The Civil Rules Package As Approved By the Judicial Conference (September, 2014)

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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 which are 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 a September 2014 Report to the Judicial Conference.[2]

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[2] The June 2014 Committee Report ("June 2014 RULES REPORT") describing the proposed rules and including the text and Committee Notes is included as Appendix B to the September, 2014 Standing Committee Report, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf . This Memorandum utilizes citations to the pagination in Appendix B.

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

Background

The process which led to the package of amendments began with the May, 2010 Conference on Civil Litigation held by the Committee at the Duke Law School, which was convened to ascertain whether it was necessary to "totally rethink the current approach taken by the civil rules."[4]

The Duke Conference generated a number of scholarly papers and involved highly motivated dialogue stretching over two days.[5] Key "takeaways" were the need for better case management, application of the long-ignored principle of "proportionality" and an 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.[6]

The task of developing individual rule proposals was subsequently split between the Discovery Subcommittee, chaired by the Hon. Paul Grimm and the "Duke" Subcommittee, chaired by the Hon. John Koeltl. Both Subcommittees vetted interim proposals at "mini-conferences" and the resulting proposals were merged into the "package" released for public comment in August, 2013.

Hearings and Public Comments

The Rules Committee conducted three Public Hearings that involved over 120 testifying witnesses. Copies of transcripts of each remain available on the US Courts website. In addition, the Committee received over 2300 written comments, which were summarized by the Committee[7] and remain available as archived.[8]

There were two phases to the public comment period. During the initial phase, expansive comments on virtually all proposals were provided by Lawyers for Civil Justice ("LCJ")[9] and the American Association for Justice ("AAJ," formerly "ATLA").[10]

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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 Committee Report of May 2013, as supplemented in June, 2013, begins at page 259 of 354. That Report is sometimes referred to herein as the "2013 RULES REPORT."

[4] Mary Kay Kane, Pretrial Procedural Reform and Jack Friedenthal, 78 GEO. WASH. L. REV. 30, 38 (2009).

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

[6] Executive Summary, Gregory P. Joseph, May 11, 2010 (with proposed "Elements" of a preservation rule), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Executive%20Summary.pdf.

[7] 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.

[8] At http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

[9] LCJ Public Comment to the Advisory Committee on Civil Rules, August 30, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267, as supplemented, February, 2014, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0540.

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.

General support for the package came from corporate entities, affiliated advocacy entities and corporate-oriented law firms. Over 300 General Counsel and executives endorsed a joint Statement of Support. However, specific aspects were supported by individuals and many organizations, including some of those noted above.

Much of the opposition centered on the proposed changes to the scope of discovery in Rule 26(b)(1), the lowering of presumptive limits on discovery devices and aspects of the replacement of Rule 37(e).[11] It 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 members of the House and Senate.

The second phase occurred in response to the targeted, but substantial, changes in proposed Rules 26 and 37 recommended by the Discovery and Duke Subcommittees to the Rules Committee after close of the public comment period.[12] Those proposed revisions (including a recommendation to withdraw proposed reductions in presumptive limits on use of discovery devices) prompted further comments.[13]

The Rules Committee ultimately adopted the revised proposals, including some last minute changes to proposed Rule 37(e), at its April 10-11, 2014 meeting in Portland, Oregon. The Standing Committee approved the rules and Committee notes, with some changes, at its May 29, 2014 Meeting.[14] Both Committees agreed that republication of the proposals was not required. Under the applicable Judicial Conference Guidelines, republication is not necessary when a rules committee decides that it would not assist the work of the committee.[15]

As noted, the Judicial Conference subsequently approved the revised proposals and referred them to the Supreme Court on September 16, 2014.

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

[11] CCL Preliminary Report on Comments on Proposed Changes to [FRCP], May 12, 2014, 5, copy at http://www.cclfirm.com/files/Report_050914.pdf.

[12] The Agenda Book containing the two Subcommittee Reports may be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[13] *See, e.g.*, LCJ Comment, May 22, 2014 (commenting on final proposals), copy at http://www.lfcj.com/.

[14] It had been furnished a Report of May 2, 2014 ("May 2014 RULES REPORT") available in the May Agenda Book at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks (scroll to Report).

[15] *See* Procedures Governing the Rulemaking Process, § 440.20.50 (2011)(a rule "should be republished" when substantial changes are made "*unless* the committee determines that it would "not be necessary to achieve adequate public comment and would not assist the work of the rules committee").

II. The Rules Package

We discuss the individual Rule proposals (and their associated Committee Notes) in numerical order, which reflects the division of work of the Subcommittees. The Standing Committee was informed that the Rules Committee "views the Duke Proposals" [all proposals except Rule 37(e)] as a "package" which is "designed to work together."[16] Rule 37(e), on the other hand, is best seen as a more detailed replacement rule whose "time has come" in order to deal with preservation of ESI.[17]

(1) Cooperation (Rule 1)

Rule 1 would be amended so as to be "construed, ~~and~~ administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." (new material underlined).

According to the Committee Note, the proposed amendment is intended to emphasize that "just as the court should construe and administer" the rules to secure the just, speedy, and inexpensive determination of actions, "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" but that it is important to discourage "over-use, misuse, and abuse of procedural tools that increase cost and result in delay." The Note concludes that "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure." [18]

Cooperation was heavily emphasized at the Duke Conference as consistent with the Sedona Conference® Cooperation Proclamation and its effort to change the culture of discovery.[19]

Favorable mention of "cooperation" or "collaboration" also occurs at two other places in the proposed Committee Notes supporting the proposed "package."[20] Many Local Rules and other e-discovery initiatives also invoke cooperation as an aspirational standard.[21]

It was announced during the Standing Committee meeting that the Rules Committee had accepted a suggestion that the Committee Note should state that nothing

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[16] June 2014 RULES REPORT, B-14 ("the Committee believes that these changes will promoted worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process").
[17] *Id*. ("[t]he Committee recognized in 2006 that the continuing expansion of ESI might provide reasons to adopt a more detailed rule").
[18] Committee Note, at B-21-22.
[19] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[20] Committee Note, at B-28 ("meaningful collaboration") and Committee Note, at B-41 ("cooperative management").
[21] *See* [MODEL] STIPULATED ORDER (N.D. CAL), ¶ 2, copy at http://www.cand.uscourts.gov/eDiscoveryGuidelines ("[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation covered by the Order]).

in the rule was intended to create a basis for sanctions against parties that did not, if fact, cooperate. The proposed Committee Note thus 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."[22]

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

A series of proposed amendments were proposed to facilitate active case management of discovery by the judiciary, consistent with suggestions made at the Duke Conference.[23]

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

The time limits in Rule 4(m) governing the service of process are to be reduced in number from 120 to 90 days, rather than the initial proposal to reduce the time to 60 days.

Timing (Issuance of Scheduling Orders)

A Rule 16(b) scheduling order will be required to issue as soon as practicable, but no later than 90 days after any defendant has been served or 60 days after any appearance of a defendant, down from 90 days in the current rule, unless there is "good cause for delay."

Additional explanatory material was added to the Committee Note to Rule 16 after Public Comments emphasizing that the discretion to provide for extra time was designed to establish the meaningful collaboration necessary for a useful scheduling conference in complex cases.

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) would also be amended to add a parallel provision for the time to respond.

The Committee Note explains that this change is "designed to facilitate focused discussion during the Rule 26(f) Conference."

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[22] Committee Note, at B-22. The May 2014 Rules Committee Report noted that the rule could have, but did not, place a duty to construe and administer the rules "to the desired ends" on parties – rather than merely hint at it. May 2014 RULES REPORT, 16.

[23] *See, e.g.,* Paul W. Grimm and Elizabeth J. Cabraser, The State of Discovery Practice in Civil Cases, 5 ("the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process").

Scheduling Conference

Rule 16(b) will be modified by striking the reference to scheduling conferences held by "telephone, mail, or other means." The Committee Note urges that the conference be held in person, by telephone, or by more sophisticated electronic means – not by mail. The Note explains that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."

Rule 16(b) would be amended to authorize the option of inclusion of a requirement in scheduling orders that parties must seek a conference with the court prior to moving for a discovery order. Whether or not to require such conferences is left to the discretion of the judge in each case. 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."

Scheduling Orders/Enhanced Preservation Planning

Rules 16(b)(3)(B) will be modified to expand the list of permitted contents of a scheduling order and the Rule 26(f)(3) will reflect changes in proposed discovery plans as required.

Thus, Rule 16(b) will permit a scheduling order issued by the court to "provide" for preservation of ESI as needed, presumably following up from discussions stimulated by the new requirement in Rule 26(f)(3)(C) that parties state their views on "disclosure, ~~or~~ discovery, or preservation" of ESI, including the form or forms in which it should be produced.

Both rules will also be encouraged to address whether the scheduling order should incorporate an agreement regarding claims of privilege "under Federal Rule of Evidence 502." The Rules Committee Report opines that "ESI is a growing issue in civil litigation, and the Committee believes that parties and courts should be encouraged to address it early. Similarly, Rule 502 was designed in part to reduce the expense of producing ESI or other voluminous documents and the parties and judges should consider its potential application earlier in the litigation."[24]

The proposed Committee Note to Rule 37(e) predicts that "[p]reservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation." It goes on to state that if the parties cannot reach agreement about preservation issues, "promptly seeking judicial guidance about the extent of reasonable preservation may be important."[25]

[24] June 2014 RULES REPORT, B-12.
[25] Committee Note, B-60.

The proposed Committee Note to Rule 16, on the other hand, observes that "Rule 37(e) [will] recognize that a duty to preserve discoverable information may arise before an action is filed." No effort is made in either the Committee Report or the Note to explain how access to a court is possible when a party is subject to a duty to preserve "before an action is filed."[26]

The Rules Committee ignored the Sedona recommendation that Rule 26 should be amended so that protective orders would be available to a party "who is, or may be, subject to a request to preserve."[27]

(3) Scope/ Proportionality (Rule 26)

Rule 26(b)(2)(C)(iii), often referred to as the "proportionality" rule, requires a court 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."

The advent of e-discovery with its enormous expansion in volumes brought new prominence to the "proportionality" requirement and to the certification requirement applicable to counsel in Rule 26(g). The doctrine has been widely embraced by Local Federal Rules, Guidelines and Protocols and was a prominent part of the discussion at the 2010 Duke Litigation Conference.

According to the June, 2014 Rules Committee Report, there was "near-unanimous agreement" that the disposition of civil actions could be improved by advancing, *inter alia*, "proportionality in the use of available procedures."[28] The Sedona Conference® Principles advocates use of the "proportionality standard" in assessing both preservation and discovery.[29]

The 2013 Proposal

In accordance with a recommendation of its Duke Subcommittee, the Rules Committee suggested a modification of the scope of discovery in Rule 26(b)(2)(1)[30] so as

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[26] The proposed Committee Note for Rule 37(e) as originally published conceded that "[u]ntil litigation commences, reference to the court may not be possible." May 2014 RULES REPORT, 59. *See e.g.*, Texas v. City of Frisco, 2008 WL 828055 (E.D. Tex. 2008).

[27] Sedona Comment, November 26, 2013, at 6, copy at file:///C:/Users/PC/Downloads/Sedona_WG1_SC_Comment_on_Proposed_Rule_Amendments_11-26-13.pdf.

[28] June 2014 RULES REPORT, B-2 & B-5 ("widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case").

[29] The Sedona Conference® Principles, at Principles 2 and 5. *See also* The Sedona Conference® Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010).

[30] Rule 26(b)(1) currently provides that a party may obtain discovery of "nonprivileged matter that is relevant to any party's claim or defense" while authorizing, for good cause, a court to order "discovery of any matter relevant to the subject matter involved in the action." It also provides for discovery that is

to "limit the scope of discovery to what is proportional to the needs of the case" by moving the proportionality factors into that Rule. This was seen as a way to provide needed emphasis to what was reported an underused concept. The proposal also included deletion of the balance of the rule and addition of some new language.

However, the proposal kicked off a firestorm of opposition during the three public hearings and in many written comments. The opposition portrayed the incorporation of the word "proportional" and the movement of the related factors as an attempt to deny discovery important to prosecution of constitutional and individual civil rights or employment claims.[31]

Indeed, a former Reporter for the Committee characterized the proposal as a manifestation of "acquisitive class politics," resulting from unfounded assertions of a crisis in discovery costs not supported by empirical evidence.[32] A principal argument was that the amendment would unfairly shift the burden of establishing that the "likely benefit" of discovery is not outweighed by its "burden or expense" to the proponent of discovery.[33]

The American Association of Justice ("AAJ")[34] argued that the change would "fundamentally tilt the scales of justice in favor of well-resourced defendants" because a producing party could "simply refuse reasonable discovery requests" and force requesting parties to have to "*prove* that the requests are not unduly burdensome or expensive."[35] (emphasis in original). Moreover, as the Center for Constitutional Litigation ("CCL") subsequently noted, "the vast majority of scholars and judges who commented on [the proposal]" expressed a preference to continue proportionality as a "limit enforced by the court."[36]

The Revised Proposal

At its April, 2014 Meeting, the Rules Committee approved the relocation of the proportionality factors, but made a number of modifications. The "amount in controversy" factor was moved to a secondary position behind "the importance of the issues at stake in the action." In addition, an express reference to "the parties' relative access to relevant information" was added to the list of considerations to provide "explicit focus" on the need to deal with "information asymmetry."[37]

"reasonably calculated to lead to the discovery of admissible evidence." The rule notes that all "discovery" is subject to the "limitations imposed by Rule 26(b)(2)(C)."

[31] *See, e.g.,* The Leadership Conference on Civil and Human Rights Comment, November 7, 2013, 4 ("Limiting discovery and creating a proportionality standard will only function to widen the gap between those who control the information, and those who need access to it to vindicate their rights").

[32] Paul D. Carrington Comment, October 31, 2013.

[33] Stephen J. Herman, September 30, 2013, 2.

[34] AAJ Comment, December 19, 2013.

[35] *Id*., at 11.

[36] Letter, CCL to Hon. David G. Campbell, Chair, April 9, 2014.

[37] Committee Note, at B-41 ("the burden of responding to discovery lies heavier on the party who has more information, and properly so").

The Committee explained that, as modified, the revised provision would be a significant improvement.[38]

Accordingly, Rule 26(b)(2)(1) would 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." (New material underlined).

The balance of Rule 26(b)(1) would be deleted. This would include the list of examples[39] along with authority to order "subject matter" discovery for good cause.[40] Also deleted would be the statement that "[r]elevant information need not be admissible at trial if [it] appears reasonably calculated to lead to admissible evidence," because it has been used, incorrectly, to define the scope of discovery.[41] It would be replaced by the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."

Rule 26(b)(2)(C)(iii) would still permit direct invocation of proportionality considerations by motion for protective orders,[42] as well as by objection, when a court determines that "the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)." (new matter underlined).

Proposed Committee Note

The proposed Committee Note was also revised after the public comment period. It traces the "restoration" of proportionality as part of the scope provision and repeats parts of the 1983 and 1993 Committee Notes to emphasize the need for judicial management when parties "fall short of effective, cooperative management on their own." It also emphasizes that monetary stakes are only one factor to be balanced against other factors and the need for an "even-handed" approach to applying the standards.

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[38] May 2014 RULES REPORT, 5 ("a significant improvement to the rules governing discovery"); JUNE 2014 RULES REPORT, B-5 ("will improve the rules governing discovery"). The June Report did not repeat the observation in the May Report that "if" the expressions of concern reflect "widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation." (*Id.* 8).

[39] Rule 26(b)(1)("including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identify and location of persons who know of any discoverable information").

[40] Committee Note, at B-43 (the language is rarely invoked and "[p]roportional discovery" suffices).

[41] *Id.*, at B-44.

[42] McPherson v. Canon Business Solutions 2014 WL 654573, at *3 (D. N.J. Feb. 20, 2014)(best understood as "a motion to limit discovery").

The Note states that the relocation of the factors into the "scope" rule will not limit proportional discovery nor change the burden of proof involved.[43] It also asserts 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."[44]

After the Standing Committee Meeting, the Note was amended to provide that parties "should be willing to consider" the opportunities to reduce costs by use of reliable "computer-based methods of searching" information, especially in cases involving large volumes" of ESI.[45] Case law indicates, however, that controversies remain over the degree of transparency and flexibility in use of such methods, such as predictive coding.[46]

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

The 2013 Initial Proposal included provisions to lower the presumptive limits for discovery under Rules 30, 31, 33 and 36[47] in order to "decrease the cost of civil litigation, making it more accessible for average citizens."[48] The Rules Committee had relied upon research by the FJC to the effect that most cases would not be affected by such a change. A proposal to presumptively limit the number of requests for production in Rule 34 was dropped earlier.[49]

The specific 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, including all discrete subparts (except as to requests to admit the genuineness of any described document).

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[43] Committee Note, at B-39 ("the change does not place on the party seeking discovery the burden of addressing all proportionality considerations").
[44] *Id*. ("[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discover disputes").
[45] *Id*., at B-42.
[46] *See* Progressive Casualty v. Delany, 2014 WL 35634367, at *8 (D. Nev. Feb. 11, 2014)("[p]redictive coding has emerged as a far more accurate means of producing responsive ESU in discovery" than "human review or keyword searches"); *accord*, FDIC v. Bowden, 2014 WL 2548137, at *8 & 13 (S.D. Ga. June 6, 2014)("[e]mploying search terms to search ESI" is a reasonable search strategy but ordering parties to "consider the use of predictive coding").
[47] 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.
[48] 2013 RULES REPORT, at (unnumbered) page 268 of 354.
[49] *Id*., at 267.

However, while the proposals garnered some public support, they also encountered "fierce resistance"[50] on grounds that present limits worked well and might have the effect of limiting discovery unnecessarily.[51] As a result, the Discovery Subcommittee recommended[52] 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 to cross-reference the addition of "proportionality" to Rule 26(b)(1).[53] The rules formerly referred only to (b)(2), where proportionality factors were then located. One commentator, however, has interpreted this to mean that the change "allows for greater discovery, when appropriate, than presumptively authorized by the rules."[54]

At the Rules Committee Meeting where the withdrawal was announced, it was noted 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."[55] The June 2014 Report to the Standing Committee states 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.[56]

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

It is proposed that Rule 26(c)(1) be amended to acknowledge that a protective order issued for good cause to protect against undue burden or expense may also include provisions for the "allocation of expenses."

The Committee Note explains that "[a]uthority to enter such orders is included in the present rule, and courts already exercise this authority."[57] The June 2014 Committee Report added an explicit reference to *Oppenheimer Fund v. Sanders*, 437 U.S. 340,358 (1978) to buttress the point.[58]

The Note initially stated that "[e]xplicit recognition will forestall the temptation some parties may feel to contest this authority." Additional language was added to the

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[50] 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").
[51] 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.
[52] 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.
[53] *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)").
[54] Charles S. Fax, Civil Procedure Update, Litigation News, ABA Section of Litigation, Vol. 40, N. 1 (Fall 2014), at 18.
[55] Minutes, Rules Committee Meeting, April 10-11, 2014, at lines 308-314.
[56] June 2014 RULES REPORT, B-4.
[57] Committee Note, at B-45.
[58] June 2014 RULES REPORT, B-10.

Note to state that "[r]ecognizing the authority to shift the costs of discovery 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."

The May 2014 Committee Report Committee Report noted that the Discovery Subcommittee plans to explore "whether it may be desirable to develop more detailed provisions to guide the determination whether a requesting party should pay the costs of responding."[59]

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

It is proposed to amend Rule 34 and 37 to facilitate requesting and producing discoverable information and to address some confusing aspects of current practice. The changes include:

First, Rule 34(b) is clarified by confirming that a party may indicate whether it "will produce copies of documents or [ESI] instead of permitting inspection."[60] [Rule 37(a)(3)(B)(iv) would also be changed in parallel to authorize motions to compel for *both* failures to permitting inspection and failures to produce.][61] The Committee Note to Rule 34 explains that these changes merely "reflect[s] the common practice of producing copies of documents or [ESI] rather than simply permitting inspection" and that "the response to the request must state that copies will be produced."

The production must be completed no later than the time for inspection already established. Based on a question from a Standing Committee Member, the Rules Committee Chair agreed at the meeting of May 29, 2014 to revise that requirement to refer to a time "specified," not one which is "stated."

Second, Rule 34(b)(2) (B) will require that the response to a request must, as to each item of category, either state that it will be permitted or must state "~~an objection~~ with specificity the grounds for objecting to the request, including the reasons." This is intended to tie into the new provision, below, directing that an objection must state whether any responsive materials are being withheld on the basis of that objection.[62]

Third, Rule 34(b)(2)(C) will require a party to state, as part of any objection to a request to produce, "whether any responsive materials are being withheld on the basis of [an] objection."[63] According to the Committee Note, this "should end the confusion that frequently arises when a producing party states several objections and still produces

[59] May 2014 RULES REPORT, 11.
[60] Rule 34(b)(2)(B).
[61] Committee Note, at B-58 ("[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling 'production, or inspection'").
[62] Committee Note, at B-53.
[63] 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."

information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."[64]

The Committee note eschews any requirement that the producing party must provide a detailed description or log of all documents withheld, but does require the party to "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion." 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.'"[65]

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

Since 2004, the Rules Committee has sought to "fill the gap" in Federal Rule 37 caused by a failure to dealt explicitly with preservation issues, including pre-litigation failures to preserve. The first effort[66] led to current Rule 37(e), adopted in 2006, limiting rule-based sanctions for ESI losses despite "routine, good faith" conduct; an effort which has been judged to have missed the mark.

In its current form, Rule 37(e)(as renumbered without change in 2007) provides that:

> "(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

The rule has proven to be inadequate because it addressed only sanctions based on violations of existing rules, leaving it open to courts to avoid its strictures by use of inherent authority. In addition, "Federal Circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information," contributing to over-preservation.[67]

Initial Proposal

Based on considerable work, including a Mini-Conference on the subject held after the 2010 Duke Conference, the Discovery Subcommittee developed a series of altetrnatives which ultimately led to a proposed replacement for Rule 37(e). A

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[64] Committee Note, at B-54.
[65] *Id.* (also stating that "the statement of what has been withheld can properly identify as matters 'withheld' anything beyond the scope of the search specified in the objection").
[66] According to the June 2014 Rules Report, "[t]he Committee recognized in 2006 that the continuing expansion of ESI might provide reasons to adopt a more detailed rule"). June 2014 RULES REPORT, B-14.
[67] Committee Note, at B-58 ("[t]hese developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough").

Preliminary draft along with an explanatory Report (and certain key questions) was released for public comment in August, 2013.[68]

The draft authorized sanctions or an adverse inference when a failure to preserve caused substantial prejudice in the litigation *and* was the result of "willful or bad faith" conduct *or* "irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation. It also listed "factors" to be used in "assessing a party's conduct." It did not provide detailed preservation guidelines.[69]

The proposal encountered a rough reception at three Public Hearings and in written comments. Critics attacked its ambiguities, lack of acknowledgement of court discretion and the incorporation of an exception based on "irreparable deprivation."[70] However, it also advanced the concept of focusing on remediation of prejudice. Many public comments cautiously endorsed this approach to "curative" measures and some argued it could form the basis of a revised rule.[71]

The Revised Proposal

After close of the public comment period, and further review, the Discovery Subcommittee recommended that the proposal be limited to ESI and recast to deal with prejudice while resolving the split in the Federal Circuits over the culpability required for adverse inferences[72] in order to help reduce over-preservation.[73]

As revised, it would provide broad discretion to fashion curative remedies while cabining harsh measures.[74]

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[68] As noted earlier, the 2013 proposals are found at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf. The excerpt from the Report of the Committee explaining its intent for the rule is found at pages 270-275, and includes five specific questions to guide public comments. The proposed text and Committee Note are found at pages 314-328.

[69] June 2014 COMMITTEE REPORT, B-15 ("[t]he Subcommittee [had] concluded that a detailed rule specifying the trigger, scope and duration of a preservation obligation is not feasible [because it] cannot be applied to the wide variety of cases in federal court").

[70] The May 2014 Committee Report describes the comments to the Published Rule in detail. *See* May 2014 RULES REPORT, at 36-39. The June 2014 Committee Report deletes the discussion of that topic in its entirety and does not include a copy of either the published text or the Committee Note.

[71] 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").

[72] *Compare* Residential Funding Corp. v. DeGeorge, 306 F.3d 99 (2d Cir. Sept. 26, 2002)(adverse inferences may be imposed if evidence was destroyed "knowingly, even if without intent [to breach a duty to preserve it], or *negligently*") (emphasis in original) *with* Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997)("[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case").

[73] June 2014 RULES REPORT, B-14 ("Resolving the circuit split with a more uniform approach to lost ESI, and thereby reducing a primary incentive for over-preservation, has been recognized by the Committee as a worthwhile goal").

[74] The Discovery 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.

After approval of some last minute changes by the Rules Committee at its Meeting in April, 2014,[75] and following preparation of a new Committee Note,[76] the Standing Committee approved the revised proposal in May, 2014. At its meeting of September 16, 2014, the Judicial Conference also approved the proposal as forwarded[77] and sent it to the Supreme Court.

The revised proposal provides as follows:

Rule 37(e) Failure to 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.

Application

The Rule applies only to the failure to preserve ESI that "should have been preserved in the anticipation or conduct of litigation." It will foreclose use of sanctioning authority exercised under inherent judicial power,[78] while employing the common law duty to preserve – as modified – to trigger entitlement.

Although the Rule excludes use of inherent sanctioning power, the rule should not preclude resort to other provisions of Rule 37, such as Rule 37(b) and (c), where relevant.

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[75] *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/.

[76] The Note was included in the May, 2014 Agenda Book for the Standing Committee Meeting; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks.

[77] Appendix B, June 2014 RULES REPORT, available on the U.S. Courts website at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf (scroll to Appendix B).

[78] U.S. Aleo, 681 F.3d 290, 310 (6th Cir. 2012)("a judge may not use inherent power to end-run a cabined power"); *accord*, Committee Note, at B-58 (the rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used").

Trigger

The rule adopts the common law principle that the duty to preserve arises "when litigation is reasonably anticipated,"[79] thus rejecting calls to eliminate the onset of a duty to preserve before an action is actually filed. The Committee has explained that it believed that such a rule "would result in the loss or destruction of much information needed for litigation."[80]

The rule does not provide a list of "bright-line" triggers, as such a rule is "not feasible."[81]

Instead, the Committee Note provides that courts should consider the extent to which a party as on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation.[82]

Reasonable Steps

While a party seeking relief must establish traditional elements of breach of the duty to preserve,[83] it must also show the loss of ESI resulted from a failure to take "reasonable steps," which provides a form of culpability.[84] Absent that showing, there is no entitlement to relief under the rule - thus providing a *de facto* safe harbor.[85]

The "reasonable steps" requirement was added to the rule by the Rules Committee at its April 11, 2014 meeting in Portland.[86] Thus, "[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 efforts to preserve."[87] The Rule "does not call for perfection."[88]

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[79] June 2014 RULES REPORT, B-15.
[80] *Id*. The Committee Note to Rule 16 observes that the revised proposal for Rule 37(e) recognizes that "a duty to preserve discoverable information may arise before an action is filed."
[81] *Id*.
[82] Committee Note, B-59.
[83] Ziemkiewicz v. R+L Carriers, 996 F. Supp.2d 378, 391-392 (D. Md. Feb. 6, 2014)(party must prove (1) obligation to preserve (2) destruction or loss accompanied by "culpable state of mind" and (3) evidence destroyed or altered was relevant to claims or defenses to extent that it would have supported them).
[84] As expressed by the Subcommittee Chair, "the revised proposal . . . is limited to circumstances in which a party failed to take reasonable steps to preserve, thus embracing a form of 'culpability.'" Minutes, Rules Committee Meeting, April 10-11, 2014, lines, 631-633. *See, e.g.*, Eby v. Target, 2014 WL 941906, at *5 (E.D. Mich. March 11, 2014)(refusing to sanction failure to preserve because there "has been no showing of *culpable conduct*")(emphasis added).
[85] 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").
[86] Minutes, Rules Committee Meeting, April 10-11, 2014, lines 597-614 ("[t]he new draft . . . limits the rule to settings in which a party "failed to take reasonable steps to preserve" [and] "[i]f the information cannot be restored or replaced").
[87] Committee Note, at B-61.
[88] *Id*. ("perfection in preserving all relevant [ESI] is often impossible").

Hopefully, over time, as parties gain confidence that they can confidently rely on the rule, the "reasonable steps" criteria will simultaneously promote compliance and help reduce unnecessary over-preservation. There is some reason for optimism in this regard.[89]

The rule does not define "reasonable steps."[90] Some cases, such as *Pension Committee*,[91] advocate an approach bordering on strict liability, which leaves open the possibility that some courts may be tempted to apply a *per se* approach to the topic. To courts employing that logic, "[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent"[92] and sanctionable.[93]

The Committee has explained, however, that the rule requires only "reasonable preservation behavior" and that "[p]roportionality is party of the calculus of reasonableness."[94] That formulation is reminiscent of the *Rimkus* case.[95] In that case, the court stated that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards")(emphasis in original).[96]

When a "reasonable steps" analysis is employed, the court should examine the reasonability and proportionality of the preservation efforts actually undertaken, not mechanically compare the conduct to a predetermined preservation checklist established under other circumstances.

This approach is consistent with more recent case law refusing to apply *Pension Committee*.[97]

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[89] *See, e.g.*, EDI Panel Transcript (October 2013), at 13 (quoting Jon Palmer of Microsoft as stating that if a suitable rule were enacted he "would no longer put entire organizations under a hold when I know that there are three or four key players within the organization are going to have all of the relevant material"), copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1680.

[90] Victor Li, Looking Back on Zubulake, 10 Years Later, ABA Journal, Sept. 1, 2014 (quoting Hon. Shira Scheindlin ["[m]aybe I'll get to write about it"]), copy at http://www.abajournal.com/magazine/article/looking_back_on_zubulake_10_years_later.

[91] 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").

[92] Zubulake v. UBS Warburg ("Zubulake IV"), 220 F.R.D. 212, 220 & n. 46 (S.D. N.Y. Oct. 22, 2003).

[93] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 437, n. 99 (S.D. N.Y. July 20, 2004)(authorizing an adverse inference).

[94] Minutes, Rules Committee Meeting, April 10-11, 2014, lines 599-600.

[95] Rimkus Consulting v. Cammarata, 688 F. Supp.2d 598 (S.D. Tex. Feb. 19, 2010).

[96] *Id.*, 613.

[97] 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 in light of the criticism of its approach by the Second Circuit in Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. 2012)).

Subdivision (e)(1) Measures

Subsection (e)(1) authorizes courts to impose measures not barred by subsection (2) which are "no greater than necessary to cure the prejudice" caused by the breach of the duty to preserve. No explicit finding of culpability is required. According to the Committee Note, the burden of "proving or disproving prejudice" is not governed by the rule but by the discretion of the judge.[98]

The Committee Note lists examples of "serious measures" which may be "appropriate"[99] as well as ones which may be "inappropriate."[100] Examples of the former include the preclusion of evidence and the presentment of evidence of failures to preserve and argument to the jury along "with all the other evidence in making its decision."[101]

The Committee Note states that "[t]hese measures, which would not involve instructing a jury that it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice."[102] The Note cautions, however, that "[c]are must be taken" that measures adopted "do not have the effect of measures" that are permitted under subdivision (e)(2) "only on finding of intent to deprive another of the lost information's use in the litigation."

While consistent with practice in some Circuits,[103] it risks a slippery slope by placing a "thumb on the scale."[104] As the Sixth Circuit noted in *Arch Insurance v. Broan-Nutone*,[105] an instruction about spoliation evidence "[comes] dressed in the authority of the court, giving it more weight than if merely argued by counsel."

Recent experience in the *Actos* litigation suggests that great care will be required.[106]

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[98] Committee Note, at B-63 (requiring the party seeking curative measures to prove prejudice may be reasonable under some circumstances but unfair in others).

[99] *Id*., at B-64 (barring evidence, permitting evidence and argument "regarding the loss of information" or giving instructions to assess jury's evaluation of such evidence or argument).

[100] *Id.* (striking pleadings related to or precluding evidence in support of "the central or only claim or defense as compared to excluding a specific piece of evidence to offset contradictory information).

[101] Committee Note, at B-64 & 66.

[102] *Id*. at B-66 (Subdivision (e)(2) also "does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial").

[103] *See, e.g., Christou v. Beatport,* 2013 WL 248058, at *14 (D. Colo. Jan. 23, 2013)(the "jury can draw any inference it wants" from the evidence of the failure to preserve).

[104] Gorelick et al., Destruction of Evidence s. 2.4 (2014)("DSTEVID s 2.4)("[o]nce a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterable changed").

[105] 509 Fed. Appx. 453, 2012 WL 66334323 (6th Cir. 2012).

[106] *Cf.* In re Actos (Pioglitazone) Products Liability Litigation, 2014 WL 308909 at *38 (W.D. La. Jan. 27, 2014)(allowing jury "to hear all evidence and argument establishing and bearing on the good or bad faith of Takeda's conduct"). The jury subsequently awarded $9B in punitive damages. *See also* In re Actos, 2014 WL 4364832, at *45-46 (W.D. La. Sept. 2, 2014)(refusing post-trial relief because "even if there were evidence [that the jury found that spoliation was the basis for a punitive damage award] [t]he jury was free to make its own inferences").

Subdivision (e)(2) Measures

Only upon a finding that a party has "acted with the intent to deprive another party of the information's use in the litigation" is a court authorized under subdivision (e)(2) to conclude that lost ESI was unfavorable or to instruct a jury that they may or must conclude that it was unfavorable or act to dismiss the action or enter a default judgment.[107]

The required finding of intent to deprive may be made by a court or by the jury. If the court chooses to have the jury make the finding, the jury instruction must make it clear that the jury may draw an inference only if it first finds that the party acted with the intent to deprive.

The purpose of subdivision (e)(2) is to reject *Residential Funding* logic[108] which permits award of harsh sanctions based on findings of negligence or gross negligence, thereby "provid[ing] a uniform standard in federal court for use" when invoking the listed measures.[109] A Member of the Discovery Subcommittee described the subdivision as a "rifle shot" aimed at replacing *Residential Funding* in order to "take some very severe measures of[f] the table"[110] without a showing of intent equivalent to bad faith.

Some have expressed concern that proof of "intent to deprive" might be satisfied by merely reckless or willful conduct.[111] This would be inconsistent, however, with the Committee intent to require conduct "akin to bad faith, but [which is] defined even more precisely."[112] The language chosen invokes the "historical rationale for adverse inferences" under which conduct must be shown to have been for the purpose of hiding adverse information, not merely intentional conduct.[113]

An explicit showing of prejudice is not required under subdivision (e)(2). The Committee Note provides that "the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced."[114]

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[107] There remain the possibility, for example, that shifting of attorney's fee for punitive purposes as the result of a failure to preserve must be shown to have met a heightened standard under Chambers v. NASCO, 501 U.S. 32, 45-46 (1991); *see also* Joseph v. LineHaul Logistics, 2013 WL 6406323, at 1 (9th Cir. Dec. 9, 2013)("[b]ad faith must be found before a federal court can award attorneys' fees as a sanction under its inherent authority").

[108] Residential Funding Corp. v. DeGeorge, 306 F.3d 99 (2d Cir. Sept. 26, 2002).

[109] Committee Note, at B-65 (the rule "rejects cases such as Residential Funding").

[110] Discovery Subcommittee Notes, March 4, 2014 Meeting, at 438.

[111] Phillip Favro, The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments, EDDE Journal (ABA)(Summer 2014), copy at file:///C:/Users/PC/Downloads/-ST203001-relatedresources-EDDE_JOURNAL-volume5_issue3.pdf (citing to Pension Committtee).

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

[113] *Id*. (citing Aramuru v. Boeing, 112 F.3d 1398, 1407 (10th Cir. 1997).

[114] Committee Note, B-67.

Impact

It has been observed that after subdivision (e)(2) goes into effect, the standards applicable to adverse inferences applied in the Fifth, Seventh, Eighth, Tenth and Eleventh Circuit will become the law of the land, and "even if a party's handling of data was not perfect, they may still be able to avoid an adverse inference instruction."[115] Review of a random sample of cases decided in 2013 where adverse inferences had been authorized supports that conclusion.[116]

This result is considered to be fair because it is paired with subdivision (e)(1), where, "the focus is on solving the problem, not punishing the malefactor."[117] Moreover, the rule will serve the highly desirable, goal of helping ensure that the procedural rules applied to litigants are not "sensitive to location."[118]

Complications

The Subcommittee recommended confining the proposed rule to ESI because the "reasons for limiting the rule to ESI outweigh[ed] the potential complication[s]."[119] The argument is that the case law on preservation of hard copy documents and tangible things is well established and that ESI preservation issues are the predominant concern.

By and large that may be true. However, there are few principled distinctions between losses confined to ESI and those involving ESI and hard copy documents[120] or losses of tangible things which contain ESI. It remains to be seen how courts will apply varying standards in those contexts when the losses result from the same duty to preserve.[121]

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[115] ACC Lexology, April 22, 2014, Proposed revised FRCP 37(e) seeks to clarify and standardize ESI Spoliation, Fish & Richardson PC, copy at http://www.lexology.com/library/detail.aspx?g=8e766542-bc5b-42b5-8f94-9baf1a9a6179.

[116] Typical examples of cases where adverse inferences might not have been granted if the rule had been in effect: 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 the cases might not have reached the adverse inference stage since the preservation steps would have been assessed under a "reasonable steps" standard.

[117] Charles S. Fax, Litigation News (ABA Section of Litigation), Summer 2014, 18.

[118] Samuel P. Jordan, Local Rules and the Limits of Trans-Territorial Posture, 52 WM. & MARY L. REV. 415, 416 (2010)("procedural rules applied in a federal case should not be sensitive to location").

[119] Report of Subcommittee (March 2014), at 7.

[120] *See, e.g.* Nunnally v. District of Columbia, 2013 WL 6869665 (D.D.C. Dec. 19, 20013.

[121] It has been noted that intentional deletion of a videotape in a prisoner case "does not concern ESI in the sense addressed in the proposed amendment" since the latter is "concerned more with the operation of modern ESI systems." Pettit v. Smith, 2014 WL 4425779, n. 6 (D. Ariz. Sept. 9, 2014).

The Subcommittee discussed, but did not recommend, inclusion of language in the Committee Note which suggested that the "considerations that bear on addressing a loss of ESI may bear on the loss of traditional documents."[122]

It would appear that one major reason to limit the rule to ESI was to avoid the complications illustrated by *Silvestri v. GM*,[123] involving spoliation of a damaged automobile prior to its inspection by the manufacturer.[124] That case held that harsh sanctions such as a dismissal may be appropriate even when the culpability of the offending party is low, because "it [is] unfair to require [the party] to proceed further in the case."[125] Under the revised proposal, that doctrine will be available in cases of loss of tangible property despite Rule 37(e).

However, the underlying premise of *Silvestri* doctrine is not necessarily banished from the ESI context. The Supreme Court noted in *Chambers v. NASCO*[126] that inherent powers "can be invoked even if procedural rules exist which sanction the same conduct."[127] While a court should "ordinarily" rely on the Rules, it may "safely rely on its inherent power" when, "in the informed discretion of the court," the "Rules are [not] up to the task."[128] Parties may contend that the failure to preserve items of ESI have created such an irreparable deprivation of the ability to proceed as to invoke that exception.

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[122] Minutes, Discovery Subcommittee Meeting, March 12, 2014 (noting the incongruity of different standards applying to the loss of a paper print of an e-mail message and the email message itself).
[123] 271 F.3d 583, 593 (4th Cir. 2001).
[124] June 2014 COMMITTEE REPORT, B-16.
[125] Young v. Office of US Senate, 217 F.R.D. 61, 65-66 (D.D.C. Aug. 22, 2003)(listing unfairness as one justification for dismissing action under inherent power whether or not a rule applies).
[126] 501 U.S. 32, 47 (1991).
[127] *Id*., 49.
[128] *Id*., 50.

APPENDIX

Rules Text (as adopted by the Judicial Conference)

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).~~

* * *

(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.