Applying the 2015 Civil Rules Amendments

Thomas Y. Allman

(1) Cooperation 3
(2) Case Management 5
(3) Scope of Discovery/Proportionality 7
(4) Presumptive Limits 14
(5) Cost Allocation 15
(6) Production Requests/Objections 16
(7) Forms 17
(8) Failure to Preserve/Spoliation 19

I. Introduction

This Memorandum provides an overview of the “package” of amendments to the Federal Rules of Civil Procedure which became effective on December 1, 2015 and a summary, where available, of cases reflecting their implementation.

Background

The amendments resulted from a four-year effort by the Civil Rules Advisory Committee (the “Rules Committee”) which began with a Conference on Civil Litigation held by the Committee at the Duke Law School (the “Duke Conference”) over two days in May 2010. The initial decision to hold the Conference reflected a desire to seek answers to issues such as whether “whether discovery really is out of control.”

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

---

1 © 2016 Thomas Y. Allman. Mr. Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® Working Group 1 on E-Discovery as well as the E-Discovery Committee of Lawyers for Civil Justice. An earlier version of this paper is available at 82 DEF. Couns. J. 375 (2015).
5 John G. Koeltl, Progress in the Spirit of Rule 1, 60 Duke L. J. 537, 544 (2010).
The Conference involved discussions by participants and Panels members drawn from judicial, practitioner and academic bases. The submissions remain available on a dedicated website. A comprehensive Report on the Conference was made to the Chief Justice at the time.

The task of developing individual rule proposals was undertaken by an *ad hoc* “Duke” Subcommittee, chaired by the Hon. John Koeltl, and the existing Discovery Subcommittee, chaired by the Hon. Paul Grimm. Both subcommittees vetted alternative draft rule proposals at “mini-conferences.” Although notice pleading requirements highlighted by the Supreme Court decisions in *Twombly* and *Iqbal* were discussed at the Duke Conference, the Rules Committee ultimately decided to treat that subject separately.

An initial “package” of proposals resulting from these efforts was released for public comment in August 2013.

**Hearings and Public Comments**

The response to the initial proposals was robust, with 120 witnesses testifying at three public hearings and through submission of over 2300 written comments.

Lawyers for Civil Justice (“LCJ”) and the American Association for Justice (“AAJ,” formerly “ATLA”) provided expansive comments representing views of their constituents. The AAJ urged rejection of adding proportionality factors to the scope of discovery, reducing presumptive limits and making sanctions less likely in instances of spoliation. LCJ supported limiting sanctions, adding proportionality to the scope of discovery, acknowledging cost-allocation and making reductions in presumptive numerical limits on use of discovery devices.

---

6 Minutes, Rules Committee Meeting, April 20-21, 2009, at 30.
8 The Discovery Subcommittee work was initially led by Judge David Campbell prior to his becoming Chair of the Rules Committee after Judge Mark Kravitz became Chair of the Standing Committee in November, 2011.
In addition to many individual comments, 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 provided comments on the proposals.

The Final Rules Package

After close of the public comment period, revised proposals were adopted by the Rules Committee at its April, 2014 meeting in Portland, Oregon. The Minutes of the April meeting provide an excellent summary of the intent of the revisions.\(^\text{15}\) The Standing Committee approved the revisions in May 2014 and submitted a recommendation for approval by the Judicial Conference along with a June 2014 Rules Committee Report which included the final text and Committee Notes.\(^\text{16}\)

The Judicial Conference approved and forwarded the proposals to the Supreme Court\(^\text{17}\) which adopted them with minor changes in several Notes and forwarded the package (including the June 2014 Report) to Congress on April 29, 2015.\(^\text{18}\) The Rules were adopted unanimously and the Chief Justice has expressed his strong support for them in his Year End Report.\(^\text{19}\)

II. The “Duke” Amendments

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

(1) Cooperation (Rule 1)

Rule 1 speaks of the need to achieve the “just, speedy, and inexpensive determination of every action and proceeding.” Many participants at the 2010 Duke Conference emphasized the need to cooperate in achieving the goals of Rule 1. This emphasis on role of cooperation in discovery can be partially attributable to the advocacy


\(^{17}\) See Minutes, Rules Committee Meeting, October 30, 2014, 2.

\(^{18}\) The Supreme Court order, rules text and Committee Notes (“Rules Transmittal”) are available at http://www.uscourts.gov/file/document/congress-materials. According to the Supreme Court order, they “govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending” on December 1, 2015.

\(^{19}\) See 2015 Year-End Report, supra, n. 2.
of the Sedona Conference® Cooperation Proclamation, which received substantial judicial emphasis in numerous lower court opinions. Some local rules and e-discovery initiatives invoke cooperation as an aspirational standard.

The Duke Subcommittee initially considered an amendment to require that parties “should cooperate” to achieve the goals of Rule 1. However, this was deemed to be “too vague, and thus fraught with the mischief of satellite litigation.” As finally approved, the amended Rule requires it be “construed, and administered and employed by the court and the parties to secure” its goals. The Committee Note explains that “the parties share the responsibility to employ the rules” in that matter.

The Committee Note also observes that “most lawyers and parties cooperate to achieve those ends” and that “[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.” The Note also 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.” Concerns had been expressed about striking the proper balance between cooperative actions and the professional requirements of effective representation.

The June 2014 Committee Report submitted to the Supreme Court (and Congress) asserts that “the change to Rule 1 will encourage parties to cooperate in achieving the just, speedy, and inexpensive resolution of every action.”

Application

In a decision applying the amended rule, a court ordered the parties to engage in "cooperative dialogue in an effort to come to an agreement regarding proportional discovery." Another court, upon finding that an uncooperative party had acted “contrary to” the amended rule, imposed a “quick peek” plan for review of allegedly privileged

---

20 The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
21 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”).
22 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]).
23 Effective July 1, 2015, Colorado also amended its Rule 1 to required that the rule be “employed by the court and parties” to secure the just, speedy, and inexpensive determination of every actions.
25 Id.
26 Committee Note, 2.
27 Committee Note, 1-2.
28 Committee Note, 2.
29 See Report to Standing Committee, May 2, 2014, at 16 (the civil rules provide procedural requirements while rules of professional responsibility add requirements of their use; complicating these provisions by a “vague concept of ‘cooperation’ may invite confusion and ill-founded attempts to seek sanctions).
30 June 2014 RULES REPORT, available supra at n. 16, II (D), hereinafter “June 2014 RULES REPORT.”
documents in order to achieve “cooperative and proportional discovery.” According to the Chief Justice in his 2015 Year End Report, “Rule 1 of the [FRCP] has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart.”

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

As noted, a key conclusion from the Duke Conference was that effective case management was an essential element discovery reform.

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

The time limits in Rule 4(m) governing the service of process are reduced from 120 to 90 days. The intent is to “reduce delay at the beginning of litigation.” The subdivision does not apply to service in a foreign country “or to service of a notice under Rule 71.1(d)(3)(A).” In response to a request by the Supreme Court, the Note no longer makes the observation that shortening the presumptive time for service will increase the occasions to extend the time “for good cause.”

Default Judgment

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

Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2) (“Early Rule 34 Requests”)) allows delivery of discovery requests prior to the “meet and confer” required by Rule 26(f). The response time does not commence, however, until after the first Rule 26(f) conference. The time to respond under Rule 34(b)(2)(A) “if the request was delivered under 26(d)(2)” is amended to be “within 30 days after the parties’ first Rule 26(f) conference.” The Committee Note explains that this change is “designed to facilitate focused discussion during the Rule 26(f) Conference.”

Scheduling Conference

Rule 16(b)(1) no longer contains authority to conduct scheduling conferences by “telephone, mail, or other means” so as to encourage direct exchanges among the parties and the Court. The Rule now merely refers to consultation “at a scheduling conference.”

33 Id. at *6. For a link to the Year End Report, see n.2.
34 For changes to Rule 4(d), see Subsection (7)( Forms (Rules 4(d), 84, Appendix of Forms).
35 Committee Note, 4.
36 Committee Note, 25.
The Committee Note observes, however, that the conference may be held “in person, by telephone, or by more sophisticated electronic means” and “is more effective if the court and parties engage in direct simultaneous communication.”

Scheduling Orders: Timing

Rule 16(b)(2) is amended to require a court to issue the scheduling order no later than 90 days after any defendant has been served or 60 days after any appearance of a defendant, down from 120 and 90 days, respectively, in the absence of “good cause for delay.” The Committee Note explains that in some cases, parties may need “extra time” to establish “meaningful collaboration” to secure the information needed to participate in a useful way. In practice, the process often extends over multiple hearings.

Scheduling Orders: Pre-motion Conferences

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

Scheduling Orders: Preservation

In parallel with changes to Rule 26(f)(3)(C), requiring that parties state their views on “disclosure, or discovery, or preservation” of electronically stored information (ESI), Rule 16(b)(3)(B)(iii) permits a scheduling order to provide for “disclosure, or discovery, or preservation” of ESI. The Note to Rule 37(e) states that “promptly seeking judicial guidance about the extent of reasonable preservation may be important” if the parties cannot reach agreement about preservation issues. It also opines that “[p]reservation orders may become more common” as a result of the encouragement to address preservation.

FRE 502 Orders

Similarly, in parallel to the changes in Rule 26(f)(3)(D) requiring parties to discuss whether to seek orders “under Federal Rules of Evidence 502” regarding privilege waiver, Rule 16(b)(3)(B)(iii)(iv) now permits a scheduling order to include agreements dealing

37 Id., 7 (excluding the use of “mail” as a method of exchanging views).
38 Id., 8.
39 Id., 9. See also Steven S. Gensler and Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849, 861 (2013)(noting that many courts have moved to a system of pre-motion conferences to resolve discovery disputes).
40 Committee Note, 40.
with asserting claims of privilege or of protection as trial-preparation materials, “including agreements reached under Federal Rule of Evidence 502.”

Sequence of Discovery

The sequence of discovery specified under Rule 26(d)(3) applies unless “the parties stipulate or” the court orders otherwise.

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

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

As amended, Rule 26(b)(1) provides:

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

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

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

---

41 After public comments, the Committee moved the “amount in controversy” factor to a secondary position behind “the importance of the issues at stake in the action” and added a new factor to address the parties’ relative access to relevant information.

42 Committee Note, 23. The Note explains that the examples used to justify inclusion of “subject matter” jurisdiction in 2000 would “not [be] foreclosed by the amendments.”
lead to something helpful in the litigation is “fair game in discovery.” Information not admissible in evidence remains discoverable if within the scope of discovery.

In addition, Rule 26(b)(1) no longer contains some examples of discoverable information, although they are still discoverable if relevant and proportional. The cross reference to proportionality considerations was also deleted as redundant.

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

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

Background

The scope of discovery under Rule 26(b)(1) has been subject to “proportionality limitations” since the 1983 amendments. At that time, Rule 26(g) was also added to the rules to make proportionality concerns applicable to certifications involving discovery requests and responses to that context. However, for many years, these changes “created only a ripple in the case law.”

By the time of the Duke Conference, it was widely contended that the failure to enforce proportionality had contributed to excessive costs of discovery. The Rules Committee concluded that an “increased emphasis on proportionality,” enforced through active case management, was needed to achieve the goals of Rule 1. This conclusion was reached despite an FJC survey suggesting that for most cases discovery was

---

43 June 2014 RULES REPORT, supra n. 16, at II (a)(2)(d)(“[s]ome even disregard the reference to admissibility, suggesting that any inquiry ‘reasonably calculated’ to lead to something helpful in the litigation is fair game in discovery. The proposed amendment will eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule

44 Committee Note, 24.

45 See 97 F.R.D. 165, 215 (1983)(Rule 26(b)(Discovery Scope and Limits), subsection (1)(iii)(discovery shall be limited if the court determines that it is “unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at state in the litigation”). The 1983 Committee Note described this addition as intended to limit “disproportionate” discovery of matters which were “otherwise proper subjects of inquiry.” Id.

46 Id., Rule 26(g)(signing of discovery documents by counsel certifies that they are not “unreasonable or unduly burdensome, given the needs of the case [etc]”).

47 Richard L. Marcus, Discovery Containment Redux, 39 B.C.L. REV. 747, 773-774 (1998)(the addition of proportionality and the certification requirements have not made a significant contribution).


49 Emery G. Lee III and Thomas E. Willging, Defining the Problem of Cost in Federal Civil Litigation, 60 DUKE L. J. 765, 773-774 (2010)( “[discovery] costs are generally proportionate” to client stakes in the litigation).
proportional to the needs of the case. However, in a significant subset of cases there was dissatisfaction with disproportionate discovery.

After exploring alternatives at a Mini-Conference, the Committee decided to move the proportionality factors from their then-current location into Rule 26(b)(1).

**Criticisms/Committee Response**

The proposal unleashed a firestorm of opposition when the text and Draft Committee Note were released for public comment, fueled in part by a perception that the scope of discovery was to be “changed,” as stated in the Draft Note. Many saw this as a potential restriction on discovery in asymmetric litigation.

The AAJ argued that it would shift the burden to requesting parties to “prove that the requests are not unduly burdensome or expensive,” since a producing party could “simply refuse reasonable discovery requests.”

The Committee responded vigorously to what it felt were “quite unintended” interpretations of its proportionality proposal. The Draft Note was revised to drop the reference to the “changed” scope of discovery in favor of a statement that the change simply “restores” the proportionality considerations to their original place in Rule 26(b)(1). The Note also added that the change does not “place on the party seeking discovery the burden of addressing all proportionality concerns.”

Further, the Note was amended to include a statement that a party may not “refuse discovery simply by making a boilerplate objection that it is not proportional.” It was

---


52 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](https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf).

53 Minutes, Subcommittee Conference Call, October 22, 2012, at 5-6 (“adding the [listed] factors to explain what ‘proportional’ means relieves the risk of uncertain meaning”), available at [https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf](https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf).

54 See, e.g., Draft Committee Note, 2013 PROPOSAL, supra n. 11, at 296 (“[t]he scope of discovery is changed . . . to limit the scope of discovery to what is proportional to the needs of the case.”).

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

56 AAJ Comment, supra n. 15, December 19, 2013.

57 Id., at 11 (emphasis in original).

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

59 Committee Note, 19.

60 Id.

61 Id.
explained to the Committee that a party may not act unilaterally based on proportionality concerns as to otherwise relevant information.  

Scope of Discovery

Most observers do agree that the revisions to Rule 26(b)(1) do not alter the scope of discovery. Typically, the cases decided to date under the amended rule would have been decided the same under the previous version of Rule 26(b)(1). As one article argues, it is a “mistaken belief that the changes dictate severe limitations on discovery.” If disputes are brought before the court, the parties’ responsibilities remain “as they have been since 1983.”

However, as the Chief Justice noted in his 2015 Year-End Report, the key is “careful and realistic assessment of actual need” which “may, as a practical matter, require active involvement of a neutral arbiter - the federal judge – to guide decisions respecting the scope of discovery.”

The amended rule thus emphasizes “the need [for courts] to analyze proportionality before ordering production of relevant information.” In *Gilead Sciences v. Merck & Co.*, a request was deemed to be “precisely the kind of disproportionate discovery that Rule 26 – old or new – was intended to preclude.”

Several courts have held that while discovery no longer extends to the “subject matter” of litigation and the “reasonably calculated to lead to admissible evidence” language was stricken, relevance “still” extends “broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on” any party’s claim

---

62 April 2014 Minutes, *supra* n. 63, at 7 (lines 273 -276)(Judge Koeltl)(“a party [cannot] unilaterally decide to limit its responses to what it considers proportional”).


64 Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, July 2015 TRIAL, 37 (“the actual rule amendments do not support [the] perspective [of severe restrictions on discovery]”); cf Andrew J. Kennedy, ABA Section of Litigation, Significant Changes to Discovery and Case Management Practices, ABA LITIGATION NEWS (Oct. 14, 2015)(the rule will cause “a sea change in the scope of discovery”).

65 Committee Note, 20.


68 2016 WL 146574, at *2 (N.D. Cal. Jan. 13, 2016) (a party seeking discovery must should, before anything else, that the discovery sought is proportional to the needs of the case”).


or defense. The 1978 Supreme Court decision cited for that proposition, however, dealt with “subject matter” discovery and its use dilutes the importance of deleting “reasonably calculated to lead to the discovery of admissible evidence” and risks its perpetuation.

Burden of Proof

The rule does not assign a particular burden of proof to a party to demonstrate the presence or lack of proportionality. Each party is expected to provide information uniquely in their possession to the court, which then is expected to reach a “case-specific determination of the appropriate scope of discovery.” As the court put it in Herrera v. Plantation Sweets, the rule “elevates” proportionality factors, but the burdens of proof have not changed.

An objecting party raising proportionality concerns must come forward with facts “typically in the form of an affidavit” which shows how the discovery is inconsistent with Rule 26(b)(1). Only when discovery requests are “transparently disproportionate in the context of a particular case” is the requesting party at risk of denial.

In Carr v State Farm Mutual, the court held that a party seeking to resist discovery must show that the discovery fails the proportionality calculation by coming forward with specific information.” Similarly, the party seeking discovery “may well need,” to “make its own showing of many or all of the proportionality factors.”

Third Party Guidance

The Duke Center for Judicial Studies has published Guidelines and Principles which advocate techniques such as greater use of pretrial orders, stipulated facts and focused discovery to implement the changes. In conjunction with the ABA, the Duke

---

71 LightSquared, supra, at *2; accord US ex rel Shamesh v. CA, Inc., 2016 WL 74394, at *6 (D.D.C. Jan. 6, 2016) (“like before” relevance is to be construed broadly [citing Oppenheimer Fund, 437 U.S. 340, 351 (1978)] and need not be admissible in evidence to be discoverable).
72 Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (1978) (relevant to the subject matter involved in the pending action” has been construed broadly to encompass [quoted matter].
73 Some courts continue to apply the test to relevance. Elliott v. Superior Pool, 2016 WL 29243, at *2 (C.D. Ill. Jan. 4, 2016)(relevance means that the request “must be reasonably calculated to lead to discovery of admissible evidence”).
74 Committee Note, 20 (the party requesting discovery “may have little information about the burden or expense of responding” but the producing party may have little information about the importance of the discovery “as understood” by the requesting parties).
76 Hon. Craig B. Shaffer, The “Burdens” of Applying Proportionality (hereinafter “Shaffer, Applying Proportionality”), 16 SEDONA CONF. J. ___ (2015), at 21 (a “facially objectionable” standard applies when requests are “overly broad or seek information that does not appear relevant”).
77 Id. at 24.
Center is also sponsoring a series of “Roadshow” seminars at various cities across the country. Some academic criticism has been leveled at the effort as improperly blurring the line between private initiatives and the official rulemaking and judicial training efforts.

A member of the Rules Committee has published a comprehensive analysis of the rule change as has a prominent Magistrate Judge, in conjunction with a prominent e-discovery expert. A former Chair of the Sedona Conference WG1 has also published an article (“APB to Requesting Parties: Prepare for Proportionality”) while cautioning against “[u]nbalanced [g]uidance” about the amendments to Rule 26(b)(1). In addition, the former Chair of the Discovery Subcommittee has compiled a list of “techniques” which courts can employ to achieve proportionality.

Law Firms are sharing practical suggestions. One firm, for example, states that “it is [now] clear that a specific objection [based on proportionality] will preserve the position” and that a motion for a protective order is not required.

Discovery Filings (Rule 26(g))

Rule 26(g) applies proportionality considerations to conduct by parties and their counsel in connection with discovery filings. It states that “by signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” the content of the filing is “neither unreasonable nor unduly burdensome, 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.”

---

81 Andrew J. Kennedy, supra, ABA LITIGATION NEWS (Oct. 14, 2015)(describing a 13-city roadshow extending into 2016 to engage in dialogue to discuss the myriad of ways proportionality can be achieved among judges and lawyers).
83 Shaffer, Applying Proportionality, at 44-51.
85 Ariana J. Tadler, Practical Law Resource ID w-001-0015 (Nov. 15, 2015)(WESTLAW Practical Law subsection of “Secondary Sources”)(noting that “few, if any, of the roadshow panelists participated in the collaborative drafting process” and recommending primary reliance on the rules and Committee Notes).
88 See Minutes, April 2014 Rules Committee Meeting, at 5 (lines 193-194)(“Rule 26(g) now makes proportionality an obligation of both the party that requests discovery and the party that responds”).
89 Rule 26(g)(1)(B)(iii). The Rule also bars discovery filings “interposed for an improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation.” Id. (B)(ii). See Shaffer, Applying Proportionality, 11 (comparable proportionality factors are found in Rule 26(g)).
The 2015 Committee Note states that the changes to Rule 26(b)(1) “reinforce” Rule 26(g) obligations by requiring “parties to consider these factors in making discovery requests, responses, or objections.” Failure to do so can result in denial of motions to compel.

Pursuant to Rule 26(g)(3), counsel (and the party for whom it signs), whether requesting or producing discovery, may and increasingly have been sanctioned when a “certification violates this rule without substantial justification.”

Computer Assisted Review (“CAR”)

The Committee Note endorses use of “computer-based methods of searching” as a form of proportionality designed to reduce the burden or expense of producing ESI. This endorsement - added during review by the Standing Committee - suggests that courts and parties should consider use of “reliable means” of searching ESI by electronically enabled means. It takes no position on whether “seed sets” are protected from discovery.

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

State Developments

Some states have also adopted measures to emphasize proportionality in discovery. Utah integrated proportionality into its definition of the scope of discovery, placing the

---

90 Committee Note, 19.
91 See, e.g., Turner v. The Paul Revere Insurance Co., 2015 WL 5097805, at *8 (D. Nev. Aug. 28, 2015)(denying motion to compel because not both relevant to any party’s claim or defense and proportional to the needs of the case as required under Rule 26(b) and (g)).
92 Witt v. GC Services, 307 F.R.D. 554, 564 (D. Colo. Dec. 9, 2014) (“a motion to compel necessarily requires the court to apply the Rule 26(g) standard to the moving party’s interrogatories and requests for production”); see also HM Electronics v. R.F. Technologies, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015)(sanctions on lead attorney for incomplete or misleading responses).
94 Committee Note, 22. See, e.g., Malone v. Kantner, 2015 WL 1470334, at n. 7 (D. Neb. March 31, 2015) (“predictive coding” is being promoted as “not only a more efficient and cost effective method of ESI review, but a more accurate one”).
97 Id., at 19 (“[t]he parties and the judge should consider using technology to help achieve proportional discovery”).
burden of demonstrating it on the party seeking discovery.98 Advocates of the change have contended that the need for motion to compel has been greatly reduced.

Minnesota also requires that “the process and the costs” be “proportionate to the amount in controversy and complexity and importance of the issues” involved.99 Illinois added proportionality to its civil rules100 and emphasized, in the related Committee Note, that certain categories of ESI are not normally discoverable as a result.101

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

The initial package released in 2013 included amendments which would have lowered the presumptive limits on the use of discovery devices in Rules 30, 31, 33 and 36102 in order to “decrease the cost of civil litigation, making it more accessible for average citizens.”103 The proposal was advocated as further advancing proportionality consistent with considerations identified at the Duke Conference.

The proposed changes would have included the following:

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

An earlier proposal to presumptively limit the number of requests for production in Rule 34 had already been dropped during the drafting process.104

However, the proposals encountered “fierce resistance”105 on grounds that the present limits worked well and that new ones might have the effect of limiting discovery unnecessarily. The opposition came from the organized bar as well as from testimony and

---

98 URCP Rule 26(b)(1)(Discovery Scope in General)(“Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below”); see also URCP Rule 37(b)(2)(“[i]f the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional”) and Philip Favro and Hon. Derek Pullan, New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure, 2012 MICH. ST. L. REV. 933, 947 (2012).
99 M宁 ST. RCP Rule 1 (2013). The scope of discovery is limited to “matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [list].” M宁 ST. RCP Rule 26.02(b)(2013).
100 IL R SC T. 211(c)(3).
102 2013 PROPOSAL, supra n. 10 at 300-304, 305 & 310-311 [of 354].
103 Id., at 268.
104 Id., at 267.
105 June 2014 RULES REPORT, at II (A)(1)(“[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect”).
comments from individual lawyers who were concerned that this indicated an attempt to deny essential discovery.

Some concerns were expressed that courts might view the presumptive numbers as hard ceilings. If so, any failure to agree on reasonable limits could result in motion practice.\(^\text{106}\)

After review, the Duke Subcommittee recommended\(^\text{107}\) and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools. The Chair of the Duke Subcommittee noted that “[s]uch widespread and forceful opposition deserves respect.”\(^\text{108}\)

The Committee expressed the hope after the withdrawal 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.”\(^\text{109}\) It expects 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.\(^\text{110}\)

\section{5) Cost Allocation (Rule 26(c))}

The costs of collection and reviewing information for production are said to constitute the largest component of discovery costs.\(^\text{111}\) Not surprisingly, producing party advocates have long advocated that the civil rules should require that the “requester pays” the reasonable costs of such efforts, a position renewed at the Duke Conference.\(^\text{112}\)

While a draft embodying cost-shifting\(^\text{113}\) of response costs was developed for discussion, the Subcommittee declined to recommend its adoption. Instead, Rule 26(c)(1)(B) has been amended to provide that a protective order issued for good cause may specify terms, “including time and place or the allocation of expenses, for the disclosure or discovery.” The Committee described this as making cost-shifting a more “prominent feature of Rule 26(c).”\(^\text{114}\)

\begin{itemize}
\item[]\(^\text{106}\) April 2014 Minutes, \textit{supra} n. 63, at 7 (lines 307-310).
\item[]\(^\text{108}\) April 2014 Minutes, at lines 466-467.
\item[]\(^\text{109}\) \textit{Id.} (at lines 467-470).
\item[]\(^\text{110}\) June 2014 \textit{RULES REPORT}, available \textit{supra}, n. 2 at II (A)(1).
\item[]\(^\text{111}\) RAND Institute for Justice, \textit{Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery}, 1, 16 (2012)(at least 73\% of costs in surveyed instances), copy at \url{http://www.rand.org/content/dam/rand/rwu/pubs/monographs/2012/RAND_MG1208.pdf}.
\item[]\(^\text{112}\) LCJ Comment, Reshaping the Rules of Civil Procedure for the 21st Century, May 2, 2010, at 55-60 (recommending changes to Rules 26, 45 and Rule 54(d)).
\item[]\(^\text{113}\) Duke Conference Subcommittee Rules Sketches, at 17-19, Agenda Materials for Rules Committee Meeting, March 22-23, 2012 (requiring a requesting party to “bear part or all of the expenses reasonably incurred in responding [to a discovery request]”); available at \url{http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012} (beginning at 375 of 644).
\item[]\(^\text{114}\) Initial Rules Sketches, at 37, as modified after Mini-Conference.
\end{itemize}
The Committee Note explains that the “[a]uthority to enter such orders [shifting costs] is included in the present rule,” and the inclusion will forestall the temptation some parties may feel to contest this authority.\textsuperscript{115} There is Supreme Court support for that statement.\textsuperscript{116}

After objections that the change would give “undue weight” to use of cost-shifting\textsuperscript{117} the Note was further amended to provide that the change “does not mean that cost-shifting should become a common practice.” The Note also affirms that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”\textsuperscript{118}

Some have expressed concern that this addition to the Committee Note prejudices any continuing study of “requester pays” proposals. The Chair of the Subcommittee denied that this was the case.\textsuperscript{119} However, at the November 2015 meeting of the Rules Committee, it was stated that “the time has not yet arrived” to work on the questions since the “refocused emphasis on the scope of discovery” in Rule 26(b)(1) may reduce the need for more general cost-bearing rules\textsuperscript{120} if proportional discovery becomes the norm.

\textbf{(6) Production Requests/Objections (Rule 34, 37)}

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

First, Rule 34(b)(2)(B) now requires that an objection to a discovery request must state “an objection with specificity the grounds for objecting to the request, including the reasons.” The Committee Note explains that “if the objection [such as over-breadth] recognizes that some part of the request is appropriate, the objection should state the scope that is not objectionable.” An acceptable example is an objection that states that the party will limit its search to information created within a given period of time or to specified sources.\textsuperscript{121}

Second, an amendment to Rule 34(b)(2)(C) requires that any such objection must state “whether any responsive materials are being withheld on the basis of that

\begin{thebibliography}{99}
\bibitem{115} Committee Note, 25.
\bibitem{117} AAJ Comments, \textit{supra}, n. 16, December 19, 2013, at 17-18 (noting that “AAJ does not object to the Committee’s proposed change to Rule 26(c)(1)(B) per se” but suggesting amended Committee Note); \textit{cf.} LCJ Comment, \textit{supra}, n. 15, August 30, 2013, at 19-20 (endorsing proposal as “a small step towards our larger vision of reform”).
\bibitem{118} Committee Note, 25.
\bibitem{119} April 2014 Minutes, \textit{supra} n. 63, at 6 (lines 234-238).
\bibitem{120} Discovery Subcommittee Report: \textit{Requester Pays}, available at 2015 November Rules Committee Agenda, at 327-329 of 578.
\bibitem{121} Committee Note, 33-34.
\end{thebibliography}
This is intended to “end the confusion” when a producing party states several objections but still produces some information. The Committee Note states that a producing party “does not need to provide a detailed description or log of all documents withheld,” but should alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.

The amended Note also includes the statement that “an objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been withheld.” According to the Chair of the Subcommittee, parties should discuss the response and if they cannot resolve the issue, seek a court order.

Third, Rule 34(b)(2)(B) permits a “responding party [to] state that it will produce copies of documents or of [ESI] instead of permitting inspection.” This belatedly updates the rule to conform to “common practice” of producing copies of documents or ESI “rather than simply permitting inspection.” The Response must state that copies will be produced. Rule 37(a)(3)(B)(iv) is also changed to authorize motions to compel for both failures to permitting inspection and failures to produce.

Rule 34(b)(2)(B) also requires that if production (as opposed to inspection) is elected, it must be completed no later than the time specified “in the request or another reasonable time specified in the response.” If the production is made in stages, the response should specify the beginning and end dates of the production.

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

Both Rule 84 and the Appendix of Forms appended to the Civil Rules are abrogated, although certain of the forms are integrated into Rule 4(d), which now incorporates the forms “appended to this Rule 4.”

Prior to the amendment, Rule 84 stated that “the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” However, in response to the relative lack of use of the forms, the Rules Committee

---

122 The new language continues to be followed by the requirement that “[a]n objection to part of a request must specify the part and permit inspection of the rest.”
123 Committee Note, 34.
124 Committee Note, 34.
125 Committee Note, 34.
126 April 2014 Minutes, at 10 (lines 423-427).
127 Committee Note, 34 (“the response to the request must state that copies will be produced”). For a useful summary of the evolution in the discovery process between former and current contexts, see Anderson Living Trust v. WPX Energy Production, 298 F.R.D. 514, 521-527 (D. Mass. 2014).
128 Committee Note, 38 (“[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling ‘production, or inspection’”).
129 See generally, material at Committee Note, 52-57.
concluded that it is time “to get out of the forms business.” It noted that “many of the forms are out of date,” are little used and amendment is “cumbersome” since it requires the same process as amending the rules themselves.

As explained in the Committee Note, “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.

The phrase “[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]” now forms the text which appears as Rule 84 and replaces the separate list of “Appendix of Forms.” At the Supreme Courts’ suggestion, the Committee Note was amended to observe that the “abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”

The reference to using the Administrative Office as an alternative source was also expanded to include reference to websites of district courts and local law libraries as potential sources.

The Chief Justice, in his year-end Report, touted this change and described a process whereby “a group of experienced judges” have been assembled to “replace these outdate forms with modern versions that reflect current practice and procedure.” The revised forms are available on the federal judiciary website.

Criticisms

The Committee rejected concerns that abrogation was inappropriate because the forms had become so intimately associated with the sponsoring or related rule that they could not be changed without a rule-by-rule process. The Rules Committee decided that the publication process and the opportunity to comment on the proposal “fully satisfies the Rules Enabling Act requirements.

Some have criticized the Supreme Court for “erasing” the forms and replacing them with new ones as part of a “disturbing new civil rulemaking process whereby private groups, not bound by the Rules Enabling Act, enact what are equivalent to rules “largely behind closed doors and without public input.”

---

130 June 2014 RULES REPORT, available supra, n. 2, IV (Abrogation of Rule 84).
131 Committee Note, 49.
132 Memorandum, April 2, 2015, Judicial Conference to Supreme Court, , supra, n. 2, at 129 of 144.
133 Id.
134 Committee Note, 49.
138 June 2014 RULES REPORT, available supra, n. 2, IV (Abrogation of Rule 84).
III. Rule 37(e)

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

The Federal Rules historically have not dealt with the duty to preserve or with the sanctions that may be imposed in the event of a failure to do so (“spoliation”). The initial Rule 37(e), effective in 2006, merely limited certain sanctions issued “under these rules,” typically available only if a court order had been violated.\(^{140}\) Since most courts invoked their inherent powers to sanction, the rule was effectively bypassed.

The E-Discovery Panel at the 2010 Duke Litigation Conference recommended adoption of a comprehensive rule to govern the duty to preserve.\(^{141}\) The Discovery Subcommittee, however, focused on a “sanctions only” approach to resolve competing requirements among the Federal Circuits which were widely regarded as a source of costly “over-preservation.”\(^{142}\)

An initial proposal was released for public comment in August, 2013.\(^{143}\) A court could not impose “sanctions” or issue “an adverse-inference jury instruction” unless a party’s actions caused “substantial prejudice” in the litigation and were “willful or in bad faith” or “irreparably deprived” a party of any “meaningful” ability to present or defend claims.\(^{144}\) However, curative measures were available without a showing of culpable conduct or prejudicial impact.

The initial proposal met with a mixed reception.\(^{145}\) The author of the Zubulake opinions, in a footnote to Sekisui American v. Hart, argued that the requirement would “create perverse incentives and encourage sloppy behavior.”\(^{146}\) The court also argued that an “innocent” party should never have the burden to prove that prejudice resulted from a failure to preserve.\(^{147}\)

\(^{140}\) Cf. Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72 (S.D. N.Y. 1991)(acts of spoliation prior to issuance of discovery orders violate Rule 37(b) because the inability to comply is “self-inflicted”).

\(^{141}\) The Panel “reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.” John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010).

\(^{142}\) Committee Note, 38 (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions “if a court finds [a party] did not do enough”).

\(^{143}\) 2013 PROPOSAL, supra n. 10, at 314-317 of 354.

\(^{144}\) The court was to “consider all relevant factors” in applying the rule, including the reasonableness of a party’s effort to preserve information and the proportionality of the preservation efforts, among others.

\(^{145}\) A summary of the comments on Rule 37(e)(August 2013) is found in the Agenda Book for the May 2014 Standing Committee Meeting, at 331. Individual written comments are archived under the numbers referenced in the Summary at http://www.regulations.gov/#/docketDetail;D=USC-RULES-CV-2013-0002.


Others endorsed the uniformity approach but questioned the effectiveness of using “willfulness” as a distinguishing requirement.\(^{148}\) It was argued that a no-fault exception for “irreparable” prejudice should not apply\(^ {149}\) and that curative remedies should be “no more severe than that necessary to cure any prejudice” unless the court found that the party had acted in bad faith.\(^ {150}\)

The Revised Proposal

After the close of the public comment period, the Committee decided that the revised rule should apply only to ESI and that the heightened culpability requirements should be restricted to case-determinative measures.\(^ {151}\) However, just before final approval by the Committee, a substitute draft was produced which incorporated a \emph{de facto}\ safe harbor and conditioned remedial relief without culpability on a showing of prejudice.\(^ {152}\)

It is that revised proposal, as ultimately approved with minor grammatical adjustments, which became effective on December 1, 2015. Rule 37(e) now provides:

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

Revised Rule 37(e) thus forecloses reliance on inherent sanctioning authority under circumstances covered by the rule.\(^ {153}\) As a minimum, this means that some Circuit case

\(^{148}\) The ease with which a court found “willful” conduct under the (then) proposed rule is illustrated by Mazzei v. Money Store, 2014 WL 3610894, at n. 1 (S.D. N.Y. 2014)(finding that conduct would be “willful” even if proposed rule applied to abrogate Residential funding under the factors listed).


\(^{150}\) Hon. James C. Francis IV, letter to Rules Committee, 5-6 (January 10, 2014).

\(^{151}\) The Subcommittee Report is found in the April 2014 Rules Committee Agenda Book, at 369.

\(^{152}\) See Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014 (“Rule 37(e) Revised Again”) (also reproducing revised text as presented to and approved by the Committee at its Meeting), available at http://www.bna.com/advisory-committee-makes-n17179889550/.

\(^{153}\) Committee Note, 38 (the rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used”).
law which permits harsh measures based on mere negligence will no longer be available.\(^ {154}\) Under Chambers v. NASCO,\(^ {155}\) however, a court may rely upon its inherent power to sanction if, in the exercise of “informed discretion,” a rule is not “up to the task.” One instance of such a situation has already emerged.\(^ {156}\)

The rule is silent as to whether it fully displaces the use of Rule 37(b) remedies for breach of preservation orders\(^ {157}\) or those available under 28 U.S.C. 1927.\(^ {158}\) This implies that the limits on harsh measures apply to sanctions for failure to preserve imposed under the authority of those provisions.\(^ {159}\)

Rule 37(e) is applicable only to “losses” of ESI.\(^ {160}\) Different requirements may be applicable to losses of documents or tangible property in some Circuits. This preserves the flexibility of courts to deviate from limits on harsh measures where culpability is low but prejudice is high in cases involving tangible property losses.\(^ {161}\)

In Stinson v. City of New York\(^ {162}\) the court questioned, but did not decide, whether the rule would apply “where a party failed to preserve both ESI and hard-copy evidence.” It would seem logical that the rule-based standard apply to both if created under and related to the same factual context.

The rule does not apply to any action where redress for spoliation is sought pursuant to a state-created action in tort for the recovery of damages.\(^ {163}\)

---


\(^ {156}\) Cat3 v. Black Lineage, 2016 WL 154116, at *10 (S.D. NY. Jan. 12, 2016) (“[i]f the plaintiff were correct that Rule 37(e) is inapplicable here, relief would nonetheless be warranted under the Court’s inherent power. A ‘particularized showing of bad faith’ is necessary to justify exercising that power”).

\(^ {157}\) Cf. HM Electronics v. R.F. Technologies, 2015 WL 4714908, at *30 (S.D. Calif. Aug. 7, 2015) (issuing sanctions against attorney authorized by Rule 37(b) but concluding that it “would reach the same result on this record” if it applied Rule 37(e), as amended).

\(^ {158}\) Insurance Recovery v. Connolly, 2013 WL 5551299 (D. Mass. 2013) (sanctions against counsel that directed compliance orders regarding preservation of ESI in a business dispute assessed under Rule 37(b) and 28 USC 1927).

\(^ {159}\) See, e.g., Sun Rover Energy v. Nelson, 800 F. 3d 1219, 1225-26 )10th Cir. Sept. 2, 2015)(Rule 37(c)(1) does not expressly reference sanctions against counsel nor is there anything in advisory committee notes to suggest it was intended).

\(^ {160}\) The Committee plans to monitor the rule and, if it works, “we can think seriously about extending it to other forms of information.” Minutes, April 2014 Rules Committee, at 31 (lines 1277-1280). One logical extension would be to apply it to ESI and documents, a distinction (with tangible things) already present in Rule 34.

\(^ {161}\) Committee Note, 38. See, e.g., Silvestri v. GM, 271 F.3d 583, 593 (4th Cir. Nov. 14, 2001).

\(^ {162}\) 2016 WL 54684, at n. 5 (S.D. N.Y. January 5, 2016).

(8.1) Threshold Requirements

Rule 37(e) consists of two distinct segments. The first deals with the requirements which must exist before the rule applies. The second delineates the remedies/sanctions which are available when the rule is applicable, thus satisfying any possible Enabling Act concerns because the rule “regulates how rights are enforced in litigation.”

The threshold requirements largely incorporate existing common law standards, except where specifically modified. As the Subcommittee put it in reporting its proposed rule to the full Committee, “the preservation obligation is created by case law, not Rule 37(e).

A duty to preserve arises only “in the anticipation or conduct of litigation.” This involves a fact-specific test to be resolved on a case-by-case basis. Absent such a finding no duty exists.

The scope of the duty to preserve encompasses relevant and discoverable ESI. The impact of the changes to the scope of discovery in Rule 26(b)(1) appear to be minimal, although proportionality considerations are equally available to temper the duty to preserve. In the pre-litigation context, a party proceeds at its own risk, given the fact that any challenge will be assessed retrospectively. Over-broad preservation demands should be assessed accordingly.

Once litigation commences, preservation plans can be discussed and, if appropriate or necessary, judicial guidance sought on the scope of the duty. Rule 37(e) does not require proof of culpability as a condition for making remedies available under the rule. Instead, Rule 37(e) applies only if the ESI is missing because of a failure to undertake “reasonable steps” and it cannot be restored or replaced through additional discovery.

---

165 See, e.g., Committee Note, 39 (“[m]any court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonable foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve (emphasis added).”
166 Rule 37(e) Proposal, Discovery Subcommittee Report, April 11-12 2013 Agenda Book, at page 148 of 324; accord, Joseph, New Law of Electronic Spoliation, supra, 37 (“Rule 37(e) does not . . . alter existing federal law concerning whether evidence should have been preserved or when the duty to preserve attached”).
167 Committee Note, 39 (“It is important not to be blinded . . . by hindsight arising from familiarity with an action as it is actually filed”).
168 The Committee Note, at 40, speculates that “[p]reservation orders may become more common” and suggests that parties should “promptly” seek judicial guidance about the extent of reasonable preservation if they cannot reach agreement.
169 See, e.g., Beaven v. United States Dept. of Justice, 622 F. 3d 540, 553 (6th Cir. 2010). While the “culpable state of mind” formulation is used in many Circuits, others use a “balancing” or “two-part” tests in which prejudice plays a key role.
“Reasonable Steps”

The “reasonable steps” requirement serves as both a carrot and a stick regarding preservation conduct.170 If the party takes “reasonable steps,” the inquiry ends. As the Committee Note puts it, “reasonable steps to preserve suffice; it does not call for perfection.”171 This will permit courts to weed out ill-advised “gotcha” motions. It is fair to call it a “real” safe harbor.172

Parties typically implement “litigation holds,” an approach popularized by Zubulake v. UBS Warburg (“Zubulake IV”).173 The goal is to notify key custodians and others of their responsibilities to take affirmative action to prevent the destruction or alteration of relevant information.

However, a failure to promptly or perfectly do so does not preclude meeting the “reasonable steps” requirement. Preservation obligations are not tort-based; a party may have undertaken “flawed” effort and yet have undertaken “reasonable” steps under the circumstances.174 In contrast, Zubulake held that any imperfection in execution was “culpable,” since “[w]hen the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”175

In a case assessing preservation conduct under the amended rule, the court held that “manipulation of the email addresses is not consistent with taking 'reasonable steps to preserve the evidence.'”176

It is inappropriate to use per se standards in defining reasonability.177 In Rinkus v. Cammarata,178 for example, the court held that whether conduct is reasonable “depend on

---

170 Memo Report, Discovery Subcommittee, Rules Committee Agenda Book, November 1-2, 2012, at 3 (Page 123 of 542). The initial Draft Committee Note specified that the rule would “ensure that the potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts.” 2013 PROPOSAL, supra n. 10, at 318 of 354.
171 Committee Note, 41.
174 See, e.g., Qualcomm v. Broadcom, 2010 WL 1336937, at *6 (S.D. Calif. April 2, 2010)( refusing to impose sanctions under Rule 26(g) or inherent power “although a number of poor decisions were made”).
175 Id. at 220 (S.D. N.Y. 2003)(“Zubulake IV”). This logic was ultimately rejected by the Second Circuit. Chin, infra. The Committee also deleted a specific reference to use of litigation holds from its list of factors to avoid “unduly” emphasizing their use. See Rule 37(e) Proposal Memo, April 11-12 2013 Agenda Book, at page 144-145 of 324.
whether what was done – or not done – was proportional to that case and consistent with clearly established standards.” Emphasis in original). The Committee Note emphasizes that “proportionality” is a factor in any retrospective analysis under the Rule.179

The costs and burdens involved should be proportional to the burdens and costs involved in the preservation effort.180 It may, for example, be reasonable under the circumstances for a party to delay in imposing litigation holds,181 or to fail to retain ephemeral ESI unlikely to be sought in discovery182 or to fail to interrupt auto-deletion functions when alternative methods are available.183

Moreover, a “good faith” adherence to pre-existing policies and practices184 weighs in favor of finding “reasonable steps.”185 This is analogous to instances acknowledging the role of business judgment186 and “reasonable steps” to prevent or detect corporate misconduct.187

“Lost” and “Restore or Replace”

Rule 37(e) is also inapplicable unless the ESI at issue is actually “lost” and cannot be replaced or restored. The Note explains that “[b]ecause electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.”188 The Rule thus makes measures unavailable if the lost ESI can be “restored or replaced through additional discovery.”189

This use of “additional discovery” as a threshold requirement was added to the revised rule when it was presented to the Rules Committee for action at its April 2014

179 Committee Note, 41 (“[a] party may act reasonably by choosing a less costly form of information preservation”).
180 The Sedona Conference® Commentary on Proportionality in Electronic Discovery, 14 SEDONA CONF. J. 155, 162 (2013)
184 Committee Note, 41 (“As under the current rule [37(e)], the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps”).
187 USCG Guidelines Manual, §8B2.1, Para. (b)(it does not necessarily mean that the program is not effective).
188 Committee Note, 39.
189 Committee Note, 42 (“[i]f the information is restored or replaced, no further measures should be taken.”).
Meeting. Prior to that time, “additional discovery” was available merely upon a showing of a failure to preserve without proof of prejudice or culpability. In the substitute final version of the Rule adopted at the April meeting, however, the required showing that it “cannot be restored or replaced through additional discovery” became a threshold requirement for any measures under the rule.

The Minutes of the Meeting explain that only if additional discovery “does not work” is a court entitled to order measures to cure prejudice. In CAT3 v Black Lineage, the court rejected the argument that forensic restoration of an altered email constituted restoration within the meaning of the rule. In dicta, however, it also indicated that if that were not the case, it could exercise its inherent authority to sanction under the egregious facts of the case, since bad faith conduct was involved.

The use of inherent power to sanction where lost ESI is “restored” despite bad faith conduct was apparently seen by the court as an example of the rule not being “up to the task” in that narrow situation. Given the unique fact pattern this option is not routinely available to courts finding the threshold requirements to be lacking. It is best seen as a response to an unintended gap in the rule which requires court attention using inherent power.

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

(8.2) Measures Available

Assuming that ESI has been “lost” because of a failure to take “reasonable steps” and has not been replaced by additional discovery, Rule 37(e) authorizes “measures” to address prejudice and, under certain conditions, severe sanctions upon a showing of intent to deprive a party of the use of the ESI.

Subdivision (e)(1): Addressing Prejudice

Subdivision (e)(1) authorizes a court to order [open-ended] measures “upon finding prejudice to another party from the loss of information” once the threshold requirements

---

191 Minutes, supra, April 2014 Rules Committee Meeting, at Ins 805-808.
192 CAT3, Inc. v Black Linage et al, 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016)(plaintiffs incorrectly argue that even if their misdeeds were discovered and the information recovered “they cannot be sanctioned”).
193 Id.
194 Committee Note, 42.
195 Thomas Allman, Standing Committee Oks Federal Discovery Amendments, Law Technology News (Online), June 2, 2104 (available on LEXIS NEXIS), at 4 (noting that the word “only” was inserted at the outset of (e)(2) to make the point that the harsh measures are not a subset of the broad remedies).
are met. The subsection requires no prior finding of destruction with a culpable intent. The focus is on “solving the problem, not punishing the malefactor.” The measures employed may not, however, be any “greater than necessary to cure the prejudice.” They have been aptly described, nonetheless, as “serious sanctions” which may be imposed for negligent or inadvertent conduct.

On balance, therefore, it is not surprising that commentators suggest that “[c]ompanies may be well-advised to see how courts interpret new Rule 37(e) before going too far toward revamping existing preservation practices” to reduce over-preservation.

Prejudice. A showing of prejudice is an essential precondition to remedial action. Traditionally, prejudice involves conduct which has “impair[ed] the ability to go to trial” or “threaten[s] to interfere with the rightful decision of the case.” One court has found, however, that the costs involved in showing that the threshold conditions (“economic prejudice”) is a sufficient showing to justify measures.

The rule does not assign the burden of proof on this element to the moving party, which is left to the discretion of the trial judge. Under the amended Rule, “each party is responsible for providing such information and argument as it can” and the court may ask one or another party, or all parties, for further information. However, that “conjecture as to prejudice” does not constitute evidence that it exists.

It remains to be seen whether a presumption of prejudice based on culpability survives. In Sekisui American, a critic of the initial proposal held that missing emails

---

197 Joseph, Rule 37(e), supra, at 39-40 (the “serious sanctions” which may be imposed as “curative measures” under the subdivision include (1) directing that designated facts be taken as established; (2) prohibiting the party from supporting or opposing designated claims or defenses; (3) barring introduction of designated matters; (4) striking pleadings; (5) introducing evidence of failure to preserve; (6) allow argument on failure to preserve; and (7) giving jury instructions other than adverse inference instructions).
198 Communication to Author from in-house counsel observer, April 2014 (copy on file with author); see also John W. Griffin Jr., A Voice for Injured Plaintiffs, August 2015 TRIAL, 20 & 22 (“[i]n the end, the committee preserved the rights of district court judges to remedy the negligent spoliation of evidence”).
201 CAT3 v. Black Lineage, supra, 2016 WL 154116, at *10 (“defendants have been put to the burden and expense of ferreting out the malfeasance and seeking relief from the court”).
202 Committee Note, 43 (the content may be fairly evident or there may be enough information from other sources to meet the needs of the parties).
203 Committee Note, at 43.
204 June 2014 RULES REPORT, supra n. 2, at III (D).
205 Yoder & Frey Auctioneers v. EquipmentFacts, 774 F.3d 1065, 1071 (6th Cir. 2014)(affirming denial of sanction request for failure to show relevance of missing ESI to contested issues).
were prejudicial since gross negligence was involved.\textsuperscript{207} The court relied on \textit{Residential Funding} for the position that it is “sufficient circumstantial evidence” that missing evidence was unfavorable if the destruction was willful.\textsuperscript{208} Similarly, in the Ninth Circuit, a “finding of spoliation” has served to shift the burden of proof to the “guilty party” to show that no prejudice resulted.\textsuperscript{209}

The authority to order measures no greater than necessary to cure prejudice does not require a court to cure every prejudicial effect.\textsuperscript{210}

\textit{Measures Available.} Subject to Subsection (e)(2), some of the measures listed in Rule 37(b)(2)(A) provide relevant procedural examples for use under this subsection.\textsuperscript{211} However, it would be inappropriate to preclude a party from offering evidence in support of the “central or only claim or defense in the case” absent a finding of “intent to deprive.”\textsuperscript{212} A court may also exclude use of specific item of evidence to “offset prejudice caused by failure to preserve other evidence.”\textsuperscript{213}

\textit{Admission of Evidence and Argument about Spoliation.} The Committee Note approves of the submittal of evidence of spoliation and argument to the jury accompanied by “instructions to assist in its evaluation of such evidence, other than instructions to which subdivision (e)(2) applies,”\textsuperscript{214} if no greater than necessary to cure prejudice.\textsuperscript{215}

This reflects existing practice in many courts.\textsuperscript{216} It is similar in effect but different in justification from that offered by the Second Circuit decision in \textit{Mali v. Federal

\textsuperscript{207} \textit{Id.}, *7 (because the destruction was “willful,” the “prejudice [of the contents of any missing email] is therefore presumed”). The court criticized the initial proposal as creating perverse incentives and disagreed that the burden to prove prejudice should fall “on the innocent party.” \textit{Id.} at *9.

\textsuperscript{208} \textit{Id.} at *5 (citing \textit{Residential Funding v. DeGeorge}, 306 F. 3d 99, 109 (2nd Cir. 2002).

\textsuperscript{209} \textit{Fleming v. Escort}, 2015 WL 5611576, at *2 (D. Idaho 2015)(non-moving party in “much better postion to show what was destroyed”).

\textsuperscript{210} Committee Note, 44 (much is entrusted to the discretion of the court).

\textsuperscript{211} The list includes measures such as (i) designating facts as established (ii) precluding support of claims or defenses or the introduction of evidence (iii) striking pleadings (iv) staying proceedings (v) dismissing actions in whole or in part (vi) or rendering default judgment or treating failure to obey an order as contempt of court.

\textsuperscript{212} Committee Note, 44.

\textsuperscript{213} \textit{See, e.g.}, \textit{Jones v. Bremen High School}, 2010 WL 2106640, at *9-10 (N.D. Ill. 2010)(refusing to impose adverse inference but precluding arguments to jury based on absence of emails for period of inadequate preservation to “remedy plaintiff’s prejudice”).

\textsuperscript{214} \textit{Id.}.

\textsuperscript{215} Committee Note, 46. \textit{See, e.g.}, \textit{Russell v. U. of Texas}, 234 Fed. Appx. 195, 208 (5th Cir. June 28, 2007) (“the jury heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit”).

\textsuperscript{216} \textit{See, e.g.}, \textit{Savage v. City of Lewisburg, Tenn.}, 2014 WL 6827329, at *3 (M.D. Tenn. Dec. 3, 2014)(“Plaintiff may argue that the jury should infer that the unavailable audio recordings contain evidence that Plaintiff’s fellow patrol officers failed to provide her adequate backup assistance after she filed sexual harassment complaints”).
Insurance Company, announced during the Committee deliberations. In that decision, the court allowed a jury to draw inferences from non-production of certain information on the theory that it “was not a punishment” but “simply an explanation to the jury of its fact-finding powers.”

According to the Committee Note, only a jury instruction which “directs or permits the jury to infer” that lost ESI was unfavorable requires an “intent to deprive.” However, FRE 403 cautions that exclusion of evidence is necessary where there is a danger of undue prejudice, confusing the issues and misleading the. An adverse inference instruction “may tip the balance in ways the lost evidence never would have” and impose a “heavy penalty for losses” of ESI, creating “powerful incentives to over-preserve, often at great cost.”

Thus, in the Delta/AirTran Baggage Fee litigation, the court did not permit the plaintiffs to present evidence to the jury regarding alleged spoliation because it would “transform what should be a trial about [an] alleged antitrust conspiracy into one on discovery practices and abuses.”

Monetary Sanctions including Attorney's Fees. The Committee apparently assumed that awards of expenses, including attorney’s fees, were so routinely available that it was not necessary (as is the case in other provisions of Rule 37) to explicitly state that as the case. This is somewhat surprising, given the historic limits on fee-shifting under inherent power in the absence of a specific rule or statute or a showing of bad faith.

The initial proposal explicitly authorized monetary sanctions. Early indications are that an award of attorney fees will be a routine result under the Rule.

---

217 Mali v. Federal Insurance Company, 720 F.3d 387, 393 (2nd Cir. June 13, 2013)(noting that findings of culpable conduct would not be required as in the case of another “type” of adverse inference instruction such as that of Residential Funding).

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

219 Id., 46.

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

221 Committee Note, 45.

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


224 Discovery Subcommittee Minutes, March 4, 2014, 4 (“it is a “commonplace measure””).

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

Unfortunately, the routine award of such measures may very well increase incentives to file “gotcha” spoliation motions, regardless of the materiality of the prejudice involved.

Subdivision (e)(2): Cabining Harsh Measures

Subdivision (e)(2) limits authority to impose specified and very severe measures without a finding of “intent to deprive another party of the lost information’s use in the litigation.” No explicit showing of prejudice is required by the Subdivision. In contrast, the initial proposal generally required a showing of “willful” or “bad faith” conduct which caused “substantial prejudice” before “sanctions” or an “adverse inference” could issue.\(^{227}\)

As amended, the specified measures which are cabined includes:

(a) A presumption “that the lost information was unfavorable to the party;”
(b) An instruction to the jury that it “may or must presume the information was unfavorable to the party; or”
(c) The dismissal of the action or the entry of a “default judgment.”

The least onerous sanction corresponding to the culpability and prejudice suffered should be employed. The Committee Note cautions that severe measures should not be used if lesser measures would be sufficient to redress the loss.\(^{228}\) Moreover, as is the case in current spoliation law, it will not be enough for courts following earlier case law to simply find suspicious conduct.\(^{229}\)

**Intent to Deprive.** The Rule rejects the Residential Funding logic that a showing of negligent preservation behavior (or even grossly negligent conduct) is sufficient to justify an adverse inference jury instruction.\(^{230}\) That court concluded that it made “little difference” to the party that did not have access to the information whether it was done “willfully or negligently.”

The Rules Committee concluded, instead, that a uniform requirement for harsh measures should be akin to the “bad faith” or “bad conduct” requirement in use in many

---

\(^{227}\) Proposed Rule 37(e)(1)(B)(i), 2013 PROPOSAL, supra n. 10, at 315 of 354. Subdivision (e)(ii) of the proposed rule also permitted such measures where the failure “irreparably deprived a party” of a meaningful opportunity to present or defend, a provision that was dropped after public comments when the Revised rule was confined to losses of ESI.

\(^{228}\) Committee Note, 47.


\(^{230}\) Committee Note, 45 (the rule “rejects cases such as Residential Funding Corp. [306 F.3d 99, 108 (2nd Cir. 2002)](the culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently)” (emphasis in original)). *Id.* at 108.
Circuits. 231 It concluded that the Residential Funding logic did not supply sufficient indicia of knowledge of an impropriety to constitute an evidentiary admission based on consciousness of guilt. 232 Instead, the rule preserves a broad range of measures to cure prejudice for negligent or grossly negligent losses and “limit[s] the most severe measures” to instances of intentional loss or destruction. 233 This “changes the law in several Circuits” including the First, Second, Sixth, Ninth and sometimes the D.C. Circuit. 234

Some have expressed concerns that courts will simply designate conduct which is willful or reckless as reflecting an “intent to deprive.” That risk is real. 235 However, neither reckless 236 nor willful 237 conduct requires an intent to deprive another party of the evidence. As one observer has pointed out, the intent to deprive test “is the toughest standard to prove that the Advisory Committee could have adopted.” 238

Some argue that the finding of intent is properly for the jury. In contrast, in Brookshire Brothers v. Aldridge, 239 the Texas Supreme Court held that it was reversible error to introduce evidence of spoliation that was unrelated to the issues of the case. In that jurisdiction, the judge, not the jury, must determine if a party has spoliated evidence and, if so, the appropriate remedy.

Prejudice and Subdivision (2) Remedies

A showing of prejudice is not required under Subdivision (e)(2) because it is presumed to exist when a finding is made that the party “acted with the intent to deprive another party of the information’s use in the litigation.” 240 Some argue that the omission

---

231 See, e.g., Guzman v. Jones, 804 F.3d 707, 713 (5th Cir. Oct. 22, 2015)(“[w]e permit an adverse against the spoliator” only upon a showing of ‘bad faith’ or ‘bad conduct’ which “generally means destruction for the purpose of hiding adverse evidence”); see also Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013)(“for the purpose of hiding adverse information”).

232 Committee Note, 45 (”[n]egligent or even grossly negligent behavior does not logically support that inference [since] it may have been favorable to either party, including the party that lost it”).

233 Id.


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

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

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


240 Committee Note, 47 (“Subdivision (e)(2) does not require any further finding of prejudice).
reflects a “change in the law” to allow imposition of harshly punitive sanctions based solely on bad intent.\textsuperscript{241} This is illogical.

If there is no prejudicial impact, it is typically because the ESI is not “lost” or has been “restored or replaced” through additional discovery. The Standing Committee modified the Committee Note to strike the observation that in “rare cases” conduct which is “reprehensible” justifies serious measures in the absence of prejudice.\textsuperscript{242} It would appear that the Committee was prepared to tolerate the risk of the highly motivated but incompetent spoliator and, as CAT\textsuperscript{3} demonstrates, leave it to the discretion of the trial court to involve inherent authority tailored to the circumstances if necessary.\textsuperscript{243}

Prejudice is best seen as a requirement of both subsections, as is the case of spoliation under the common law.\textsuperscript{244} This is consistent with existing case law.\textsuperscript{245}

\textsuperscript{241} Joseph, New Law of Electronic Spoliation, supra, 41 (conceding that the lack of prejudice impacts whether any sanction is appropriate).

\textsuperscript{242} Minutes, Standing Committee, May 29-30, 2014, at n. 2 (showing initial and revised Note): see also Memo, May 22, 2014, Dave Campbell to Jeff Sutton, Revision to Proposed Rule 37(e) Committee Note (copy on file with Author)(noting that a Member of the Standing Committee had “questioned the wisdom” of suggesting that severe measures could be imposed “when no prejudice resulted from the loss”).

\textsuperscript{243} CAT\textsuperscript{3}, Inc. v Black Linage et al, 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016)(plaintiffs incorrectly argue that even if their misdeeds were discovered and the information recovered “they cannot be sanctioned”).

\textsuperscript{244} Minutes, April 2014 Rules Committee, at 25 (lines 1015-1017 (“[t]he Committee Note will say that the court should not dismiss or default simply for deliberate loss of immaterial information. But if there is prejudice - including what may be inferred from the deliberate intent to deprive – dismissal or default is available”); accord, at 29 (lines 1214-1315) (harsh measures are “not [available] if the lost information is truly inconsequential”).

\textsuperscript{245} See, e.g., Vicente v. Prescott, City of, 2014 WL 3939277, at *10-11 (D. Ariz. Aug. 13, 2014)(refusing to consider sanctions where a “complete lack of prejudice” existed despite the fact that “preservation efforts were inadequate”).
APPENDIX

Approved Rules Text (as transmitted to Congress)

Rule 1 Scope and Purpose
* * * [These rules] should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4 Summons
(d) Waiving Service [NOTE: TEXT OF AMENDED RULE AND APPENDED FORMS NOT REPRODUCED HERE]
* * *

Rule 4 Summons

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within 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 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

3 Contents of the Order. * * *

(B) Permitted Contents. The scheduling order may:

(iii) provide for disclosure, or preservation of electronically stored information;
(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
(v) direct that before moving for an order relating to discovery the movant must request a conference with the court;

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

(b) DISCOVERY SCOPE AND LIMITS.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, 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, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

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

Rule 30 Depositions by Oral Examination

(a) When a Deposition May Be Taken. * * *

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

(d) Duration; Sanction; Motion to Terminate or Limit.

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

Rule 31 Depositions by Written Questions

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

**Rule 33 Interrogatories to Parties**

(a) **IN GENERAL.**

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

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

(b) **PROCEDURE.** *

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

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

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

(C) **Objections.** An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. *"*
Rule 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery. * * *

(3) Specific Motions. * * *

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

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

* * * *

(e) Failure to Provide Preserve Electronically Stored Information

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

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

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

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

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

(C) dismiss the action or enter a default judgment.
Rule 55. Default; Default Judgment

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

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

* * *

Rule 84. Forms

[Abrogated (Apr. ___, 2015, eff. Dec. 1, 2015.)]

* * *

APPENDIX OF FORMS

[Abrogated (Apr. ___, 2015, eff. Dec. 1, 2015.)]