v. GC Services, 307 F.R.D. 554, 564 (D. Colo. Dec. 9, 2014)(“a motion to compel necessarily requires the court to apply the Rule 26(g) standard to the moving party’s interrogatories and requests for production”).
subject to the same Rule 26(g) ‘stop and think’ obligation measures by an objective, rather than a subjective, standard.”

It is conceivable that a renewed focus on enforcing proportionality in discovery filings may yield additional motion practice under Rule 26(g) and further disrupt relationships between counsel and clients if the “reasonable inquiry” required of counsel is challenged. However, it is equally possible that that parties and their attorneys will self-regulate discovery filings and reduce the need for court involvement. As Judge Schaffer has noted, “[f]ocused and precisely drafted discovery requests may actually preempt challenges framed in terms of proportionality.”

Applying Proportionality

The Duke Center for Judicial Studies has developed Guidelines and Principles for implementing the 2015 Discovery Amendments to Achieve Proportionality which advocate ongoing discovery planning, greater use of pretrial orders, stipulated facts and focused discovery. A current member of the Rules Committee has also published an exhaustive analysis of practical implications of the rule changes as has a Magistrate Judge and a prominent e-discovery expert. In addition, the former Chair of the Discovery Subcommittee has compiled a list of sixteen “techniques” which courts can employ to achieve proportionality.

Computer Assisted Review

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

The Duke Guidelines and Practices concede that it is “generally not appropriate for the judge” to order a party to “purchase or use” a specific technology or method, but

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91 Shaffer, Applying Proportionality, 14-15 (emphasis in the original).
92 Cf. BloombergBNA eDiscovery Resource Center (Proportionality), July 31, 2015, quoting Hon. Shira Scheindlin at ABA Panel, Chicago (“I hope judges will be tough about allowing motions”).
93 Shaffer, Applying Proportionality, at 33.
95 Shaffer, supra, Applying Proportionality, at 44-51.
99 Committee Note, 22. See, e.g., Malone v. Kantner, 2015 WL 1470334, at n. 7 (D. Neb. March 31, 2015)(“predictive coding” is being promoted as “not only a more efficient and cost effective method of ESI review, but a more accurate one”).
suggest that a judge “may” consider whether a party has been unreasonable in choosing a particular method or technology. They also caution, however, that “parties and judges should not limit themselves in advance to any particular technology or approach to using it.”

Analogous State Developments

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

(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 in order to “decrease the cost of civil litigation, making it more accessible for average citizens.” An earlier proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process. The proposed changes would have included the following:

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

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100 Commentary to Guideline 5, Guidelines and Practices, at 9.
101 Commentary to Practice Point 10, Guidelines and Practices, at 19 (“[t]he parties and the judge should consider using technology to help achieve proportional discovery”).
102 URCP Rule 26(b)(1)(Discovery Scope in General)(“Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below”); see also URCP Rule 37(b)(2)(i) “[i]f the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional”) and Philip Favro and Hon. Derek Pullan, New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure, 2012 MICH. ST. L. REV. 933, 947 (2012).
103 MINN. ST. RCP Rule 1 (2013). The scope of discovery is limited to “matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [list].” MINN. ST. RCP Rule 26.02(b)(2013).
104 15, R S Ct. 201(c)(3).
105 Id., Committee Note (2014).
106 2013 PROPOSAL, supra n. 8 at 300-304, 305 & 310-311 [of 354].
107 Id., at 268.
108 Id., at 267.
However, the proposals encountered “fierce resistance” on grounds that the present limits worked well and that new ones might have the effect of limiting discovery unnecessarily. The opposition came from the organized bar as well as from testimony and comments from individual lawyers and included concerns that courts might view the presumptive numbers as hard ceilings. If so, any failure to agree on reasonable limits could result in motion practice.

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

The Committee has expressed the hope that most parties “will continue to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially, and if need be, as the case unfolds.” 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.

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

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

At the Duke Conference, some suggested that Rules 26 and 45 should be amended to make the reasonable costs of preserving, collecting, reviewing and producing electronic and paper documents the responsibility of requesting parties (“requester party pays”). The costs of collection and reviewing information for production is often the largest component of discovery costs.

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

\[\text{April 2014 Minutes, supra n. 63, at 7 (lines 307-310).}\]


\[\text{April 2014 Minutes, at lines 466-467.}\]

\[\text{Id. (at lines 467-470).}\]

\[\text{June 2014 RULES REPORT, available supra, n. 2 at II (A)(1).}\]

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

\[\text{RAND Institute for Justice, } \text{Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, 1, 16 (2012)(at least 73% of costs in surveyed instances), copy at } \text{http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf}\]
While a partial draft endorsing cost-shifting was circulated for discussion, the Subcommittee declined to recommend adoption of new rules. Instead, it proposed and the Committee agreed to making cost-shifting a more “prominent feature of Rule 26(c).” 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.”

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.” There is well-established Supreme Court support for the statement.

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

Some protested that this amendment to the Committee Note prejudged any continuing study of “requester pays” proposals. The Chair of the Subcommittee disagreed and assured interested parties that the work of the Committee would continue, but “it will not be easy.” At the April 2015 Meeting, the Chair of the Discovery Subcommittee reported on the passionate views held on the topic by “all sides” and outlined the issues to be covered.

However, after further work on the topic, the Subcommittee has reported to the November 2015 meeting that “the time has not yet arrived” for active work on the questions because the “refocused emphasis on the scope of discovery” in Rule 26(b)(1) could lead to more nearly proportional discovery, which, if it occurs, may reduce the need for more general cost-bearing rules.

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118 Initial Rules Sketches, at 37, as modified after Mini-Conference.
119 Committee Note, 25.
121 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”).
122 Committee Note, 25.
123 April 2014 Minutes, supra n. 63, at 6 (lines 234-238).
124 April 2015 Minutes, at 18-22.
(6) Production Requests/Objections (Rule 34, 37)

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

First, Rule 34(b)(2)(B) will 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].” An example might be an objection that states that the party will limit its search to information created within a given period of time or to specified sources. 126

This is closely related to a modification in Rule 34(b)(2)(C) which will require that any objection must state “whether any responsive materials are being withheld on the basis of [an] objection.” 127 This is intended to “end the confusion” when a producing party states several objections but still produces information. 128

The requirement is said to be inapplicable, however, when the responding party does not know whether anything has been withheld beyond the search made, as for example if the request is for “all documents” but the search is limited in time. A party may not know if anything has been “withheld.” In that case, the response should object that the request is overbroad and the search will be limited, which counts as statement that anything earlier has been “withheld.” The parties are free to discuss the response and if they cannot resolve the issue, seek a court order. 129

Accordingly, the Committee Note was amended to state that a producing party “does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.” 130

The amended Note includes the statement that “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.” 131

Third, 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.” This belatedly updates the rule to conform to standard practice. As the

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126 Committee Note, 33-34.
127 The new language continues to be followed by the requirement that “[a]n objection to part of a request must specify the part and permit inspection of the rest.”
128 Committee Note
129 April 2014 Minutes, at 10 (lines 423-427).
130 Committee Note, 34.
131 Committee Note, 34.
Committee Note observes, it is a “common practice” to produce copies of documents or ESI “rather than simply 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.

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.”

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

Both Rule 84 and the Appendix of Forms appended to the Civil Rules will be abrogated, although certain of the forms will be integrated into Rule 4(d). Thus, Rule 4(d) will incorporate the forms “appended to this Rule 4.” The phrase “[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]” will appear in place of the current text of Rule 84 and the separate list of “Appendix of Forms.” The Committee Note states that the “abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”

The Note also observes that alternative sources of civil procedure forms will be available from a number of sources. At the Supreme Courts’ suggestion, the Note’s reference to using the Administrative Office as a source was expanded to include reference to websites of district courts and local law libraries as potential sources.

Background

Rule 84 currently states that “the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” However, in response to the relative lack of use of the forms, the Rules Committee concluded that it is time “to get out of the forms business.” It noted that “many of the forms are out of date,” are little used and amendment is “cumbersome” since it requires the same process as amending the rules themselves.

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132 Committee Note, 34 (“the response to the request must state that copies will be produced”). For a useful summary of the contrasts in the discovery process between former and current contexts, see Anderson Living Trust v. WPX Energy Production, 298 F.R.D. 514, 521-527 (D. Mass. 2014).
133 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’”).
134 See generally, material at Committee Note, 52-57.
135 Id.
136 Committee Note, 49.
137 Memorandum, April 2, 2015, Judicial Conference to Supreme Court, Rules Transmittal, supra, n. 2, at 129 of 144.
138 June 2014 RULES REPORT, available supra, n. 2, IV (Abrogation of Rule 84).
The Committee rejected concerns that abrogation was inappropriate under the Rules Enabling act. It was contended that each of the forms had become so intimately associated with the sponsoring or related rule that it could not be changed without formal proceedings, including provisions for public comments. However, the Rules committee had unanimously determined that the publication process and the opportunity to comment on the proposal “fully satisfies the Rules Enabling Act requirements.”

It also was noted that some members of the academic community were concerned that abrogation of the forms would be viewed as an indirect endorsement of the Twombly and Iqbal pleading standards. The Committee has noted that the effect of pleading standards remain under review and if any action is needed, the approach will be to amend the rules, not the forms.

III. Rule 37(e)

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

After December 1, 2015, an amended Rule 37(e) will provide overlay the common law of spoliation to deal with losses of ESI, replacing the current Rule 37(e). Commentators see this new rule as “change[ing] the concept” of the duty to preserve which “will [also] change dramatically the law of spoliation.” Revised Rule 37(e) provides:

Failure to Produce Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

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140 June 2014 RULES REPORT, available supra, n. 2, IV (Abrogation of Rule 84).
141 William C. Gleisner III and Hon. Michael R. Fitzpatrick, Federal Rules of Civil Procedure Changes May Affect Wisconsin Practice, 88- JAN. WIS. LAW. 28, 32-33 (2015)(“future e-discovery disputes will be resolved in a far less draconian manner than has sometimes been the case”).
142 Gregory P. Joseph, New Law of Electronic Spoliation – Rule 37(e), 1 (hereinafter “Joseph, __”, to be published as 99 JUDICATURE No. 3, ___ (Winter 2015)(“the rule changes the law of spoliation” . . . in several Circuits” as to spoliation of electronic evidence)(copy on file with author).
The revised Rule 37(e) displaces inherent sanctioning authority as the primary authority to employ any of the measures it authorizes. However, the rule is silent as to whether it also displaces use of alternative rule or statute based authority in providing equivalent remedies.

Although applicable only to “losses” of ESI, the revised rule may be usefully applied to help guide resolution of disputes involving loss of discoverable information in other forms. By exclusion of tangible property losses, it preserves the flexibility of courts to deviate from the revised rule’s limits on harsh measures where culpability is low. However, this means that in several Circuits there will be different requirements applicable depending on the type of discoverable information lost.

Background

The Federal Rules do not currently, with the exception of Rule 37(e), deal with spoliation issues, especially those resulting from pre-litigation failures to preserve. Rule 37(e) deals only with sanctions issued “under these rules,” which are typically unavailable unless a court order has been violated. Most courts deal with spoliation by the exercise of their inherent authority under Chambers v. NASCO to deal with litigation abuse.

The E-Discovery Panel at the 2010 Duke Litigation Conference recommended adoption of a comprehensive rule which governed the trigger, duration and nature of the obligation as well as the consequences of a failure to act. The Discovery Subcommittee developed such alternatives, including a rule defining preservation

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143 Committee Note, 38 (the rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used”).
144 The Committee plans to monitor the rule and, if it works, “we can think seriously about extending it to other forms of information.” Minutes, April 2014 Rules Committee, at 31 (lines 1277-1280).
146 Rule 37(e). Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.
149 The Panel “reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.” John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010).
obligations, which were vetted at a Mini-Conference held in 2011 at the DFW Airport. The Rules Committee ultimately concluded, however, that drafting a detailed preservation provision was too difficult and could “easily be superseded by advances in technology.” Paramount in its concerns was the need to resolve the competing culpability requirements among the Federal Circuits for imposing harsh sanctions for spoliation, which were widely regarded as a source of costly “over-preservation.”

A proposal for a revised Rule 37(e) (the “Initial Proposal”) was released for public comment in August, 2013. Under that proposal, a court could require additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney’s fees caused by a failure to preserve discoverable information which “should have been” preserved.

No threshold showing of culpable conduct or prejudicial impact was required and a list of non-exclusive “factors” was provided for courts to consider in assessing the conduct of parties.

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

Public Comments

The initial proposal met with a mixed reception. While most accepted the need for a uniform national rule dealing with culpability, some opposed imposing stricter culpability standards to the issuance of all types of sanctions as an unwarranted

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

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

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

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

154 2013 PROPOSAL, supra n. 8, at 314-317 of 354.

155 Rule 37(e)(2)(Factors A-E). Reasonable conduct and proportionality concerns were mentioned as key factors in determining if there had been a breach of duty.

156 An eighty-one page Summary of Comments on Rule 37(e)(August 2013) is found in the Agenda Book for the May 2014 Standing Committee Meeting, at 331. Individual written comments are archived under the numbers referenced in the Summary at http://www.regulations.gov/#/docketDetail;D=USC-RULES-CV-2013-0002.
restriction on court discretion. A prominent District Judge argued that enactment of the proposal would only “encourage[s] sloppy behavior.

Members of the defense bar generally supported the thrust of the proposal but questioned details such as the use of “willfulness” as a limitation on sanctions. Some questioned granting authority to sanction based solely on a showing of “irreparable” prejudice. The concern was that the exception might undermine the uniform culpability limits for use of harsh sanctions.

While use of “curative measures” drew broad support, concerns were expressed that, as written, the provision was “a strict liability standard [which was not] explicitly required to be proportional to the harm caused.” The need for a prior showing of prejudice was identified. Some urged that curative remedies be “no more severe than that necessary to cure any prejudice” unless the court found that the party had acted in bad faith. Others questioned the efficacy of the listed “factors” and suggested that they be dropped or modified.

The Revised Proposal

After the close of the public comment period, the Discovery Subcommittee recommended a revised version of Rule 37(e) applying only to ESI which limited its heightened culpability requirements to potentially case-determinative sanctions. It included provisions dealing with “curative measures,” retained a list of factors and included a new Committee Note attuned to the changes.

However, shortly before final action by the Committee, a substitute draft was produced which dropped the list of factors, added a focus on remediation of prejudice as a key goal and provided a de facto safe harbor for parties which undertake “reasonable steps” to preserve. The substitute text was adopted and the drafting of a new Committee Note was ordered to be completed before review by the Standing Committee.

Scope of Preservation

The scope of preservation contemplated by the Rule 37(e) relies on existing common law, as influenced by proportionality considerations, including those

161 Hon. James C. Francis IV, letter to Rules Committee, 5-6 (January 10, 2014).
162 The Subcommittee Report is found in the April 2014 Rules Committee Agenda Book, at 369.
163 See Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014 (“Rule 37(e) Revised Again”) (reproducing revised text as approved by the Committee), available at http://www.bna.com/advisory-committee-makes-n17179889550/.
emphasized in amended Rule 26(b)(1). As the Duke Subcommittee noted, when proportionality limits are imposed on what can be discovered, “the obligation to preserve diminishes accordingly.” Obviously, “if ESI is not discoverable in the first place,” it need not be preserved.

However, whether a party is required to preserve ESI in a particular case depends on the circumstances and it is “often useful for the parties to discuss” the issue early in the case. Rules 16(b) and 26(f) have been amended to facilitate early discussions about the scope of preservation once litigation has commenced. Parties making good faith efforts to preserve, especially in the pre-litigation context, are often best situated to evaluate the appropriate procedures, methodologies and technologies for preserving their own ESI.

Transparency and cooperation by both parties is to be encouraged. Information regarding “the universe of potentially relevant documents being preserved, and those that no longer exist” should be shared. In light of Rule 26(g), however, requesting parties are well advised to tailor their preservation demands to what is at stake in the case.

As the Sedona Conference® has noted, “[t]he burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.” Examples of ESI that need not be routinely preserved are often available in local rules, protocols and guidelines such as the Seventh Circuit Electronic Discovery Principles.

“Reasonable Steps”

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167 Cf. Rule 26 Committee Note (2006), 234 F.R.D. 219, 337 (2006)(rejecting concept that a party may unilaterally decide to ignore sources of ESI it believes are inaccessible under Rule 26(b)(2)(B)).
170 The initial Draft Committee Note for Rule 37(e) made the point that “prospective litigants who call for preservation efforts by others” should keep proportionality principles [in Rule 26(b)(1)] in mind. Draft Committee Note, Rule 37(e), 2013 PROPOSAL, supra n. 13, at 327 of 354.
172 Seventh Circuit Electronic Discovery Principle 2.04 (Scope of Preservation), at (d)(listing categories of ESI that are generally not discoverable and should be identified and discussed if any party seeks their preservation), available at http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.
If a party has undertaken “reasonable steps” to preserve, the inquiry ends. Under the revised rule, the reasonable steps requirement “does not call for perfection” and the mere fact that some ESI was lost is not decisive, in contrast to the underlying logic of the *Zubulake* line of cases. This is a significant upgrading of the role of “reasonableness” as compared to the initial proposal.

The Chair of the Rules Committee explained to the Standing Committee that the revised proposal “should not be a strict liability rule” that would “automatically” impose sanctions “if information is lost.” Thus, it will not be sufficient, as it was under *Pension Committee*, that the party failed to implement one of a list of “contemporary standards” identified in that case. As the Second Circuit subsequently held, “the better approach” is to consider the failure to adopt good preservation practices as but one factor in the determination of whether sanctions should issue.

Thus, courts should not automatically hold that it is *cannot be* reasonable to fail to employ the *per se* requirements of *Pension Committee*, despite the new rule. If courts merely transpose those requirements into new terminology (“It cannot be a “reasonable step” to . . . [insert a listed preservation practice] . . .”) the Committee intention to escape from a strict liability regime will be effectively negated.

This can be illustrated by *Zest v. Implant Direct Mfg.* In that case, a party, well aware of its preservation obligations, saved emails it deemed required after a duty to preserve attached, but overlooked some which were later secured from third parties. The court found that the party “should have put in place a litigation hold,” and authorized an adverse inference instruction.

Had the revised rule been in effect, the court would have been required to determine if the loss had occurred despite the undertaking of “reasonable steps.” The court might have concluded that the party had undertaken a “reasonable, though flawed”

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173 Committee Note, 41.
174 *Zubulake* v. UBS Warburg, 220 F.R.D. 212, 220 (S.D. N.Y. 2003)(“Zubulake IV”) (“[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent”).
175 See Draft Rule 37(e)(2)(B), 2013 PROPOSAL, supra n. 13, at 316 of 354 (“the reasonableness of the party’s efforts to preserve the information”). The Committee dropped the additional clause “including the use of a litigation hold and the scope of the preservation efforts” at its November 2012 Meeting. Minutes, November 2012 Rules Committee, at lines 217-220 and 405-407 (“a hold is a technical means of implementing preservation; probably it is not need in less complex litigation”).
178 *Chin*, supra, 162 (“we reject the notion that a failure to institute a ‘litigation hold’ constitutes gross negligence *per se*”)(italics in original).
179 *Id.* (citing to *Orbit Communications* [271 F.R.D 429, 441 (S.D.N.Y. 2010)]).
effort and refused to impose sanctions.\textsuperscript{181} A party can act reasonably, even if some ESI is lost, when there is a delay in imposing litigation holds\textsuperscript{182} or a failure to image or retain back-up copies\textsuperscript{183} or to interrupt auto-deletion functions\textsuperscript{184} or when inaccessible or ephemeral ESI unlikely to be sought in discovery is not preserved.\textsuperscript{185}

As the Committee Note also explains, the proportionality of the efforts to preserve the ESI is important.\textsuperscript{186} The mere fact that it might be relevant is not sufficient to justify disproportionate efforts. This has long been advocated by the Sedona Conference \textit{Commentary} on the topic\textsuperscript{187} and the Duke \textit{Guidelines and Practices} agree that that applying proportionality to preservation is an important part of achieving overall discovery proportionality.\textsuperscript{188}

Thus, a party may act reasonably by choosing a less costly form of information preservation if it is substantially as effective.\textsuperscript{189} A court should be sensitive to party resources since aggressive efforts can be “extremely costly” and parties may have limited staff and resources to devote to the effort.\textsuperscript{190}

Moreover, the fact that a party took routine, good faith action remains relevant (as under the previous Rule)\textsuperscript{191} and parties who demonstrate that they acted thoughtfully, reasonably, and in good faith in preserving or attempting to preserve are entitled to a presumption of having done so.

This approach comports with the analysis applied in analogous contexts. In the compliance context, an entity that takes “reasonable steps” to ensure that its compliance programs are “generally effective” may benefit even though it may have failed “to

\textsuperscript{181} See, e.g., Qualcomm v. Broadcom, 2010 WL 1336937, at *6 (S.D. Calif. April 2, 2010)( refusing to impose sanctions under Rule 26(g) for failure to make a “reasonable inquiry” or under inherent authority “although a number of poor decisions were made”).


\textsuperscript{183} Reinsdorf v. Skecheers U.S.A., 296 F.R.D. 604, 630 (C.D. Cal. 2013)(no sanctions for failing to back-up or image data on website that was outdated).


\textsuperscript{186} Committee Note, 41 (“[a]nother factor in evaluating the reasonableness of preservation efforts in proportionality”).

\textsuperscript{187} The Sedona Conference® \textit{Commentary on Proportionality in Electronic Discovery}, 14 SEDONA CONF. J. 155, 162 (2013)(decisions should be evaluated “in light of both the proportionality factors set forth in Rule 26(b)(2)(C) and the preserving party’s good faith and reasonableness”).

\textsuperscript{188} \textit{Guidelines and Practices}, at 18.

\textsuperscript{189} Committee Note, 42.

\textsuperscript{190} \textit{Id}.

\textsuperscript{191} Committee Note, 41 (“As under the current rule [37(e)], the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps”).
prevent or detect” misconduct.\textsuperscript{192} The Sedona Conference® Commentary on Legal Holds: The Trigger and the Process provides useful procedural guidance to “navigate to the safe harbor described in the rule.”\textsuperscript{193}

“Restore or Replace”

However, even if reasonable steps were not taken, a court must first determine whether the lost ESI can be restored or replaced through additional discovery before imposing any measures. This involves “attempting first to cure the loss.”\textsuperscript{194} Thus, “[i]f the information is restored or replaced, no further measures should be taken.”\textsuperscript{195} This is especially important in an era where ESI is exchanged between multiple senders and copies may be found in multiple locations.

The additional discovery may involve custodians not earlier searched or sources that would ordinarily be considered inaccessible. The authority to order such discovery stems from Rules 16 and 26 and the Committee Note pointedly cites to amended Rule 26(c)(1)(B) which acknowledges the authority to “allocate” any associated expenses involved.\textsuperscript{196}

The Committee Note also points out, however, that any additional discovery required by the court should be “proportional” to the importance of the lost ESI and that substantial measures should not be employed to restore or replace marginally relevant or duplicative information.\textsuperscript{197}

Subdivision (e)(1): Addressing Prejudice

Subdivision (e)(1) authorizes a court to order curative measures “upon finding prejudice to another party from the loss of information” once the threshold requirements are met. The focus is on “solving the problem, not punishing the malefactor.”\textsuperscript{198} While not explicitly requiring a showing of culpability,\textsuperscript{199} a failure to take “reasonable steps” necessarily includes a form of culpability given the role that an absence of good faith in preservation conduct plays in the assessment.\textsuperscript{200}

\textsuperscript{192} USCG Guidelines Manual, §8B2.1, Para. (b)(it does not necessarily mean that the program is not effective).
\textsuperscript{194} Minutes, supra, April 2014 Rules Committee Meeting, at 23 (line 943-945).
\textsuperscript{195} Committee Note, 42.
\textsuperscript{196} Committee Note, 42.
\textsuperscript{197} Id.
\textsuperscript{198} ABA Litigation News, Summer 2014, 18, Less is More: Proposed Rule 37(e) Strikes the Right Balance.
\textsuperscript{199} Some may see this as providing less of a “safe harbor” for compliant parties that the existing Rule 37(e), which barred sanctions based on “good faith” conduct.
\textsuperscript{200} Minutes, April 2014 Rules Committee Meeting.
Prejudice involves showing that losses of relevant ESI have “impair[ed] the ability to go to trial” or “threaten[s] to interfere with the rightful decision of the case.”\textsuperscript{201} The allocation of the burden of “proving or disproving prejudice” is left to the discretion of the judge.\textsuperscript{202} According to the Committee Report, “each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.”\textsuperscript{203}

The Committee Note observes that when it is difficult to determine the content of missing ESI, placing the burden on moving parties to demonstrate prejudice can be fair in some circumstances and not in others.\textsuperscript{204} As in the case of establishing relevance, however, “conjecture does not constitute evidence.”\textsuperscript{205}

The rule preserves access to a broad range of measures but limits them to “measures no greater than necessary to cure the prejudice.”\textsuperscript{206} Rule 37(b)(2)(A), for example, refers to the (i) establishing of designated facts as established (ii) precluding support of claims or defenses or introduction of evidence (iii) striking pleadings (iv) staying proceedings (v) dismissing the action in whole or in part (vi) rendering default judgment or treating failure to obey an order as contempt of court.

Make no mistake about it, however; “we will still have a system where mere negligence or human error (viewed with hindsight) may form the basis for very significant sanctions/penalties.”\textsuperscript{207} “Much is entrusted to the court’s discretion.”\textsuperscript{208}

According to the Committee Note, a court may forbid the party that failed to preserve information “from putting on certain evidence” or exclude use of specific item of evidence to “offset prejudice caused by failure to preserve other evidence.”\textsuperscript{209} However, it would be inappropriate to preclude a party from offering any evidence in support of the “central or only claim or defense in the case” because the cabining of such case-dispositive measures requires a Subdivision (e)(2) finding of “intent to deprive.”\textsuperscript{210}

\textsuperscript{201} Burton v. Walgreen, 2015 WL 4228854, at *3 (D. Nev. July 10, 2015)(failure to preserve did not “prejudice plaintiff’s ability to prove causation”).
\textsuperscript{202} Committee Note, at 43.
\textsuperscript{203} June 2014 RULES REPORT, supra n. 2, at III (D).
\textsuperscript{204} Committee Note, 43 (the content may be fairly evident or there may be enough information from other sources to meet the needs of the parties).
\textsuperscript{205} Yoder & Frey Auctioneers v. EquipmentFacts, 774 F.3d 1065, 1071 (6th Cir. 2014)(affirming denial of sanction request for failure to show relevance of missing ESI to contested issues).
\textsuperscript{206} See also John W. Griffin Jr., A Voice for Injured Plaintiffs, August 2015 TRIAL, 20 & 22 (“[i]n the end, the committee preserved the rights of district court judges to remedy the negligent spoliation of evidence”).
\textsuperscript{207} Communication to Author from in-house counsel observer, April 2014 (copy on file with author).
\textsuperscript{208} Committee Note, 44.
\textsuperscript{209} See, e.g., Jones v. Bremen High School, 2010 WL 2106640, at *9-10 (N.D. Ill. 2010)(refusing to impose adverse inference since no showing of purposeful destruction but precluding arguments to jury based on absence of emails for period of inadequate preservation as well as costs of preparation of motion for sanctions to “remedy plaintiff’s prejudice”).
\textsuperscript{210} Committee Note, 44.
The Note also approves the submittal of evidence and argument to the jury regarding the failure to preserve and “instructions to assist in its evaluation of such evidence, other than instructions to which subdivision (e)(2) applies,” if no greater than necessary to cure prejudice.\textsuperscript{211}

The Committee Note is silent on the authority to shift attorney fees to “cure” prejudice under subsection (e)(1), which may reflect historic concerns about fee-shifting in the absence of a showing of bad faith.\textsuperscript{213} It more likely reflects the fact that the remedy is sufficiently common as to not warrant further mention.\textsuperscript{214} In any event, care must be taken that measures imposed under subdivision (e)(1) do not have the effect of measures listed in subdivision (e)(2) without a finding of “intent to deprive another party of the lost information’s use in the litigation.”\textsuperscript{215}

The Note also cautions that the authority to order measures no greater than necessary to cure prejudice “does not require the court” to cure every possible prejudicial effect.\textsuperscript{216}

\textbf{Subdivision (e)(2): Cabining Harsh Measures}

Subdivision (e)(2) cabins authority to impose severe measures under subdivision (e)(1) without mentioning the role of prejudice. The Committee Note explains that prejudice may be inferred from the enhanced culpability showing.\textsuperscript{217} One interpretation is that the Committee intended to permit harsh measures as punishment or a deterrent even if no prejudice is shown.\textsuperscript{218}

However, a better approach is to view subsection (e)(2) as primarily focused on the resolution of the existing Federal Circuit split on culpability, with an ongoing requirement of prejudiced assumed or “baked in” to the rule.\textsuperscript{219} Under that view, the prejudice requirement is not mentioned in (e)(2) since it is typically satisfied by a

\textsuperscript{211} Id.
\textsuperscript{212} Committee Note, 46. \textit{See, e.g.}, Russell v. U. of Texas, 234 Fed. Appx. 195, 208 (5th Cir. June 28, 2007) (“the jury heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit”).
\textsuperscript{213} \textit{See, e.g.}, Chambers v. NASCO, 501 U.S. 32, 45-46 (1991)(attorney fees are available only when “a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons”).
\textsuperscript{214} Discovery Subcommittee Minutes, March 4, 2014, 4 (“it is a “commonplace measure”).
\textsuperscript{215} Committee Note, 44.
\textsuperscript{216} Id.
\textsuperscript{217} Committee Note, 47
\textsuperscript{218} The Committee sought to avoid the risk of “rewarding a party who has destroyed evidence so successfully that it leaves no evidence of its content.” Thomas Allman, \textit{Standing Committee Oks Federal Discovery Amendments}, Law Technology News (Online), June 2, 2104 (available on LEXIS NEXIS), at 4 (according to discussion at Standing Committee Meeting of May 29, 2014, the authority to act under subsection (e)(2) is in “addition” to that of subdivision (e)(1) and is neither an “alternative” to nor a “subset” of it).
\textsuperscript{219} \textit{See, e.g.}, Vicente v. Prescott, City of, 2014 WL 3939277, at *10-11 (D. Ariz. Aug. 13, 2014)(refusing to consider sanctions where a “complete lack of prejudice” existed despite the fact that “preservation efforts were inadequate”).
The Standing Committee Report to the Judicial Conference, for example, describes the rule as “eliminating the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI.” An “incompetent spoliator” (one completely successful in destroying all evidence of the contents) will necessarily be unable to overcome the presumption/inference of prejudice.

Uniform Culpability Standard

Under Subdivision (e) must have “acted with the intent to deprive another party of the information’s use in the litigation” before a court may: (1) presume that lost ESI was unfavorable or (2) instruct a jury that it “may or must presume” that lost ESI was unfavorable or (3) dismiss the action or enter a default judgment. The purpose of subsection (e)(2) is to achieve a uniform and predictable national standard akin to the “bad faith” or “bad conduct” requirement which has historically been used in many Circuits.

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

The intent is reduce the in terrorem effect of the threat of harsh sanctions for unintentional spoliation. After Subdivision (e)(2) goes into effect, case law which permits adverse inferences without a specific showing of intentional conduct will no

220 Minutes, April 2014 Rules Committee, at 25 (lines 1015-1017 (“[t]he Committee Note will say that the court should not dismiss or default simply for deliberate loss of immaterial information. But if there is prejudice - including what may be inferred from the deliberate intent to deprive – dismissal or default is available”); accord, at 29 (lines 1214-1315) (harsh measures “not [available] if the lost information is truly inconsequential”).
221 Summary of the Report of the Standing Committee, ST09-2014, 16, reproduced in Rules Transmittal, supra n. 2
222 Guzman v. Jones, __ F.3d __, 2015 WL 6437436, at *4 (5th Cir. Oct. 22, 2015)(“[w]e permit an adverse against the spoliator” only upon a showing of ‘bad faith’ or ‘bad conduct’); see also Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013) (“for the purpose of hiding adverse information”).
223 Committee Note, 45 (the rule “rejects cases such as Residential Funding Corp. [306 F.3d 99, 108 (2nd Cir. 2002)(the culpable state of mind factor is satisfied by a showing that the evidence was destroyed “knowingly, even if without intent to [breach a duty to preserve it], or negligently”) (emphasis in original)”). The court adopted the logic that it made “little difference” to the party that did not have access to the information whether it was done “willfully or negligently.” Id. at 108.
224 Committee Note, 45 (“negligent or even grossly negligent behavior does not logically support that inference”).
longer be good law.\textsuperscript{226} Admittedly, the uniformity will be limited to the federal courts; there will be that states will continue to apply lesser culpability requirements. A finding of “intent to deprive” may be made by the court or the jury\textsuperscript{227} and may be inferred where the totality of the circumstances warrant such a finding.

Even when the requisite “intent to deprive” exists, however, “[t]he remedy should fit the wrong.” The least onerous sanction corresponding to the culpability and prejudice suffered should be employed. The Committee Note cautions that severe measures should not be used if lesser measures would be sufficient to redress the loss.\textsuperscript{228}

Some have expressed concerns that courts will mischaracterize conduct which is willful or reckless as reflecting an “intent to deprive.” That risk is unavoidable.\textsuperscript{229} However, it is clear that a showing of “intent to deprive” requires evidence of purposeful conduct intended to deprive the other party of relevant and discoverable evidence.\textsuperscript{230} A finding of reckless\textsuperscript{231} or willful conduct is not enough\textsuperscript{232} since neither requires an intent to deprive another party of the evidence.\textsuperscript{233} As one observer has pointed out, it “is the toughest standard to prove that the Advisory Committee could have adopted.”\textsuperscript{234}

Jury Instructions

It was noted earlier that the Committee Note states that Subsection (e)(1) does not bar introduction of the facts of spoliation - and argument about the inferences to be drawn from those facts - to juries (provided, of course, that there is a sufficient showing of “prejudice” to justify the action). It is permissible for a court to give the jury


\textsuperscript{227} Committee Note, 47 (the jury must first find that the party acted with the intent to deprive another party of the information’s use in the litigation).

\textsuperscript{228} Committee Note, 47.

\textsuperscript{229} See, e.g., HM Electronics v. R.F. Technologies, 2015 WL 4714908, at *12 & *30 (S.D. Cal. Aug. 7, 2015)(acknowledging that the new Rule does not require perfection but imposing adverse inference because “even if [revised Rule 37(e) applied] the Court would reach the same result”).

\textsuperscript{230} Rimkus Consulting v. Cammarata, 688 F. Supp.2d, 598, 647 (S.D. Tex. Feb. 19, 2010)(adverse inference permissible only if “the jury finds that the defendants deleted emails to prevent their use in litigation”). See Discovery Subcommittee Meeting Notes, March 4, 2014, 2((the formulation is “very similar to the one used by Judge Rosenthal in Rimkus”).

\textsuperscript{231} As one Committee Member put it “[n]ot even [a] reckless loss will support those measures.” Minutes, April 2014 Rules Committee Meeting, 18 (lines 785-786).


\textsuperscript{233} Victor Stanley, supra, 269 F.R.D. at 530 (to find “willfulness,” it is sufficient that the actor merely intended to destroy the evidence”).

\textsuperscript{234} Patricia W. Moore, Civil Procedure & Federal Courts Blog, September 12, 2014.
instructions to assist in its evaluation of such “evidence or argument.” According to the Note, it only the use of jury instructions which “directs or permits the jury to infer” that lost ESI was unfavorable to the party that lost it that require the heightened culpability requirement of Subsection (e)(2).

This reflects existing practice in many courts. It is akin to the decision in Mali v. Federal Insurance Company, announced by the Second Circuit during the Committee deliberations, and duly noted by the Committee. In that decision, the court permitted a jury to draw inferences from non-production of certain information on the theory that it “was not a punishment” but “simply an explanation to the jury of its fact-finding powers.” While the Committee Note does not endorse that logic, it comes close to implementing it as a practical matter.

Some interpret the Committee Note as endorsing use of juries to make all factual findings, including whether spoliation has occurred and whether the missing ESI was unfavorable. However, “[o]nce a jury is informed that evidence has been destroyed, the jury’s perception of the spoliator may be unalterably changed.” An adverse inference instruction “may tip the balance in ways the lost evidence never would have” and impose a “heavy penalty for losses” of ESI, creating “powerful incentives to over-preserve, often at great cost.”

Courts must be especially vigilant, therefore, to ensure that engaging the jury does not unduly prejudice or distort the trial on the merits. FRE 403 cautions that exclusion of evidence is necessary where there is a danger of undue prejudice, confusing the issues and misleading the jury. In Decker v. GE Healthcare, for example,

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235 Committee Note, 44.
236 Committee Note, 46.
237 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”).
238 Mali v. Federal Insurance Company, 720 F.3d 387, 393 (2nd Cir. June 13, 2013)(noting that findings of culpable conduct would not be required as in the case of another “type” of adverse inference instruction such as that of Residential Funding).
239 Hon. Shira A. Scheindlin and Natalie M. Orr, The Adverse Inference Instruction After Revised Rule 37(e): An evidence-Based Proposal, 83 FORDHAM L. REV.1299, 1315 (2014)(the rule does not prohibit a “Mali-type permissive instruction [Mali v. Federal Insurance, 720 F.3d 387 (2nd Cir. 2013)] that leaves all factual findings, including whether spoliation occurred, to the jury”).
240 Gorelick et al., Destruction of Evidence §. 2.4 (2014)(“DSTEVID § 2.4”).
241 Committee Note, 45.
242 June 2014 RULES REPORT, supra, at III (E).
243 Haley v. Kolbe & Kolbe Millwork, 2014 WL 6982330, at *2 (W.D. Wisc. Dec. 10, 2014)(refusing to instruct a jury that a party had “breached their duty to preserve evidence” because “there would be no purpose [for it] except to invite the jury to draw such an [adverse] inference”).
244 GORELICK ET AL, DESTRUCTION OF EVIDENCE § 2.4 (2014) (“DSTEVID § 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).
instructions were refused because to do so would give the issue “a lot more importance that it has had in this trial.”

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

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

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

Over-Preservation

As noted, one of the original reasons for seeking a uniform culpability rule for sanctions was to address complaints about the inadequate treatment of “over-preservation” in existing Rule 37(e).

However, after the public hearings on the initial proposal for a revised Rule 37(e), the Committee observed that supportive witnesses were not able to provide a “precise

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249 In re Actos, 2014 WL 4364832, at *45 (W.D. La. Sept. 2, 2014)(refusing post-trial relief); see also In re Actos, supra, 2014 WL 5461859, at *55 (modifying punitive damages to $28M against Takeda and $9M against Lilly “to send a message” for “seriously reprehensible behavior”).
251 Id. *29.
252 Id. *20.
prediction” of the amount that would be saved by reducing the fear of sanctions.”

Accordingly, the “potential savings” – though worth pursuing - were deemed “too uncertain to justify seriously limiting trial court discretion.”

As noted, the revised rule leaves much to the discretion of the court once prejudice is shown, including harsh remedies designed to address that issue.

Nonetheless, several elements of the revised rule provide hope that it may help reduce unnecessary over-preservation. The rule explicitly introduces proportionality considerations into the discussion, provides for a de facto safe harbor for those who take reasonable steps, even if some ESI is lost, and suggests that restoration or replacement of the missing ESI negates the need for a court to act. Not surprising, however, “[c]ompanies may be well-advised to see how courts interpret new Rule 37€ before going too far toward revamping existing preservation practices.”

254 May 2, 2014 Report of Rules Committee to Standing Committee, 38 (while reducing the “incentives for over-preservation” remained a “worthwhile goal,” the “savings” to be achieved by such a reduction are “quite uncertain), available at http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014.

255 Id.

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 APPENDED FORMS 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 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, \textit{or} discovery, \textit{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 \textit{under Federal Rule of Evidence 502};

Rule 30 Depositions by Oral Examination

(a) \textbf{When a Deposition May Be Taken.} * * *

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

(d) \textbf{Duration; Sanction; Motion to Terminate or Limit.}

(1) \textit{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) \textit{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) \textbf{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.)]