The 2015 Civil Rules Package As Approved By the Judicial Conference

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Introduction
The Rules Package

I. Introduction

This Memorandum describes the proposed "package" of amendments to the Federal Rules of Civil Procedure now pending before the Supreme Court. If the amendments are adopted in whole or in part by the Court and submitted to Congress prior to May 1, 2015, they will become effective on December 1, 2015 if legislation is not adopted to reject, modify, or defer them. The text of the Amendments is included as Appendix A.

The proposals are the culmination of a four year effort by the Committee on Rules of Practice and Procedure of the Judicial Conference (the "Standing Committee") and its Civil Rules Advisory Committee (the "Rules Committee"), as described in the June 2014 Rules Committee Report.[2]

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[2] The June 2014 Rules Committee Report ("June 2014 RULES REPORT") describing the proposed rules and including text and Committee Notes was included as Appendix B to the September, 2014 Standing Committee Report, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf. A stand-alone copy of the June 2014 RULES REPORT is found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf. Pagination to material in the Report as used herein is in the form "B-___".

The proposed amendments reflect a significant evolution from the original proposals which were released in August, 2013.[3]

Background

The amendment process began with the 2010 Conference on Civil Litigation held by the Committee at the Duke Law School.[4] The Conference is best described in the Report to the Chief Justice issued by the Rules Committee in September, 2010.[5]

Key "takeaways" were the need for better case management, more effective use of the long-ignored principle of "proportionality" and an increased emphasis on the role of cooperation among parties in discovery. In addition, the E-Discovery Panel recommended development of uniform national rules regarding preservation and spoliation of discoverable information.

The task of developing individual rule proposals was split between the Discovery Subcommittee, chaired by the Hon. Paul Grimm[6] and the "Duke" Subcommittee, chaired by the Hon. John Koeltl. Both Subcommittees met frequently and each vetted their respective interim draft rule proposals at "mini-conferences."

A merged "package" of rules was released for public comment in August, 2013. The Rules Committee conducted three Public Hearings in late 2013 and early 2014 that involved over 120 testifying witnesses. Copies of transcripts of each of the hearings are available on the U.S. Courts website.[7] In addition, the Committee received over 2300 written comments, which were summarized by the Committee and the originals of which are also available.[8]

After close of the public comment period, the Subcommittees met and developed revised recommendations.[9] Based on those recommendations, and following a last

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[3] The original 2013 Rules Package may be found at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf. The explanatory Rules Committee Report of May 2013, as supplemented in June, 2013, begins at page 259 of 354. That Report also contains the original text and Committee Notes and is sometimes referred to herein as the "2013 RULES REPORT."

[4] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 540-541 (2010).

[5] Memo, Rules Committee to The Chief Justice, September 10, 2010, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf.

[6] The Discovery Subcommittee was originally chaired by Judge David Campbell prior to his becoming Chair of the Rules Committee.

[7] The initial Public Hearing was held by the Rules Committee in Washington, D.C. on November 7, 2013 followed by a second hearing on January 9, 2014 in Phoenix and a third and final hearing on February 7, 2014 at the Dallas (DFW) airport. Transcripts of the three are available at http://www.uscourts.gov (scroll to Rules and Policies, then Archives of the Rules Committee).

[8] Detailed summaries of the Comments were included in the Agenda Book submitted prior to the Rules Committee meeting in Portland Oregon on April 10-11, 2014. The written comments are archived at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

[9] Both Subcommittee Reports may be found in the April 2014 Rules Committee Agenda Book, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

minute rewrite of Rule 37(e),[10] revised proposals were adopted by the Rules Committee at its April 10-11, 2014 meeting and approved by the Standing Committee at its May 29, 2014 meeting.[11] The Judicial Conference subsequently approved the revised proposals and referred them to the Supreme Court for further action.[12]

Three Rules Committee Reports are of particular significance in tracing this evolution. They are the initial Committee Report[13] which accompanied the release of the original "package" for public comment in August, 2013; the May 2014 Report,[14] which described the initial changes made after public comment; and the June 2104 Report, which transmitted the final form of the text and Committee Notes to the Judicial Conference after the Standing Committee meeting.[15]

However, since nuance is important, attention should also be paid to the Minutes of the meetings of the Rules Committee and the Duke and Discovery subcommittees, and, especially, to the post-public comment Subcommittee Reports.[16]

Public Comments

Expansive comments on virtually all proposals were provided by Lawyers for Civil Justice ("LCJ")[17] and the American Association for Justice ("AAJ," formerly "ATLA").[18] The AAJ urged rejection of rules that added proportionality factors to the scope of discovery, opposed reduced presumptive limits and criticized Rule 37€ because it "made sanctions less likely in instances of spoliation." LCJ, on the other hand, supported limiting spoliation sanctions, adding proportionality to the scope of discovery, and making reductions in presumptive numerical limits.

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.

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[10] Advisory Committee Makes Unexpected Changes to 37(e), April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/.
[11] The Minutes of both meetings are found in the Agenda book for the October Rules Meeting at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-10.pdf.
[12] The Rules Committee also recommended abrogation of Rule 84 and the "Appendix of Forms" and proposed certain unrelated changes to Rule 4, 5, 6 and 55 and 82. This Memorandum does not deal with those proposals, which are summarized in the Report of the Standing Committee cited in n.2, *supra*.
[13] *See* n. 3, *supra*.
[14] The May 2014 Rules Committee Report ("May 2014 RULES REPORT"), is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf.
[15] *See* n. 2, *supra*.
[16] *See* n. 9, *supra*.
[17] LCJ Comments, August 30, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267, as supplemented.
[18] AAJ Comments, December 19, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372.

Support for the most controversial amendments came from corporate entities, affiliated advocacy groups and corporate-oriented law firms. Over 300 General Counsel and executives endorsed a joint Statement of Support. Much of the opposition was expressed by representatives of individual claimants and members of the academic community, a number of whom also filed joint comments.

Opposition was also expressed by some bar entities, certain District and Magistrate Judges and a few Democratic members of the House and Senate. A Senate Subcommittee held a hearing on the topic on November 5, 2013.[19]

II. The Rules Package

The Rules Committee views the Duke Proposals [all proposals except Rule 37(e)] as a "package" which is "designed to work together."[20] Rule 37(e), in contrast, is seen as replacement for the current Rule which is necessary to deal with failures to preserve ESI in a more satisfactory manner.

We deal first with the "Duke" proposals.

(1) Cooperation (Rule 1)

Rule 1 speaks of the need to achieve the "just, speedy, and inexpensive determination of every action and proceeding." The Committee proposes that Rule 1 should be amended so as to be "construed, ~~and~~ administered and employed by the court and the parties to secure" those goals.

The Committee refused, however, to amend Rule 1 to require that parties "should cooperate to achieve these ends."[21] Cooperation had been heavily emphasized at the Duke Conference and assumed prominence in part as a result of the Sedona Conference® Cooperation Proclamation.[22] Many Local Rules[23] and other e-discovery initiatives[24] invoke cooperation as an aspirational standard.

The expressed concern of the Committee was that adding it to the Rule could have "collateral consequences."[25] It would have added "one more point on which parties can

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[19] *See* U.S. Senate Committee reviews Proposals, at http://www.legalnews.com/Detroit/1382969
[20] June 2014 RULES REPORT, B-14 ("the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process").
[21] *See* Duke Subcommittee Initial Sketch for Rule 1, March, 2012, at 42, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.
[22] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[23] *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").
[24] *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]).
[25] Minutes, November 2, 2012 Rules Committee Meeting, at lines 616-622.

disagree and blame the other when it is to their advantage."[26] A similar suggestion had been rejected in 1978.[27]

Instead, the proposed Committee Note emphasizes that "the parties share the responsibility to employ the rules" in the manner called for by Rule 1. The Note observes that "most lawyers and parties cooperate to achieve these ends" and that "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure." [28]

Public Comments

Concerns were raised during the public comment period about the references to "cooperation" in the Committee Note. As Lawyers for Civil Justice put it, "[u]ntil the concept of 'cooperation can be defined so as to provide objective ways to evaluate a party's compliance – including the proper balance between cooperative actions and the ethics rules and professional requirements of effective representation – the Committee Note should not be amended to include an unlimited exhortation to cooperation."[29]

One problem is the uncertainty about whether "cooperation" means something more than a willingness to take opportunities to discuss defensible positions in good faith[30] – in short, whether it mandates compromise.[31]

Revised Committee Note

During the May 2014 Standing Committee meeting, it was announced that the Committee Note would be further amended to clarify that the change to the rule was not intended to serve as a basis for sanctions for a failure to cooperate.[32]

The final version of the Note thus adds that "[t]his amendment does not create a new or independent source of sanctions" and "does [not] abridge the scope of any other of these rules."[33]

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[26] LCJ Comment, The Need for Meaningful Rule Amendments, June 5, 2012, 4; copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_duke_proposals_060512.pdf.
[27] Steven S. Gensler, Some Thoughts on the Lawyer's E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 547 (2009)(language was proposed in 1978 authorizing sanctions for failure to have cooperated in framing an appropriate discovery plan).
[28] Committee Note, B-21-22.
[29] LCJ Comment, *supra*, n. 16, August 30, 2013, at 20.
[30] Gensler, *supra*, at 546 (the correctness of the inference "turn[s] on the definition of cooperation").
[31] *Id*. (the view that cooperation means "a willingness to move off of defensible positions – to compromise – in an effort to reach agreement" is not what Rules 26(f), 26(c) or 37(a) actually demand).
[32] Minutes, Standing Committee Meeting, May 29-30, 2014, at 5 ("[t]he added language would make it clear that the change was not intended to create a new source for sanctions motions"); *see also* Committee Report, June 2014 RULES REPORT at B-13 ("[o]ne concern was this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate").
[33] Committee Note, B-22.

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

A series of amendments are proposed to facilitate improved case management, consistent with suggestions made at the Duke Conference.

Timing (Service of Process)

The time limits in Rule 4(m) governing the service of process are to be reduced in number from 120 to 90 days. The intent is to "reduce delay at the beginning of litigation."[34]

Timing (Issuance of Scheduling Orders)

In the absence of "good cause for delay" a judge will be required by an amendment to Rule 16(b)(2) to issue a 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.[35]

Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2)("Early Rule 34 Requests")) will be added to 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 by a parallel provision 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.[36]

Scheduling Conference

Rule 16(b)(1)(B) will be modified by striking the reference to conducting scheduling conferences by "telephone, mail, or other means." The Rule will merely refer to the duty to issue a schedule order after consulting "at a scheduling conference."

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[34] *Id*. B-24 (acknowledging that shortening the presumptive time will increase the frequency of occasions to extend the time for good cause).
[35] *Id*. B-28.
[36] *Id.*, B-45.

The Committee Note observes that the conference may be held "in person, by telephone, or by more sophisticated electronic means."

The Note also explains that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[37]

Scheduling Orders/Discovery Plans

Rule 16(b)(3)("Contents of the Order") and Rule 26(f)(3)("Discovery Plan") would be amended in several related ways.

First, parties will be required to state their views in discovery plans on "disclosure, ~~or~~ discovery, or preservation" of ESI, and the contents of scheduling orders may provide for "disclosure, ~~or~~ discovery, or preservation" of ESI.

The proposed Committee Note to Rule 16 states that a duty to preserve discoverable information "may arise before an action is filed"[38] and the Committee Note to Rule 37(e) suggests that if the parties cannot reach agreement about preservation issues, they should "promptly seeking judicial guidance about the extent of reasonable preservation."[39] No explanation is given on exactly how parties are expected to seek pre-litigation guidance issues,[40] but the Note predicts an increase in the use of preservation orders.[41]

Second, parties will be required to state their views as to whether to seek orders "under Federal Rules of Evidence 502" regarding privilege waiver, and scheduling orders will be authorized to include any such agreements.

The June 2014 Committee Report notes that Rule 502 was designed to reduce the expense of producing ESI or other voluminous documents and that parties and judges should consider its potential application early in the litigation.[42]

Finally, a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." The proposed 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."[43]

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[37] *Id.*, B-27 (implicitly excluding the use "mail" as a method of exchanging views).
[38] *Id.*, B-28.
[39] June 2014 RULES REPORT, at B-60.
[40] *Cf.* May 2014 RULES REPORT, 59 ("[u]ntil litigation commences, reference to the court [for guidance on preservation requirements] may not be possible."). *See e.g.*, Texas v. City of Frisco, 2008 WL 828055 (E.D. Tex. 2008). That comment does not appear in the June 2014 Report.
[41] *Id.* ("Preservation orders may become more common because [of the parallel amendments to Rules 26(f) and 16(b)]").
[42] June 2014 RULES REPORT, at B-12.
[43] Committee Note, B-29.

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

Since 1983, Rule 26(b)(2)(C)(iii) has required courts to act to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit," considering "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues."

This "proportionality" requirement - and the related certification provisions applicable to counsel in Rule 26(g)[44] - achieved new prominence in the context of e-discovery. There was "widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case."[45]

Initial Proposal

After considering various ways to deal with the issue,[46] the Duke Subcommittee recommended moving the proportionality factors from their current location into Rule 26(b)(1)("Scope [of discovery] in General"). This was seen as preferable to the insertion of the word "proportional"[47] into the rule by itself. The Committee was concerned that such an approach could generate uncertainty and "corresponding contention."[48]

A proposal to that effect was released for public comment along with related recommendations to delete much of the rest of Rule 26(b)(1).

Public Comments

The proposal kicked off a firestorm of opposition by those who saw it as an attempt to deny discovery important to constitutional and individual civil rights or employment claims. Concerns were raised, for example, that a producing party could "simply refuse reasonable discovery requests" and force requesting parties to have to "*prove* that the requests are not unduly burdensome or expensive."[49]

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[44] Rule 26(g)(1)(B)(iii)(an attorney signing a discovery filing impliedly certifies that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action").
[45] June 2014 RULES REPORT, B-5.
[46] *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.
[47] Minutes, Subcommittee Conference Call, October 22, 2012, at 6, copy at https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf.
[48] June 2014 RULES REPORT, B-5 ("subsequent discussions at the mini-conference . . . revealed significant discomfort with simply adding the word 'proportional' to Rule 26(b)(1)" because , standing alone, "the phrase seemed too open-ended, too dependent on the eye of the beholder"); *see also* Minutes, March 22-23, 2012 Rules Committee Meeting, at lines 1041-1044.
[49] AAJ Comment, *supra*, December 19, 2013 (emphasis in original).

Others criticized the proposal as erecting "stop signs" to discovery without having developed empirical evidence of a need to restrict discovery.[50] Some predicted a increase in assertions of disproportionality[51] and motions to compel, which would increase costs and deter filings in federal courts.[52] Finally, it was argued that moving the factors put "the cart before the horse," since an informed proportionality analysis is best accomplished only after there is more information available.[53]

Supporters of the proposal to include proportionality factors in Rule 26(b)(1), on the other hand, described it as a "modest" adjustment" without material change to existing obligations.[54]

The Revised Proposal

After close of the public comment period, the Rules Committee approved the relocation of the proportionality factors into Rule 26(b)(1), but with modifications.

First, the "amount in controversy" factor was moved to a secondary position behind "the importance of the issues at stake in the action." Second, a new factor was added requiring consideration of "the parties' relative access to relevant information" in order to provide focus on the need to deal with "information asymmetry." The revised Note explains that "the burden of responding to discovery lies heavier on the party who has more information, and properly so."[55]

As revised, Rule 26(b)(2)(1) will permit a party to "obtain discovery regarding any non-privileged 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."

Rule 26(b)(2)(C)(iii) will be revised in parallel so as to require a court to limit the frequency or extent of discovery when a court determines that "the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)."

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[50] Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U.L. REV. 286, 354 & n. 261 (April 2013)(describing the inclusion of proportionality in the 1983 rules as based on merely "impressionistic" evidence of discovery abuse).

[51] Professor Miller predicted a tidal wave of defense motions to prevent discovery on the ground that one or more of the five proposed proportionality criteria is absent.

[52] Hon. Shira A. Scheindlin Comment, January 13, 2014, at 3.

[53] Testimony by Larry Coben, January 9, 2014.

[54] Caig B. Shaffer and Ryan T. Shaffer, Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure, 7 FED. CTS. L. REV. 178, 195 (2013)(the proposal will not "materially change obligations already imposed upon litigants, their counsel, and the court").

[55] Committee Note, B-40/41.

The balance of Rule 26(b)(1) would be deleted to remove "excess" language.[56] This includes the list of types of discoverable information such as the location of discoverable matter and identity of parties who know about it.[57] The Committee Note, however, was amended to clarify that discovery of that nature should be permitted as required.[58]

Also deleted will be the authority to order discovery of any matter "relevant to the subject matter" since the Committee "has been informed that this language is rarely involved."[59]

In addition, the statement that "[r]elevant information need not be admissible at trial if [it] appears reasonably calculated to lead to admissible evidence" will be replaced by the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[60]

Assessment

During the public comment period, the Department of Justice suggested that suitable language should to be added to the Committee Note to confirm the understanding that the movement of the proportionality factors into Rule 26(b)(1) was not intended to change the scope of discovery.[61] No such unequivocal statement is included in the June 2014 Committee Report or in the revised Committee Note.

Instead, the Committee Note describes the primary thrust of the amendment as "restoring" the proportionality factors to their original place in defining the scope of discovery, thus reinforcing the Rule 26(g) obligation of the parties "to consider these factors in making discovery requests, responses, or objections."[62]

Thus, the proposed amendment "does not change the existing responsibilities" of the court and parties to consider proportionality nor does it "place on the party seeking discovery the burden of addressing all proportionality concerns."[63] The parties and the court will have a "collective responsibility" to consider the proportionality of all

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[56] *Id.*, B-9 ("[b]ecause Rule 26 is more than twice as long as the next longest civil rule, the Committee believes that removing excess language is a positive step").
[57] Committee Note, B-43 ("it is no longer necessary to clutter the long text of Rule 26 with these examples").
[58] *Id.*
[59] *Id.* ("[p]roportional discovery relevant to any party's claim or defense suffices").
[60] *Id.*(because it has been used, incorrectly, to define the scope of discovery).
[61] Department of Justice Comment, January 28, 2014, at 3 ("[t]he transfer of the text describing the factors from Rule 26(b)(2)(C) to Rule 26(b)(1) is not intended to modify the scope of permissible discovery").
[62] Committee Note, B-39.
[63] *Id.*

discovery in resolving discovery disputes,[64] as under current case law in analogous circumstances.[65]

The Committee Note also states that the change is "not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." [66] As noted, this was a major concern expressed during the public comment period by opponents. Under this analysis, the amendment is seen as making no change to "existing responsibilities of the court and the parties to consider proportionality."[67]

Some Commentators remain unconvinced and believe the change will "narrow" the scope of discovery. Under that view, the change in Rule 26(b)(1) adds proportionality as a "third element" to the scope of discovery which defines the scope, rather than a court-imposed limitation on discovery that is otherwise within the general scope.[68] At the Phoenix hearing on the Federal proposals, a Utah State trial Judge described the analogous Utah rule changes integrating proportionality in scope of discovery[69] as part of a shift to "proportional discovery."[70]

The impact of adding proportionality considerations to Rule 26(b)(1) on the scope of the duty to preserve is not discussed in the Committee Notes to either that Rule or in the Notes to proposed Rule 37(e). This contrasts with the approach taken in the analogous Committee Note prepared for the (then) Rule 37(f) in 2004. That Note originally stated that "[t]he outer limit [of the duty to preserve] is set by the Rule 26(b)(1) scope of discovery."[71] The reference was ultimately dropped from the final 2006 Note.

Computer Assisted Review

A last minute addition to the proposed Committee Note to Rule 26 endorses use of "computer-based methods of searching" information to address proportionality concerns in cases involving large volumes of ESI.[72]

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[64] *Id.*
[65] *See, e.g.*, Nkemakolam v. St. John's Military School, 2013 WL 5551696 (D. Kan. Dec. 3, 2013) at *2 ("once facial relevance is established, the burden shifts to the party resisting discovery"). *See also* Rule 26(b)(2)(B)("the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost").
[66] Committee Note, B-39.
[67] *Id.*,
[68] Patricia Moore, FRCP Will Narrow (Once Again) the Scope of Discovery, Civil Procedure & Federal Cts. Blog, Sep. 5, 2014; copy at http://lawprofessors.typepad.com/civpro/2014/09/frcp-amendments-will-narrow-once-again-the-scope-of-discovery.html.
[69] Utah Rule 26(b)(1)(Discovery Scope in General)("Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below").
[70] Testimony by Hon. Derek Pullan, January 9, 2014.
[71] Committee Note, Civil Rules Advisory Committee Report, May 17, 2004, Revised, August 3, 2004, at 34; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf.
[72] Committee Note, B-42.

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

The initial Package of proposed amendments included provisions to lower the presumptive limits on the use of discovery devices in Rules 30, 31, 33 and 36[73] in order to "decrease the cost of civil litigation, making it more accessible for average citizens."[74]

An earlier proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.[75]

The specific proposed changes would have included:

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

However, while the proposals garnered some public support, they also encountered "fierce resistance"[76] on grounds that the present limits worked well and new ones might have the effect of limiting discovery unnecessarily.[77] As a result, the Duke Subcommittee recommended[78] and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools.

Accordingly, the only proposed changes to Rules 30, 31 and 33 are the cross-references to the addition of "proportionality" factors to Rule 26(b)(1).[79]

At the Rules Committee Meeting where the withdrawal of the proposal was announced, the hope was expressed that most parties "will continue to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially, and if need be, as the case unfolds."[80] The Committee expects that it will be possible to "promote the

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[73] The initial proposals for Rules 30, 31, 33 & 36 are at (unnumbered) pages 300-304, 305 & 310-311 of the 2013 Rules Package as released for public comment at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf.
[74] 2013 RULES REPORT, at (unnumbered) page 268 of 354.
[75] *Id.*, at 267.
[76] June 2014 RULES REPORT, B-4 ("[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect").
[77] A detailed CCL Report of May, 2014 summarizes the objections. *See* CCL Preliminary Report on Comments on Proposed Changes to [FRCP], May 12, 2014, 5; copy at http://www.cclfirm.com/files/Report_050914.pdf.
[78] The Duke Subcommittee Report is in the April 2014 Rules Committee Meeting Agenda Book, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.
[79] *See, e.g.*, Proposed Rule 30(a)(2)("the court must grant leave [for additional depositions] to the extent consistent with Rule 26(b)(1) and (2)").
[80] Minutes, Rules Committee Meeting, April 10-11, 2014, at lines 308-314.

goals of proportionality and effective case management through other proposed rule changes" without raising the concerns spawned by the new presumptive limits.[81]

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

At the Duke Conference, some suggested that Rules 26 and 45 should be amended so that the requesting parties would be required to pay the reasonable costs of preserving, collecting, reviewing and producing electronic and paper documents.[82] While a partial draft along those lines was developed for discussion,[83] the Subcommittee reviewing the proposal was "not enthusiastic about cost-shifting, and [did] not propose adoption of new rules." It was agreed, however, that making cost-shifting a more "prominent feature of Rule 26(c) should go forward."[84]

Accordingly, the Committee proposes to amend Rule 26(c)(1)(B) 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 June 2014 Committee Report explains that this will "ensure" that courts and parties will consider cost allocation as an alternative to denying requested discovery or ordering it despite the risk of imposing undue burdens and expense.[85]

The Committee Note explains that recognizing the authority to enter such orders – which is already happening - "will forestall the temptation some parties may feel to contest this authority."[86] There is well-established Supreme Court support for the practice.

Revised Committee Note

During the public comment period, concerns were expressed about the weight which would be applied to the Committee Note.[87] Accordingly, the Note now also states that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[88]

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[81] June 2014 RULES REPORT, B-4.
[82] LCJ Comment, Reshaping the Rules of Civil Procedure for the 21st Century, May 2, 2010, at 55-60.
[83] Initial Rules Sketches, at 29, Addendum to Agenda Materials for Rules Committee Meeting, March 22-23, 2012 (requiring a requesting party to "bear part or all of the expenses reasonably incurred in responding [to a discovery request]"); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.
[84] Initial Rules Sketches, at 37, as modified after Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.
[85] June 2014 RULES REPORT, B-10.
[86] Committee Note, B-45.
[87] *See* AAJ Comments, *supra*, 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*, August 30, 2013, at 19-20 (endorsing proposal as "a small step towards our larger vision of reform").
[88] Committee Note, B-45 (also stating that "[r]ecognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice").

The Committee has stated that it plans to "explore the question" of whether more detailed provisions should be developed to guide "whether a requesting party should pay the costs of responding."[89]

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

It is proposed to amend Rule 34 and 37 to facilitate requests for and production of discoverable information and to clarify confusing aspects of current discovery practices. The changes include:

First, Rule 34(b)(2)(B) will be modified to confirm that a "responding party may state whether it will produce copies of documents or [ESI] instead of permitting inspection." Rule 37(a)(3)(B)(iv) will also be changed to authorize motions to compel for *both* failures to permit inspection and failures to produce.[90] As the Committee Note observes, it is "common practice" to produce copies of documents or ESI "rather than simply permitting inspection."[91]

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

Second, Rule 34(b)(2)(B) will require that an objection to a discovery request must state "~~an objection~~ with specificity the grounds for objecting to the request, including the reasons." The Committee Note explains that "if the objection [such as over-breath] recognizes that some part of the request is appropriate, the objection should state the scope that is not [objectionable]."[92]

Third, Rule 34(b)(2)(C) will require that any objection must state "whether any responsive materials are being withheld on the basis of [an] objection."[93] This is intended to "end the confusion" when a producing party states several objections and still produces information.[94] A producing party need not provide a detailed description or log but must "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion."[95]

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[89] May 2014 RULES REPORT, 11. No reference to these plans was included in the June 2014 RULES REPORT.
[90] Committee Note, B-58 ("[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling 'production, or inspection'").
[91] *Id.*, B-54 ("the response to the request must state that copies will be produced"). For a useful summary of the evolution of the process, *see* Anderson Living Trust v. WPX Energy Production, 298 F.R.D. 514, 521-527 (D. Mass. Sept. 17, 2014).
[92] Committee Note, B-53.
[93] The new language continues to be followed by the current requirement that "[a]n objection to part of a request must specific the part and permit inspection of the rest."
[94] Committee Note, B-54.
[95] *Id.*

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

The duty to preserve potential evidence in light of pending or reasonably foreseeable litigation is not articulated in the Federal Rules.[96] Breach of the duty, including pre-litigation failures - resulting in "spoliation"[97] - is typically remedied by courts exercising their inherent authority to avoid litigation abuse. Rule 37(b) sanctions are not available unless a discovery order is violated.[98]

As part of the 2006 Amendments, the Rules Committee adopted a limited restriction on rule-based sanctions for ESI losses in what is now Rule 37(e).[99] The Committee did not address pre-litigation conduct because of concerns about its authority[100] under the Rules Enabling Act.[101]

By the time of the 2010 Duke Conference, it was clear that "significantly different standards for imposing sanctions" had caused litigants to expend excessive efforts on preservation in order to avoid the risk of severe sanctions "if a court finds they did not do enough."[102] Culpability requirements vary among the Federal Circuits, especially in regard to the level required to utilize adverse inference jury instructions.

The E-Discovery Panel at the Duke Conference, accordingly, recommended inclusion of a detailed preservation rule in the federal rules – minimizing Enabling Act concerns - and suggested possible "elements" for such a rule.[103] The Rules Committee agreed to undertake a review and assigned the task to its Discovery Subcommittee, which developed alternative proposals for discussion at a Mini-Conference on Preservation and

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[96] *See* Committee Note, [then] Rule 37(f), 234 F.R.D. 219, 374 (2006)("[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case"); *see also* A. Benjamin Spencer, The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal court, 79 FORDHAM L. REV. 2005 (April 2011).

[97] Spoliation is traditionally defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber, 167 F.3d 776, 779 (2nd Cir. Feb. 12, 1999).

[98] Uniguard v. Lakewood, 982 F.2d 363, 367 (9th Cir. 1992); *cf.* Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72 (S.D. N.Y. 1991)(acts of spoliation prior to issuance of discovery orders violate Rule 37(b) because the inability to comply "was self-inflicted").

[99] Rule 37(e)("[a]bsent 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").

[100] *See* Committee Note, Civil Rules Advisory Committee Report, May 17, 2004, Revised, August 3, 2004, at 34 (the initial proposal for [then] Rule 37(f) "did not address" such conduct); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf.

[101] 28 U.S.C. §2072 (acknowledging power of Supreme Court to "prescribe general rules of practice and procedure" for "cases in the United States [courts]" provided they do not modify "substantive right[s]").

[102] Committee Note, B-58.

[103] Memo, Gregory P. Joseph, May 11, 2010, Executive Summary: E-Discovery Panel, with "elements" of a possible rule (noting but dismissing concerns about whether such a rule can or should apply prior to the commencement of an action); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Executive%20Summary.pdf.

Spoliation.[104] The alternatives included a proposed Rule 26.1 which would govern preservation obligations; compliance would have barred sanctions even if discoverable information was nonetheless lost.[105]

The primary alternative was a "sanctions-only" approach which listed "factors" for courts to consider in retroactively assessing preservation conduct. Ultimately, the Committee decided to rely on the latter approach, since "the backwards shadow" of such a rule would "reassure and give direction to those making preservation decisions."[106] In the Committee's view, this avoids Enabling Act issues because it deals with the impact of pre-litigation conduct in the context of current litigation.[107]

The Initial Proposal

A draft of the proposed replacement for current Rule 37(e) - applicable to all forms of discoverable information - was released for public comment by the Standing Committee) in August, 2013.[108]

As proposed, Rule 37(e) would have applied only when a party failed to preserve discoverable information that "should have been preserved in the anticipation or conduct of litigation" – as assessed by the common law and by five "factors" included in the draft Rule.[109] The rule authorized two types of measures:

First, a court could require a party to undertake additional discovery, "curative measures" or pay attorney fees caused by the failure to preserve.[110] No showing of prejudice or culpability would be required.[111] As one Commentator later put it, "[t]his

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[104] *See* Notes, Dallas Mini-Conference on Preservation and Spoliation, Sept. 2, 2011, copy at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

[105] Rule 37(e)("if the party has complied with Rule 26.1"). Memo, Preservation/Sanctions Issues, 14; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Preservation.pdf. Rule 26.1 provided that persons that expected to be parties to litigation must preserve discoverable information once aware of facts which would lead to such a conclusion (listing same), required "actions that are reasonable" considering proportionality, but "presumptively" excluded certain forms of information [ESI], and limited the duty to a defined period, a reasonable number of key custodian and lasting until, if suit filed, the litigation is terminated. Memo, Preservation/Sanctions Issues, 3-13.

[106] *Id*. 25.

[107] Minutes, April 2011, *supra*, at lines 883-899.

[108] The text and Committee Note are included in the May 8, 2013 Rules Committee Report, as supplemented June 2013 ("2013 RULES REPORT"), which was part of the Request for Public Comment, copy at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf. The portion of the Report explaining the Rule's intent is found at pages 270-275 and the Text and Note are found at pages 314-328.

[109] Rule 37(e)(2)(listing factors dealing with the extent of notice of litigation, the reasonableness and proportionality of the actions undertaken and the need for parties to access courts for guidance in dealing with disagreements).

[110] Rule 37(e)(1)(A).

[111] The Committee Note described these as "measures that are not sanctions." Committee Note, 2013 RULES REPORT, 40.

provision was in effect, a strict liability standard [which was not] explicitly required to be proportional to the harm caused."[112]

Second, a court could impose a "sanction" from the list in Rule 37(b) or "give an adverse inference jury instruction" if the court found that the party's actions caused "substantial prejudice" in the litigation *and* was the result of "willful or bad faith" conduct[113] *or* "irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation.[114] No attempt was made to define "willful" conduct, which has not been uniformly applied in the case law.[115]

Public Comments

The proposal encountered a decidedly mixed reception. Some argued that the Committee should not expand Rule 37(e) to deal with all forms of discoverable information. Others suggested that the list of factors was problematic and should be dropped. Yet others suggested the heightened culpability threshold for sanctions would unfairly restrict court discretion and encourage misconduct.

The reference to "curative" measures also drew mixed comments.[116] Some expressed concern that courts would simply repackage adverse inferences as "curative measures." One witness famously questioned how remedial measures could be authorized without having to show that there was prejudice that needed to be cured.[117]

Revised Proposal

After close of the public comment period, the Discovery Subcommittee met and developed a revised approach which differed markedly from the original proposal. A key change was to restrict the Rule to losses of ESI[118] and to limit the culpability requirement to a list of sanctions with case-terminating potential. It also preserved an emphasis on "curative measures" retained a list of factors to be considered. The new text was accompanied by a draft Committee Note.[119]

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[112] Gibson Dunn, 2014 Mid-Year Electronic Discovery Update, July 16, 2014; copy at http://www.gibsondunn.com/publications/pages/2014-Mid-Year-Electronic-Discovery-Update.aspx.
[113] Rule 37(e)(B)(i).
[114] Rule 37(e)(B)(ii). The Committee Note cited cases in which the alleged injury-causing instrumentality has been lost such as Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001). 2013 RULES REPORT, 44.
[115] Gibson Dunn, *supra*, ("in some jurisdictions [it] includes negligence").
[116] Letter Comment, January 10, 2014, Hon. James C. Francis IV, at 5-6 (proposing that Rule 37(e) authorize remedies "no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith").
[117] John K. Rabiej, Director, Duke Law Center for Judicial Studies, September 11, 2013 (noting that "it seems a bit odd not to refer to a prejudice standard for a curative measure").
[118] June 2014 RULES REPORT, B-16 ("the law of spoliation for evidence other than ESI is well developed and longstanding").
[119] The Subcommittee Report may be found at page 369 of 580 in the April 2014 Rules Committee Agenda Book, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf. The text of the Rule is at page 15 of the Report and the Committee Note begins at page 16.

However, before the Discovery Subcommittee proposal could be voted on, another version was produced, dropping the list of factors, focusing on remediation of prejudice and adding a de facto safe harbor for parties which undertook "reasonable steps."[120] As revised, the proposal was approved at the Portland, Oregon Meeting of the Rules Committee on April 11, 2014.[121] It was understood that yet another version of the draft Committee Note would be required.

As approved by the Rules Committee, the Standing Committee and the Judicial Conference, and with certain stylistic changes,[122] the proposal before the Supreme Court now provides:

Rule 37(e) Failure to ~~Produce~~ Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

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

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

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

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

(C) dismiss the action or enter a default judgment.[123]

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[120] The revision also dropped the distinction between curative measures which applied "without considering the need to consider whether the loss caused prejudice" and those which required a predicate finding of prejudice. *See* Discovery Subcommittee Report (undated), April 2014 Agenda Book, at 7-8 (375-376 of Agenda Book), and text at 15-15 (383-384 of Agenda Book) and compare to final text reproduced in body of this Memo.

[121] *See* Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/(reproducing text of revision finally approved by Rules Committee).

[122] The word "may" was deleted from the introductory language and added back in two other places to add "more emphasis on the word 'only' and thus underscores the intent that "(e)(2) measures are not available under (e)(1)." Minutes, Meeting of May 29-30, 214, 7; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST05-2014-min.pdf.

As a result of these changes, the Rule may be imposed only if a court *first* determines that the loss involves ESI that "should have been preserved" because the party failed to take "reasonable steps" to prevent the loss of relevant ESI once the duty to preserve was triggered. Moreover, the rule applies only if the missing ESI "cannot be restored or replaced through additional discovery."

Reasonable Steps

If a finding of reasonable steps is made, the inquiry ends.[124] The reasonable steps requirement "does not call for perfection,"[125] in contrast to the contrary assumption in cases like *Pension Committee.*[126] This is consistent with recent case law[127] applying the emerging consensus that perfection is no more required in preservation than it is in production of ESI.[128] Similarly, in the corporate 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 prevent or detect" the misconduct.[129]

Proportionality is also an important factor and "[a] party may act reasonably by choosing a less costly form of information preservation."[130]

The practical impact can be illustrated by *Zest v. Implant Direct Mfg.*[131] In that case, a party, well aware of its preservation obligations, saved the emails it deemed required after a duty to preserve attached, but overlooked emails which were later secured from third parties. The court found that the party "should have put in place a litigation hold," and authorized an adverse inference instruction even though it was "unsure" that emails were destroyed intentionally. [132]

Had the proposed rule been in effect, the court would have examined the preservation conduct to see if it constituted "reasonable steps," not merely assumed that it was unreasonable because some emails were overlooked.

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[123] June 2014 RULES REPORT, B-56/57.
[124] Committee Note, B-61 ("[b]ecause the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve").
[125] *Id.*
[126] Pension Committee v. Banc of America Securities, 685 F. Supp.2d 456, 465 (S.D. N.Y. 2010)(requiring a written litigation hold since a failure to do otherwise "is likely to result in the destruction of relevant information"), *abrogated in part by* Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. 2012)).
[127] Automated Solutions v. Paragon Data Systems, 756 F.3d 504, 516-517 (6th Cir. June 25, 2014)(refusing to apply a *per se* test pursuant to Pension Committee).
[128] Freedman v. Weatherford Int'l, 2014 WL 4547039, at *3 (S.D. N.Y. Sept. 12, 2014)(collecting cases illustrating that the Federal Rules "do not require perfection").'
[129] USCG Guidelines Manual, §8B2.1, Para. (b)(it does not necessarily mean that the program is not effective).
[130] Committee Note, B-62.
[131] 2013 WL 6159177 (S.D. Cal. Nov. 25, 2013).
[132] *Id*. at *6. The court concluded that the officer "destroyed email," although explained in a footnote that "[t]he court is unsure whether [his] emails were destroyed intentionally." It was enough for the court that the party had failed to "put in place a litigation hold."

Whether a party has acted in "good faith" is also a relevant factor[133] in assessing preservation conduct after the duty applies. 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."[134]

Subdivision (e)(1) Measures

When a covered failure to preserve causes prejudice to a party because of a failure to take "reasonable steps" to preserve, Subdivision (e)(1) authorizes courts to "order measures no greater than necessary to cure the prejudice." No explicit finding of culpability is required.[135]

Absent a finding of prejudice, the Subdivision is inapplicable. This differentiates the revised Proposal from the initial Proposal, which authorized "curative measures" without such a requirement. The method of "proving or disproving prejudice" is left to the discretion of the court, which is expected to "draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information."[136]

The Committee Note cautions that the severity of subdivision (e)(1) measures employed should be carefully "calibrated in terms of their effect." Among possible remedies mentioned in the Note are the striking of pleadings or barring use of evidence in a case, provided that it does not involve "the central or only claim or defense in the case."[137]

Similarly, a court may permit "the parties to present evidence and argument regarding the loss of information, or [give] instructions to assist a jury in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies."[138] According to the Note, such an instruction merely allows a jury to consider such evidence "along with all the other evidence in the case" and does "not involve instructing a jury it may draw an adverse inference from loss of information."[139]

Some courts currently employ such an approach where a breach of duty is clear, but the party seeking more punitive relief "has not met his [its] burden of establishing the requisite culpability to justify an adverse inference.[140] Care must be taken to ensure that

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[133] Committee Note, B-61 ("a relevant factor for the court to consider").
[134] James S. Kurz et al, The Long-Awaited Proposed FRCP Rul2 37(e), Its Workings and Its Guidance for ESI Preservation, White Paper Series 2014, 6.
[135] *Cf.* Minutes, Rules Committee Meeting, April 10-11, 2014, lines, 631-633 (the failure of a party to take reasonable steps to preserve embraces a form of 'culpability'").
[136] June 2014 RULES REPORT, B-17.
[137] Committee Note, B-64.
[138] *Id.*
[139] *Id.*, B-66.
[140] Wandner v. American Airlines, __F. Supp.3d __, 2015 WL 145019, at *2 (S.D. Fla. Jan. 12, 2015)(permitting introduction of and argument about failure to preserve and its impact on ability to prove case to deal with prejudice); *accord* Russell v. U. Texas, 234 Fed. Appx. 195, 208 (5th Cir. 2007)("the jury

such measures do not have the effect of the punitive instructions that are only permitted under subdivision (e)(2).[141] The exclusion of such evidence is warranted where its probative value is substantially outweighed by a danger of undue prejudice, confusing the issues and misleading the jury.[142]

An award of reasonable expenses, including attorney fees is presumably authorized under (e)(1), despite the silence of the Committee Note on the topic.[143] This may simply reflect the fact that the remedy is so common as to not warrant further mention.[144] It may also indicate a reluctance to deviatte from the Supreme Court limits on fee-shifting under the American Rule in the absence of a showing of bad faith.[145]

Subdivision (e)(2) Measures

Subdivision (e)(2) is intended to resolve the inter-Circuit split on the culpability required to support the imposition of case-terminating sanctions. It rejects the view of *Residential Funding v. DeGeorge Financial*[146] that adverse inferences can be based on a showing of negligent or grossly negligent failures to preserve.[147]

The Committee intended to require conduct "akin to bad faith, but [which is] defined even more precisely."[148] Thus, the Rule requires a prior showing that "the party acted with the intent to deprive another party of the information's use in the litigation" before a court may:

- "presume" that lost ESI was unfavorable or
- that a jury "may or must presume" that lost ESI was unfavorable or
- dismiss the action or enter a default judgment.

The Committee analyzed existing cases and concluded that adverse inferences "have been based on a logical conclusion – when a party destroys evidence for the purpose of preventing another party from using it in litigation, "one reasonably can infer that the evidence was unfavorable to the destroying party."[149]

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heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit").

[141] Committee Note, B-64.

[142] FRE 403.

[143] *Compare* Rule 37(e)(1)(A)(2013)(authorizing a court to "permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure [to preserve]").

[144] Discovery Subcommittee Minutes, March 4, 2014, 4 (a "commonplace measure").

[145] Chambers v. NASCO, 501 U.S. 32, 45-46 (1991)(attorney fees available only when "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons").

[146] 306 F.3d 99 (2nd Cir. 2002)(a culpable state of mind is satisfied when evidence is destroyed "knowingly, even if without intent to [breach a duty to preserve it] or *negligently*")(emphasis added by court).

[147] Committee Note, B-65.

[148] June 2014 RULES REPORT, B-17.

[149] *Id*.

A showing of prejudice is not required. During the discussion at the Standing Committee, it was noted that an explicit requirement would risk rewarding a party who has destroyed evidence so successfully that it leaves no evidence of its content.[150]

As noted in the discussion of subdivision (e)(1), the "intent to deprive" requirement applies only to an "instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it." It "does not apply to jury instructions that do not involve such an inference." Moreover, courts may give the "traditional missing evidence instruction" relating to a failure to produce evidence which a party "has in its possession at the time of trial."[151]

Assessment

After Subdivision (e)(2) goes into effect, permissive and mandatory adverse inferences will not be available unless the heightened level of culpability is affirmatively found to exist. Assuming that specific intent - not merely willful or reckless conduct – is in fact required, adverse inference instructions directed at that conduct will be less used, and properly so. This should have an impact in those Circuits adhering to *Residential Funding*[152] as well as those which interpret "bad faith" requirements to be synonymous with an intentional conduct rule.[153]

However, in *Mali v. Federal Insurance*,[154] the Second Circuit held that a permissive inference instruction as used in that case[155] was "not a punishment," but "simply an explanation to the jury of its fact-finding powers."[156] This ruling is preempted by Subdivision (e)(2). It applies to all forms of adverse inference instructions even if a court did not intend it as punishment.[157] Permitting a jury to hear instructions

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[150] Committee Note, B-67 (the finding of specific intent may support an inference that the opposing party was prejudiced).
[151] *Id.*, B-66.
[152] Examples of rulings where adverse inferences might not have been granted if the rule had been in effect include: SJS Distribution v. Sam's East, 2013 WL 5596010, at *5 (E.D.N.Y. Oct. 11, 2013)("no evidence of bad faith"); Gatto v. United Air Lines, 2013 WL 1285285, at *4 (D.N.J. March 25, 2013)(court not persuaded that evidence was "intentionally suppressed"); Food Services v. Carrington, 2013 WL 4507593, at *21 (D. Ariz. Aug. 23, 2013)(even if "did not intend to deprive an opposing party of relevant evidence"); Zest IP Holdings v. Implant Direct Mfg, 2013 WL 6159177, at n.6 & *9 ("unsure" if party acted intentionally but "at least" negligent); Montoya v. Orange Co. Sheriff's Dept., 2013 WL 6705992, at *13 (C.D. Cal. Dec. 19, 2013)("no suggestion of bad faith or deliberate destruction of evidence"). Many of these examples might not have even reached the adverse inference stage if entitlement had been assessed under a "reasonable steps" standard and the motions dismissed.
[153] *See, e.g.*, Zest IP Holdings, *supra*, 2013 WL 6159177, at *6 (sanctioning the "conscious, or perhaps willful disregard of their obligation to preserve documents" by "failing to implement a litigation hold").
[154] 720 F.3d 387 (2nd Cir. 2013).
[155] *Id.*, at 390 (you may "infer, though you are not required to do so, that if the photograph had been produced in court, it would have been unfavorable to the Plaintiffs"). *Mali* is akin to a "missing evidence" rule, because the jury had to first determine if the photograph had ever been in existence.
[156] *Id.*, at 393.
[157] Gorelick et al., Destruction of Evidence §. 2.4 (2014)("DSTEVID s 2.4)(Once "a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterably changed," regardless of the intent of the Court).

implying that a party is a "bad actor" risks prejudice and confusion of a type that is intended to be subject to the "intent to deprive" requirement.[158] To the extent that *Mali* holds otherwise, it is inconsistent with the Proposed Rule.[159]

FRE 403 aptly cautions that exclusion of evidence is necessary where there is a danger of undue prejudice, confusing the issues and misleading the jury. Similarly, the Texas Supreme Court has recently held in *Brookshire Brothers v. Aldridge*[160] that it is reversible error to introduce evidence of spoliation that was unrelated to the issues of the case.[161]

The experience in the recent *Actos* litigation also illustrates the risks involved when a jury is given *carte blanche* to consider allegations of spoliation without court management. The jury was allowed "to hear all evidence and argument establishing and bearing on the good or bad faith" of a party's conduct[162] and that "spoliation occurred in this case" and that it was "free to infer [missing] documents and files would have been helpful" to the plaintiffs.[163] It was also instructed that in considering punitive damages, it should consider "the degree of concealment or covering up of the wrongdoing."[164]

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 argued that it had not authorized the jury to sanction the parties via punitive damages although, in reviewing spoliation evidence, "[t]he jury was free to make its own inferences."[165]

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[158] *See, e.g.*, Arch Insurance v. Broan-Nutone, 509 Fed. Appx. 453 (6th Cir. Dec. 12, 2012)(although a permissive jury instruct may only formalize "what jurors would be entitled to do in the absence of a specific instruction," it comes "dressed in the authority of the court, giving it more weight than if merely argued by counsel").

[159] *Cf.* Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV.1299, 1315 (2014)("courts may [despite (e)(2)] issue a Mali-type permissive instruction" without the need to meet the "strict 'intent to deprive' standard").

[160] 57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9, 2014 WL 2994435 (S.C. Tex. July 3, 2014)(remanding for a new trial after jury verdict where the jury was allowed to hear evidence and argument about failure to preserve video footage and permitted to decide if spoliation occurred).

[161] *Id*. *29.

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

[163] In re Actos, 2014 WL 2921653, at n. 2 (W.D. La. June 23, 2014).

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

[165] In re Actos, 2014 WL 4364832, at *45 (W.D. La. Sept. 2, 2014)(refusing post-trial relief while also noting that "[t]he jury was free to make its own inferences"); *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").

APPENDIX A

Full Rules Text (as adopted by the Judicial Conference and pending before the Supreme Court)

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

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

Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ ***unless the judge finds good cause for delay the judge must issue it*** within the earlier of ~~120~~ ***90*** days after any defendant has been served with the complaint or ~~90~~ ***60*** days after any defendant has appeared.

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

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

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

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced,

including agreements reached under Federal Rule of Evidence 502;
(v) ***direct that before moving for an order relating to discovery the movant must request a conference with the court***;

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

(b) DISCOVERY SCOPE AND LIMITS.

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

(2) *Limitations on Frequency and Extent*

* * *

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

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

* * *

(c) PROTECTIVE ORDERS.

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

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

(2) Early Rule 34 Requests.

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

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

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

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

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

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

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

* * *

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

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

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

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

Rule 30 Depositions by Oral Examination

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

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

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

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

Rule 31 Depositions by Written Questions

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

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

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

(1) *Number.*

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

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

(b) PROCEDURE. * * *

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

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

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ***with specificity the grounds for objecting to the request,*** including the reasons. ***The responding party may state that it will produce copies of documents or of electronically stored information instead of***

permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

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

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

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

(3) *Specific Motions.* * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: * * *

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

* * * * *

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

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

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

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

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

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

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