

## The 2015 Civil Rules Amendments

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This Memorandum provides an overview of the background to enactment and the experience under the amendments to the Federal Rules of Civil Procedure which became effective on December 1, 2015.

### Background

The amendments resulted from a multi-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.”<sup>2</sup>

Key “takeaways” from the Duke Conference were that there was no need for wholesale revisions to the discovery rules, but that improved case management, a more focused application of the long-ignored principle of “proportionality” and enhanced cooperation among parties in discovery should be encouraged. 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.”<sup>3</sup>

The task of developing rule proposals was divided between an *ad hoc* Duke Subcommittee, chaired by the Hon. John Koeltl and the Discovery Subcommittee, chaired by the Hon. Paul Grimm, which focused solely on preservation and spoliation. Both subcommittees vetted alternative draft rule proposals at “mini-conferences.” In addition,

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<sup>2</sup> Minutes, Rules Committee Meeting, November 17-18, 2008, at 17-18.

<sup>3</sup> John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 544 (2010). The author served as a Member of the panel.

an independent subcommittee worked to make develop recommendations about treatment of the contents of the Appendix of Forms, and the associated Rule 84.

## The Initial Proposals

An initial “package” of proposed amendments was released for public comment in August 2013.<sup>4</sup> The response was robust; a total of 120 witnesses testified at three public hearings and 2356 written comments, a record, were submitted, all of which remain available on line.<sup>5</sup>

The most contentious proposals involved amendments to Rule 26(b)(1) and Rule 37(e). Competing submissions by Lawyers for Civil Justice (“LCJ”)<sup>6</sup> and the American Association for Justice (“AAJ,” formerly “ATLA”)<sup>7</sup> were typical of many individual comments. The AAJ urged rejection of the addition of proportionality factors to Rule 26(b)(1) and reducing presumptive limits on discovery devices. LCJ, in contrast, supported amending Rule 37(e), although with caveats about the details, and supported changes in Rule 26(b) relating to proportionality.

In addition to individuals, academics and policy advocacy groups, 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 all provided thoughtful comments.

## The Final Rules Package

After consideration of the public comments, the Committee affirmed its decision to move proportionality factors into Rule 26(b)(1), but made adjustments in the rule and the Committee Note in response to many of the concerns raised. In addition, the proportionality-motivated proposals to further limit discovery devices in Rules 30, 31 and 33 and place new limits in Rule 36 were withdrawn. The proposal for a comprehensive Rule 37(e) was abandoned and a revised proposal focusing only on losses of ESI was substituted.

Final versions of the proposed amendments were adopted by the Rules Committee at its April, 2014 meeting in Portland, Oregon.<sup>8</sup> The Standing Committee subsequently

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<sup>4</sup> The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules (hereinafter “2013 PROPOSAL,” available <http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf>.

<sup>5</sup> Hearing Transcripts are available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees>. The written comments are archived at <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>.

<sup>6</sup> LCJ Comments, August 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267>, as supplemented. LCJ represents a coalition of defense trial lawyer organizations, law firms and corporations.

<sup>7</sup> AAJ Comments, December 19, 2013, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372>.

<sup>8</sup> See Minutes, April 2014 Rules Committee Meeting (hereinafter April 2014 Minutes).

approved the revised proposals as did the Judicial Conference, which then forwarded them to the Supreme Court with recommendations for their adoption.

## The 2015 Amendments

The Supreme Court adopted the proposed amendments and forwarded them to Congress on April 29, 2015.<sup>9</sup> Congress took no action prior to the effective date of December 1, 2015, whereupon the rules became effective.

They apply to all subsequently filed lawsuits as well as to pending cases unless a court determines that it is impracticable or unjust to do so. Some courts have overlooked the amended rules in instances where they are clearly applicable, particularly involving Rule 26(b) and Rule 37(e) but, by and large, courts are routinely applying them where applicable.

## 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 had emphasized the need for enhanced cooperation in achieving the goals of Rule 1, a theme echoed by the Sedona Conference<sup>®</sup> Cooperation Proclamation.<sup>10</sup>

The Subcommittee initially considered mandating that parties “should cooperate” to achieve the goals of Rule 1.<sup>11</sup> However, this was ultimately deemed to be “too vague, and thus fraught with the mischief of satellite litigation.”<sup>12</sup> As finally approved, instead, the Rule 1 is to 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.

Chief Justice Roberts strongly endorsed the importance of cooperation and courts have not been reluctant to pick up on its importance.

## Counsel

The Committee Note 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.” After objection that this implied that this

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<sup>9</sup> The final rules and Committee Notes were part of the “package” of materials as transmitted to Congress can be found at <http://www.uscourts.gov/file/document/congress-materials> and are reproduced in the Committee Report found at 305 F.R.D. 457, 512 (2015)(“Proposed Rules”). The Committee Notes to Rule 4(m) and to Rule 84 were subsequently amended at the request of the Supreme Court.

<sup>10</sup> The Sedona Conference<sup>®</sup> Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).

<sup>11</sup> Duke Subcommittee Conference Call Notes, 9, October 22, 2012), 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).

<sup>12</sup> *Id.*

might be cited as a basis for sanctions, the Note was enlarged to clarify 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.”<sup>13</sup>

The amended Rule is intended to strike the proper balance between promoting cooperative actions and acknowledging the professional requirements of effective representation.<sup>14</sup>

## Impact

The amended Rule does not “give the requesting party, or the Court, the power to force cooperation.”<sup>15</sup> One court has, however, ordered the parties to engage in “cooperative dialogue in an effort to come to an agreement regarding proportional discovery.”<sup>16</sup> In *Rosalind Searcy v. Esurance*, the court noted the need for parties to “work cooperatively and to employ common sense practicality so that cases can be resolved fairly and expeditiously.”<sup>17</sup>

While a lack of cooperation is not a source of sanctions,<sup>18</sup> an uncooperative party which acted “contrary to” the amended rule found itself saddled with a “quick peek” plan for allegedly privileged documents in order to achieve “cooperative and proportional discovery.”<sup>19</sup> Similarly, in *Harbord v. Home Depot*, a court granted a protective order after concluding that the non-moving party’s “approach to discovery in this case [was] inconsistent” with Rule 1.<sup>20</sup>

## Case Management (Rules 4, 16, 26(f))

Discussions at the Duke Litigation Conference stressed the need for improvements in judicial case management as an alternative to more dramatic changes.

### Waiver of Service of Process (Rule 4(d))

Amended Rule 4(d)(1) permits a party to notify a defendant that an action has been commenced, accompanied by “a the waiver form appended to this Rule 4” and statement

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<sup>13</sup> Committee Note.

<sup>14</sup> See Report to Standing Committee, May 2, 2014, at 16 (complicating these provisions by a “vague concept of ‘cooperation’ may invite confusion and ill-founded attempts to seek sanctions).

<sup>15</sup> *Hyles v. New York City*, 2016 WL 4077114, at \*2 (S.D. N.Y. Aug. 1, 2016)(cooperation principles do not give the power to a court to force the responding party to use TAR).

<sup>16</sup> *Siriano v. Goodman*, 2015 WL 8259548, at \*7 (S.D. Ohio Dec. 9, 2015).

<sup>17</sup> 2016 WL 4149964, at \*2 (D. Nev. Aug. 1, 2016)(citing Rules 1 and 26(b)).

<sup>18</sup> Rule 37(f) and 16(f) authorize sanctions against a party or its attorney that does not participate in good faith in developing a discovery plan or in the scheduling conference.

<sup>19</sup> *Sommerville v. Moran*, 2016 WL 233627, at \*5 (S.D. Ind. Jan. 20, 2016)(encouraging parties to carefully study Committee Note to amended Rule 1).

<sup>20</sup> 2017 WL 1102685, at \*3 (D. Ore. March 24, 2017).

which describes the consequences of waiving and not waiving service using ~~text prescribed in Form 5~~ the form appended to this Rule 4.<sup>21</sup>

The Committee Note explains that “[a]brogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4.”<sup>22</sup>

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

The time limits in Rule 4(m) governing the service of process have been reduced from 120 to 90 days. In its final form, the rule does not apply to service in a foreign country “or to service of a notice under Rule 71.1(d)(3)(A).”

The Committee Note explains that the intent is to “reduce delay at the beginning of litigation.” At the request of the Supreme Court, the Note was amended to also state that shortening the presumptive time limit for service “will increase the frequency of occasions to extend the time for ~~good cause.~~”<sup>23</sup> A commentator has observed that the revised Note all but instructs courts to grant such requests.<sup>24</sup>

### Rule 26(f) Discovery Plan

A conference of parties for the purposes of planning for discovery must occur “as soon as practicable” and in any event “at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” Rule 26(f)(3)(C) now requires that the discovery plan include views and proposals about issues relating to “disclosure, ~~or~~ discovery, or preservation of ESI, as well as whether to include agreements about claims of privilege under Federal Rule of Evidence 502.

### Early Requests under Rule 34

Rule 26(d)(2) was added to enhance the usefulness of the Rule 26(f) Conference by permitting a party to “deliver” requests to another party prior to the Conference. The Committee Note to Rule 26 expresses the hope that this “relaxation of the discovery moratorium” may facilitate discussion, resulting in changes in the requests.

The “delivery” does not count as service of the Rule 34 request, which is considered served as of the *first* Rule 26(f) Conference, with the responses due 30 days after that Conference.<sup>25</sup>

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<sup>21</sup> For the full text of the appended Forms, see 305 F.R.D 457, 582-587 (2015).

<sup>22</sup> Memorandum, Judicial Conference April 2, 2015 (copy on file with author).

<sup>23</sup> *Id.* This was one of only two changes requested by the Supreme Court (the other dealt with the Committee Note to abrogated Rule 84).

<sup>24</sup> Amii N. Castle, *A Comprehensive Overview: 2015 Amendments to the [FRCP]*, 64 U. KAN. L. REV. 837, 844 (2016).

<sup>25</sup> See Rule 34(b)(2)(A) and (d)(2)(B).

## Scheduling Conference/Orders

Rule 16(a) does not require that a court hold a formal scheduling conference. However, Rule 16(b) *does* require, with some exceptions, that a court issue a scheduling order after receiving the parties Rule 26(f) report or “consulting” with the attorneys at a scheduling conference.

Amended Rule 16(b)(2) now requires that the order be issued as soon as practicable, “~~but in any event unless the judge finds good cause for delay the judge must issue it within the earlier of 120 90 days after an defendant has been served or 90 60 days after any defendant has appeared.~~”

The amended rule no longer speaks of scheduling conferences [held] ~~by telephone, mail, or other means.~~ Instead, the Committee Note observes that the conference may be held “in person, by telephone, or by more sophisticated electronic means.” The Note suggests that it is “more effective” if there is “direct, simultaneous communication.”

The Committee Note also suggests that while parties may need extra time to prepare to discuss issues in complex matters with multiple parties and large organizations, it is desirable to at least hold a first scheduling conference in conformance to the time set by the rule.

## Scheduling Order Contents

Rule 16(b)(3), specifying the permitted contents of a scheduling order, has been amended in three respects.

First, Rule 16(b)(3)(B)(iii) has been amended to permit a scheduling order to provide for “disclosure, ~~or~~ discovery, or preservation” of ESI, in parallel with the change in the required contents of discovery plan submitted prior to meeting with the Court under Rule 16.

The Committee Note to Rule 16 observes that the amendments to Rule 37(e) “recognize that a duty to preserve discoverable information may arise before an action is filed.” The Committee Note to Rule 37(e) extolls the value in “promptly seeking judicial guidance about the extent of reasonable preservation” if the parties cannot reach agreement about preservation issues.

It also predicts that “[p]reservation orders may become more common” as a result of the encouragement to address preservation.<sup>26</sup>

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<sup>26</sup> There has been no noticeable increase in reported decisions, which remain case specific. In *Schein v. Cook*, 2016 WL 3212457 (N.D. Cal. June 10, 2016), for example, a court ordered preservation of materials on an expedited basis before Rule 16 or 26(f) obligations took hold.

Second, Rule 16(b)(3)(B)(iii)(iv) permits a scheduling order to include agreements dealing with claims of privilege or of protection as trial-preparation materials, “including agreements reached under Federal Rule of Evidence 502,”<sup>27</sup> and

Third, Rule 16(b)(3)(B)(v) has been added to permit a court to “direct that before moving for an order relating to discovery the movant must request a conference with the court.” The Committee Note explains that “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion.”<sup>28</sup>

A former Magistrate Judge regards this as possibly “the great[est] cost-saver” in the 2015 Amendments.<sup>29</sup> A current Magistrate Judge has confirmed that its experience supports the Committee Note endorsement of the practice.<sup>30</sup>

## **Proportionality (Rule 26(b))**

A principal conclusion arising from the Duke Conference was that a renewed emphasis on “proportionality” in discovery was needed. The scope of discovery in Rule 26(b) has been subject to proportionality limitations since 1983, when the rule was amended to deal with “disproportionate” discovery and its consequences.<sup>31</sup>

In short, the Committee concluded that an increased emphasis was needed to achieve the goals of Rule 1.<sup>32</sup>

As a result, the Committee decided expand Rule 26(b)(1) to add the existing five proportionality factors to a new reference to proportionality so as to clarify the intended meaning of the change.<sup>33</sup> Subsequently, after public comments on the initial draft, a sixth factor (“the parties relative access to relevant information”) was also added.

As amended, with a slight rearrangement of the order of the factors, Rule 26(b)(1) now provides:

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<sup>27</sup> Courts often provide Model Stipulated Orders which provide that they “shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).” *See, e.g.*, Stipulated Order (Mix, M.J.), [http://www.cod.uscourts.gov/Portals/0/Documents/Judges/KLM/Rule\\_502\\_d\\_Order.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Judges/KLM/Rule_502_d_Order.pdf)

<sup>28</sup> Steven S. Gensler and Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 861 (2013).

<sup>29</sup> Ronald J. Hedges, *The Other December 1 Amendments to the Federal Rules of Civil Procedure*, ABA *Litigation, Pretrial Practice & Discovery* (2016).

<sup>30</sup> *Stroup v. United Airlines*, 2016 WL 7176717, at n. 15 (D. Colo. 2016)(“That certainly has been this judge’s experience over the past twelve years”)(Shaffer, M.J.).

<sup>31</sup> *See* 97 F.R.D. 165, 215 (1983)(Rule 26(b)(1)(iii)). The Committee Note described this addition as intended to limit “disproportionate” discovery of matters which were “otherwise proper subjects of inquiry.”

<sup>32</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 512 at 517 (“civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality”).

<sup>33</sup> 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).

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.

Rule 26(b)(2)(C)(iii) was amended to provide that courts 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).~~” Changes were also made to Rules 30, 31 and 33 in order, according to the Committee Note, to reflect the recognition of “proportionality” in Rule 26(b)(1).<sup>34</sup>

Subsections (i) and (ii) of Rule 26(b)(2)(C) continue to limit discovery which is unreasonably cumulative or duplicative or which can be obtain from other less burdensome sources. Rule 26(c) authorize orders to protect a party from “undue burden or expense” and was amended to acknowledge authority to “allocate” costs in the event of undue burden or expense.

Rule 26(b)(1) defines the scope of discovery as to subpoenas to third parties, and parties may seek orders under Rule 26(c) to enforce them even if the subpoenaed party does not object.<sup>35</sup> In addition, if production of ESI is involved, a lack of accessibility under Rule 26(b)(2)(B) may be invoked as an objection, which will ultimately be resolved under the proportionality principle, as tempered by a showing of “good cause.”<sup>36</sup>

## Deletions

Substantial deletions were made to Rule 26(b)(1).<sup>37</sup>

The statement that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,” which had been improperly used to describe the scope of discovery, has been deleted and replaced by the statement that “[i]nformation within this scope of discovery need not be

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<sup>34</sup> Committee Notes. In each of Rules 30, 31 and 33, the reference to Rule 26(b)(1) was replaced by a reference to “Rule 26(b)(1) and (2).”

<sup>35</sup> Noble Roman's Inc. v. Hattenhauer, 314 F.R.D. 304, 309 (S.D. Ind. March 24, 2016)(“[a court] can issue a protective order against a subpoena as a means of enforcing the scope of discovery in rule 26(b)”).

<sup>36</sup> Rule 26(b)(2)(B), a presumptive limit on production of ESI, was added in 2006. *See, e.g.,* Nelson v. American Family Mutual Insurance, 2016 WL 3919973, \*6 (D. Minn July 18, 2016)(noting that party that withholds ESI based on Rule 26(b)(2)(B) must show its basis for doing so and the court may nonetheless order discovery if “good cause” is shown, considering proportionality concerns).

<sup>37</sup> The red-lined version of the final version, showing deletions, is found at 305 F.R.D. 457, at 541-542. The related portion of the Committee note is at 553-555.

admissible in evidence to be discoverable.” The fact that discovery involves “hearsay, or double hearsay, is “beside the point,” since the information sought need not be admissible to be discoverable, as noted in *Wrice v. Burge*.<sup>38</sup>

The authority to order “subject matter” discovery for good cause was also deleted because it was “rarely invoked.” The Committee Note observes that “[p]roportional discovery relevant to any party’s claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.”

Also deleted was a list of examples of allowable discovery<sup>39</sup> which are so “deeply entrenched” in discovery practice that it is “no longer necessary to clutter the long text of Rule 26.

### Intent of the Amendments

The Committee Note explains that the change “restores” the proportionality considerations to their original place in Rule 26(b)(1).<sup>40</sup> The revised Rule “does not change the existing responsibilities of the court and the parties to consider proportionality” and “does not place on the party seeking discovery the burden of addressing all proportionality considerations.” Indeed, proportionality has long been emphasized by groups such as the Sedona Conference® as an essential component in the evaluation of the burdens and benefits of discovery.<sup>41</sup>

According to the Note, the change does not “permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.” Moreover, it “reinforces” Rule 26(g) obligations by requiring “parties to consider these [proportionality] factors in making discovery requests, responses, or objections.”

Some courts believe they have been “encouraged” to “put their thumbs on the scale” to deny discovery.<sup>42</sup> A more balanced view, however, is that the amendment is intended to restore the scope of discovery to what it was always intended to be, but was lacking when courts and parties ignored proportionality considerations.<sup>43</sup> Accordingly, corporate

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<sup>38</sup> (N.D. Ill. 2016)(Finnegan, M.J.)(quoting rule).

<sup>39</sup> The examples include “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.”

<sup>40</sup> The final language restates the intent from that expressed in the draft note. *See, e.g.*, Draft Committee Note, 2013 PROPOSAL, *supra*, 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”). The implication of a change in scope was unintended.

<sup>41</sup> The Sedona Conference® *Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 162 (2013).

<sup>42</sup> *XTO Energy v. ATD, LLC*, 2016 WL 1730171, at \*19 (D. N.M. April 1, 2016).

<sup>43</sup> The Committee Note asserts that if a dispute arises before a court, “the parties responsibilities would remain as they have been since 1983.” The courts responsibility, “using all the information provided by the parties,” is to use these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

defendants are said to be “mistaken” in their “belief that these changes dictate severe limitations on discovery.”<sup>44</sup>

In *Fassett v. Sears Holding*, a District Judge described its role as “discerning” the middle ground between making information available to uncover the truth while being “rationally bounded by efficiency and cost concerns.”<sup>45</sup> In *Henry v. Morgan’s Hotel Group* the court described the amended rule as intended to “encourage judges to be more aggressive in identifying and discouraging discovery overuse” before ordering production of relevant information.<sup>46</sup>

## Determining Relevance

The test of discovery relevance is found in the relationship of the evidence to the “claims or defenses” asserted. The former Chair of the Rules Committee has stressed that “[t]he test going forward is whether evidence is “relevant to any party’s claim or defense,” not whether it is “reasonably calculated to lead to admissible evidence.”<sup>47</sup>

As one Magistrate Judge put it, “[t]hat phrase [“reasonably calculated to lead to the discovery of admissible evidence”] should be removed from every law firm’s hard drive and erased from all cloud servers.”<sup>48</sup> In *State v. Fayda*, however, in a formulation repeated by other courts, it was stated that relevancy is “still” construed “broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on” any party’s claim or defense.”<sup>49</sup>

In *Cole’s Wexford Hotel v. Highmark*, however, a District Judge held that discovery requests are not relevant “simply because there is a possibility that the information may be relevant to the general subject matter of the action.”<sup>50</sup> However, by not defining “relevance,” Rule 26(b)(1) forces judges to rely on the “I know it when I see it” as the working definition.<sup>51</sup>

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<sup>44</sup> Altom M. Maglio, *Adapting to Amended Federal Discovery Rule*, 51- JUL TRIAL 36, 37 (2015).

<sup>45</sup> 2017 WL 386646, at \*8 (M.D. Pa. Jan. 27, 2017)(“discovery is not properly construed as an all-or-nothing game”).

<sup>46</sup> *Henry v. Morgan’s Hotel Group*, 2016 WL 303114, at \*3 (S.D. N. Y. Jan.25, 2016); *see also* Tatsha Robertson v. People Magazine, 2015 WL 9077111, at \*2 (S.D. N.Y. Dec. 16, 2015 (“the 2015 amendment does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly”).

<sup>47</sup> *In re Bard IVC Filters Products Liability Litigation*, 2016 WL 4943393, at \*2 (D. Ariz. Sept. 16, 2016)(“Old habits die hard” and noting that under the Rules Enabling Act, prior rules have “no further force of effect”).

<sup>48</sup> Iain D. Johnston, *The Effects of the December 1, 2015 Amendments From One Judge’s Perspective*, ISBA Federal Civil Practice Section Newsletter (September, 2016)(copy on file with author).

<sup>49</sup> *State Farm v. Fayda*, 2015 WL 7871037 at \*2 (S.D. N.Y 2015), quoting from *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) .

<sup>50</sup> 2016 WL 5025751, at \*2 (W.D. Pa. 2016)(Conti, J.).

<sup>51</sup> Johnston, *supra* (FRE 401 “simply cannot be the definition for discovery purposes”). FRE 401 provides that evidence is relevant if (a) it has “any tendency” to make a fact more or less probably and (b) “is of consequence” in determining the action.

## Applying Proportionality

Amended Rule 26(b)(1) provides that discoverable information must be *both* relevant to any party's claim or defense "and proportional to the needs of the case, considering" the re-arranged and slightly modified list of factors. However, it is difficult to "see how moving the same factors forward in Rule 26 could have any appreciable difference in the outcome of a discovery dispute."<sup>52</sup> Some courts have gone out of their way to assure litigants that in deciding the motion before it, "the same result would follow regardless of which version of Rule 26 was applied."<sup>53</sup>

Most objections based on proportionality objections have been resolved without detailed attention to individual factors. In *Goes Int'l v. Dodu*, the court noted that it should not be an excessive burden for an entity to produce revenue data, and thus the discovery was proportional, even for an entity located in China.<sup>54</sup> In *O'Connor v. Uber*, the "overbreadth" of the requested discovery" failed to meet "Rule 26(b)'s proportionality test."<sup>55</sup> In *Federal Mortgage Assn. v. SFR Investments*, objections that the discovery was "disproportionate to the needs of the case" was dismissed as simply "hyperbole."

Courts are prepared to limit discovery when parties already have enough information to meet their needs in the case.<sup>56</sup> In *Pertile v. GM*, a court in a roll-over case did not require GM to produce complex modeling software which, although relevant, was not proportional to the needs of the case given the failure to demonstrate that other discovery was not adequate.<sup>57</sup>

When a case has public policy implications, the "amount in controversy" factor may have a lesser weight in the court's analysis. In *Lucille Schultz v. Sentinel Insur. Co.*, for example, a court rejected objections based on the costs of compliance despite the small amount in controversy, citing other proportionality factors.<sup>58</sup> The Committee Note confirms that "many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved."

Moreover, the relative *wealth* of the parties is not significant. In *Salazar v. McDonald's*, the court held that the comparative financial resources available to handle discovery costs was irrelevant.<sup>59</sup> The Committee Note provides that "consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party."<sup>60</sup>

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<sup>52</sup> Johnston, *supra*.

<sup>53</sup> Cottonham v. Allen, 2016 WL 4035331, at n. 2 (M.D. La. July 25, 2016).

<sup>54</sup> 2016 WL 427369 (N.D. Cal. Feb. 4, 2016).

<sup>55</sup> 2016 WL 107461, at \*4 (N.D. Cal. Jan. 11, 2016).

<sup>56</sup> Turner v. Chrysler, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016).

<sup>57</sup> Pertile v. GM, 2016 WL 1059450, at \*4 (D. Colo. March 17, 2016).

<sup>58</sup> 2016 WL 3149686, at \*7 (D. S.D. June 3, 2016).

<sup>59</sup> 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).

<sup>60</sup> Committee Note.

As noted, the Committee added a new “factor” to rule 26(b)(1) after public comments thus requiring that courts consider “the parties’ relative access to relevant information.” The Committee Note explains that the “burden of responding to discovery lies heavier on the party who has more information, and properly so.” *Doe v. Trustees of Boston College* emphasized that a party with superior access needs to show “stronger burden and expense” to avoid production.<sup>61</sup>

### Burden of Proof

The Committee Note was revised to emphasize that the amended rule “does not change the existing responsibilities of the court and the parties to consider proportionality”<sup>62</sup> and does not “place on the party seeking discovery the burden of addressing all proportionality concerns.” Further, a party may not “refuse discovery simply by making a boilerplate objection that it is not proportional. The AAJ,<sup>63</sup> for example, had argued that the proposal would shift the burden to “*prove* that the requests are not unduly burdensome or expensive,” since a producing party could simply refuse reasonable discovery requests by objecting.<sup>64</sup>

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.” In *Carr v State Farm Mutual*, the court noted that the party seeking discovery “may well need” to “make its own showing of many or all of the proportionality factors.”<sup>65</sup>

### Third Parties

Proportionality considerations apply when discovery is sought from third parties. Courts are usually reluctant to allow parties to raise them if based on the burden suffered by non-parties absent a showing of special interest.<sup>66</sup> In *Noble Roman’s v. Hattenhauer*,<sup>67</sup> however, the court issued a protective order against a subpoena under Rule 26(c) to ensure that it was proportional to the needs of case.

### Technology Assisted Review (“TAR”)

The Committee Note describes use of “computer-based methods of searching” as a form of proportionality to help reduce the burden or expense of producing ESI. It suggests

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<sup>61</sup> *Doe v. Trustees of Boston College*, 2015 WL 9048225 (D. Mass., Dec. 16, 2015).

<sup>62</sup> The revised Note also states that if faced with a dispute “the parties’ responsibilities would remain as they have been since 1983.” *Id.*

<sup>63</sup> AAJ Comment, *supra*, December 19, 2013.

<sup>64</sup> *Id.*, at 11 (emphasis in original).

<sup>65</sup> 2015 WL 8010920, at \*9 (N.D. Tex. Dec. 7, 2015).

<sup>66</sup> *CDK v. Tulley Automotive*, 2016 WL 1718100, at \*9 (D. N.J. April 29, 2016)(citing *Green v. Cosby*, 2016 WL 1086716, at \*7 (E.D. Pa. Mar.21, 2016).

<sup>67</sup> 314 F.R.D. 304, (S.D. Ind. March 24, 2016)(an example of “discovery run amok”).

that courts and parties should consider use of “reliable means” of searching ESI by electronically enabled means.

In *Hyles v. New York City*, however, the court rejected an attempt by a requesting party to compel the use of TAR over objection. It held that courts are not empowered by the 2015 Amendments to force use of TAR.<sup>68</sup>

## Case Management

“Whether proportionality moves from rule text to reality depends in large part of judges.”<sup>69</sup> As noted in *Robertson v. People Magazine*, the rule “serves to exhort judges to exercise their preexisting control over discovery more exactly.”<sup>70</sup> The 2015 Amendments “include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case.”<sup>71</sup> Early “delivery” of potential requests for production prior to the Rule 26(f) conference, for example, as authorized by Rule 26(d), can facilitate more meaningful discussions about the requests, including the impact of proportionality considerations.

Phased discovery is a useful option. In *Siriano v. Goodman Manufacturing*,<sup>72</sup> a court scheduled a discovery conference to consider the benefits from the use of phased discovery, while encouraging “further cooperative dialogue in an effort to come to an agreement regarding proportional discovery.” In *Wide Voice v. Sprint*, the court “sequenced” discovery to help prioritize resolution of claims.<sup>73</sup>

The Duke Center for Judicial Studies led an effort to develop a list of *Guidelines and Principles* “aimed at provid[ing] greater guidance on what the amendments are intended to mean and how to apply them effectively.”<sup>74</sup> In conjunction with the ABA, the Duke Center sponsored an ongoing “Roadshow”<sup>75</sup> held in courthouses in various cities across the country.<sup>76</sup> Judges and practitioners have also contributed articles on the practical use of proportionality under the amended rule.<sup>77</sup>

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<sup>68</sup> 2016 WL 4077114 (S.D. N.Y. Aug. 1, 2016).

<sup>69</sup> Lee H. Rosenthal and Steven S. Gensler, *Achieving Proportionality in Practice*, 99 JUDICATURE, 43, 44 (2015) (noting that judges must make it clear to parties that they must work toward proportionality and be themselves willing and available to work with parties, including resolving discovery disputes quickly and efficiently).

<sup>70</sup> 2015 WL 9077111, at \*2 (S.D. N.Y. Dec. 16, 2015).

<sup>71</sup> Rosenthal and Gensler, *supra*, at 44 (2015).

<sup>72</sup> 2015 WL 8259548, at \*7 (S.D. Ohio Dec. 9, 2015)

<sup>73</sup> 2016 WL 155031 (D. Nev. Jan. 12, 2016)(“[a]t this stage in litigation, sequenced discovery will benefit both parties”).

<sup>74</sup> *Guidelines and Practices*, Duke Center for Judicial Studies (2015).

<sup>75</sup> See ABA Rules Amendments Roadshow, available at <http://www.frcpamendments2015.org/national-coordinators.html>.

<sup>76</sup> Andrew J. Kennedy, *supra*, ABA LITIGATION NEWS (Oct. 14, 2015)(describing the 13-city roadshow).

<sup>77</sup> Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality* (hereinafter “Shaffer, *Applying Proportionality*”), 16 SEDONA CONF. J. 55 (2015), at 21 (a “facially objectionable” standard applies when requests are “overly broad or seek information that does not appear relevant”); Hon. Eliz. D. Laporte and Jonathan Redgrave, *A Practical Guide to Achieving Proportionality Under the New Federal Rule of Civil*

## Search

Courts have applied proportionality considerations to assess the degree of search efforts required for compliance with production requests. In *Wilmington Trust v. AEP Generating*, a court refused to order an additional search because a moving party failed to provide “evidence or persuasive argument” why ordering such a search would “materially add to [an] existing collection of relevant documents.”<sup>78</sup>

## Presumptive Limits (Dropped)

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 and 33 while imposing a new limit on use of Rule 36 in order to “decrease the cost of civil litigation, making it more accessible for average citizens.”

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.

A proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.<sup>79</sup>

However, the proposals encountered “fierce resistance”<sup>80</sup> on grounds that the present limits worked well and that new ones might have the effect of unnecessarily limiting discovery. Concerns were also expressed that courts might view the presumptive numbers as hard ceilings. If so, any failure to agree on reasonable limits could result in an increase in motion practice.

After review, the Duke Subcommittee recommended and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools. The Chair of the Duke Subcommittee noted that “[s]uch widespread and forceful opposition deserves respect.”<sup>81</sup>

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*Procedure 26*, 9 FED. CTS. L. REV. 19 (2015); Ariana J. Tadler, Practical Law Resource ID w-001-0015 (Nov. 15, 2015)(WESTLAW Practical Law subsection of “Secondary Sources”).

<sup>78</sup> 2016 WL 860693, at \*2 (S.D. Ohio March 7, 2016)(noting a failure to identify gaps in production or difficulty in proving element of claims without additional documents).

<sup>79</sup> 2013 PROPOSAL, *supra*, at 267-268, 300-304, 305 & 310-311 [of 354].

<sup>80</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 515)(“[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect”).

<sup>81</sup> April 2014 Minutes, at lines 466-467.

The Committee expressed the hope that most parties “will continue to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially, and if need be, as the case unfolds.”<sup>82</sup> It expected 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.<sup>83</sup>

## Cost Allocation (Rule 26(c))

The Supreme Court in *Oppenheimer Fund v. Sanders* noted that “the presumption is that the responding party must bear the expense of complying with discovery requests.”<sup>84</sup> However, the costs of discovery – especially in an era of e-discovery<sup>85</sup> – arguably distort the outcome for parties unwilling or unable to deal with the costs. Some have advocated that the civil rules should require that the “requester pays” the reasonable costs of such efforts.<sup>86</sup>

While a draft embodying broad cost-shifting<sup>87</sup> was developed for discussion after the Duke Conference, the Subcommittee declined to recommend its adoption. Instead, Rule 26(c)(1)(B) was amended to provide that, for good cause, a court may order “the allocation of expenses” provided that it is necessary to deal with “undue burden or expense.”

The Committee Note explains that although the “[a]uthority to enter such orders [shifting costs] is included in the present rule,” the express reference to the authority “will forestall the temptation some parties may feel to contest this authority.

In response to concerns that the change would give “undue weight” to use of cost-shifting<sup>88</sup> the Committee Note was later amended to provide that the change in the Rule “does not mean that cost-shifting should become a common practice.” The Note affirms that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”

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<sup>82</sup> *Id.* (at lines 467-470).

<sup>83</sup> June 2014 RULES REPORT.

<sup>84</sup> 437 U.S. 340, 358 (1978).

<sup>85</sup> RAND Institute for Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 1, 16 (2012)(at least 73% of costs in surveyed instances), copy at [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

<sup>86</sup> LCJ Comment, *Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century*, May 2, 2010, at 55-60 (recommending changes to Rules 26, 45 and Rule 54(d)).

<sup>87</sup> 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]”).

<sup>88</sup> AAJ Comments, *supra*, December 19, 2013, at 17-18 (noting that “AAJ does not object to the Committee’s proposed change to Rule 26(c)(1)(B) per se” but suggesting amended Committee Note); *cf.* LCJ Comment, *supra*, August 30, 2013, at 19-20 (endorsing proposal as “a small step towards our larger vision of reform”).

It has been argued that the changes to Rule 26(b)(1) may reduce the need for more general cost-bearing rules<sup>89</sup> if proportional discovery becomes the norm.

Courts applying the amended Rule<sup>90</sup> have ordered cost-shifting<sup>91</sup> when it is unfair to allow party to reap the benefit of a party's efforts at evidence.<sup>92</sup> However, in *Lopez v. United States*, the court noted that merely because it can allocate costs to the requesting party does not mean that a court should compel production if it does not result in proportional discovery.<sup>93</sup>

## Discovery Requests (Rules 34)

In a long delayed change needed to reflect current practice, Rule 34(b)(2)(B) has been amended to permit a “responding party [to] state that it will produce copies of documents or of [ESI] instead of permitting inspection.” According to the Committee Note, this conforms to the “common practice” of producing copies of documents or ESI “rather than simply permitting inspection.” In addition, Rule 37(a)(3)(B)(iv) is changed to authorize motions to compel for *both* failures to permitting inspection and failures to produce.

Rule 34(b)(2)(B) 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.

### Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2) (“Early Rule 34 Requests”)) allows a party to deliver its document requests prior to the “meet and confer” required by Rule 26(f). 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 “relaxation of the discovery moratorium” before the Rule 26(f) conference is “designed to facilitate focused discussion” during the Conference since it “may [help] produce changes in the requests.” The sequence of

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<sup>89</sup> Discovery Subcommittee Report: *Requester Pays*, available at 2015 November Rules Committee Agenda, at 327-329 of 578.

<sup>90</sup> *Gaudet v. GE Industrial Services*, 2016 WL 2594812, \*5 (E.D. La. 2016)(“[a]lthough courts have long had the authority to allocate expenses, Rule 26(c) was amended in 2015 to expressly recognize this authority”).

<sup>91</sup> *Noble v. Wells Fargo Bank*, 2017 WL 931823 (E.D. Cal.2017)(costs of attorney travel to deposition of Rule 30(b)(6) witness for second deposition necessitated by inadequate compliance by non-moving party).

<sup>92</sup> *McClurg v. Mallinckrodt*, 2016 WL 7178745 (E.D. Miss. 2016)(amendment to R. 26(c)(1)(B) permits fair allocation of costs for good cause taking into account proportionality factors).

<sup>93</sup> *Lopez v. United States*, 2017 WL 1062581, at n. 6 (S.D. Cal. March 21, 2017)(“even if” an inspection were to be compelled “at Plaintiff’s expense” it would not adequately address “aspects of the [undue burden] the defendant would suffer).

discovery specified under Rule 26(d)(3) was changed so that it applies unless “the parties stipulate or” the court orders otherwise.”

This proposal was somewhat controversial. The Federal Magistrate Judges Association (“FMJA”) warned that the procedure could “devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage” and impede the progress of the case by leading to more disputes at the Rule 26(f) conference. The Department of Justice (“DOJ”) expressed similar concerns.<sup>94</sup>

## Specificity of Objections

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.<sup>95</sup>

This change has prompted a renewed attack on the routine use of “boilerplate” objections, whereby general objections are incorporated without specificity, a practice forcefully condemned by jurists in cases like *Fischer v. Forrest*<sup>96</sup> and *Liguria Foods v. Griffith Laboratories*.<sup>97</sup> In the latter case, the court held a show cause hearing on possible sanctions for counsel engaging in such practices, resulting in a call to change the legal culture of ‘boilerplate’ discovery objections.<sup>98</sup>

Another amendment to Rule 34(b)(2)(C) requires that objection lodged to a discovery request must state “whether any responsive materials are being withheld on the basis of that objection.”<sup>99</sup> According to the Committee Note, this is intended to end the confusion when a producing party states several objections but still produces some information, “leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.”

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. An objection that “states the limits that have controlled the search for

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<sup>94</sup> Amil N. Castle, *Avoid Being the Early Worm: Early Service of Rule 34 Document Requests Under the Proposed Amended Federal Rules of Civil Procedure*, 71 J. MO. B. 200, 2012 (2015)(summarizing comments).

<sup>95</sup> Committee Note.

<sup>96</sup> 2017 WL 773694 (S.D. N.Y. Feb. 28, 2017)(Peck, J.).

<sup>97</sup> 2017 WL 976626 (N.D. Iowa March 13, 2017)(Bennett, J.)

<sup>98</sup> The court observed that general objections “preserve nothing” and the better approach is to meet and confer about narrowing troublesome discovery requests. *Id.* at \*12.

<sup>99</sup> 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.”

responsive and relevant materials qualifies as a statement that the materials have been withheld.”<sup>100</sup>

According to the Chair of the Subcommittee, parties should discuss the response and, if they cannot resolve the issue, seek a court order.<sup>101</sup> In *Rowan v. Sunflower Electric Power*,<sup>102</sup> stating the limits that had controlled its search “[were] sufficient to put [the party] on notice that [the other party] has withheld documents in connection with its objections,” thus satisfying the requirements of the rule.

## Forms (Rule 84)

Prior to the 2015 Amendments, Rule 84 provided that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” Both Rule 84 and the Appendix of Forms have been abrogated, although certain of the forms formerly found in the Appendix have been integrated into Rule 4(d).<sup>103</sup>

The phrase “[Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015).]” now replaces the text and of former Rule 84 and replaces the separate list of “Appendix of Forms.”

According to the Committee Note, “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.” At the Supreme Court’s suggestion,<sup>104</sup> an initial reference in the Note to using the Administrative Office as an alternative source for forms was expanded to include the websites of many district courts and local law libraries at the suggestion of the Supreme Court.<sup>105</sup>

The Note also observes that the “abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”<sup>106</sup> During public comments, some contended that the abrogation would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards. The Committee rejected that view and stated that if it decided to take action in about pleading standards, it would do so by amendment to the rules.<sup>107</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> April 2014 Minutes, at 10 (lines 423-427).

<sup>102</sup> 2016 WL 3743102 (D. Kan. July 13, 2016).

<sup>103</sup> The text of amended Rule 4(d)(Waiving Service) and the forms transferred (“appended”) to it are located out of numerical order adjacent to the [abrogated] Appendix of Forms in the June 2014 RULES REPORT. See 305 F.R.D. 457, at 582. They are not reproduced in the Appendix to this Memorandum.

<sup>104</sup> Memorandum, April 2, 2015, Judicial Conference to Supreme Court, *copy available at* <http://www.uscourts.gov/file/document/congress-materials>.

<sup>105</sup> Memorandum, April 2, 2015, *supra*.

<sup>106</sup> *Id.*

<sup>107</sup> June 2014 RULES REPORT (Abrogation of Rule 84), 305 F.R.D. 457, 531 (2015)(noting that only a few comments argued that the forms assist pro se litigants and new lawyers and only one stated that the writer had ever used the form).

In *Richtek Technology v. uPi Semiconductor*, the court noted that Federal Circuit authority holding that the pleading standard for patent infringement in former Form 18 was sufficient (as opposed to the standard in *Twombly* and *Iqbal*) no longer applies.<sup>108</sup>

## Background

A Subcommittee of the Rules Committee canvassed judges, law firms, and others and found that virtually none of them used the forms. In particular, it was concluded that “the increased complexity of most modern cases [has] resulted in a detailed level of pleading that is far beyond that illustrated in the forms.” Ultimately, the Subcommittee recommended and the full Committee concluded that it was time “to get out of the forms business.” It noted that “many of the forms are out of date,” are little used and amending the forms is “cumbersome” since it requires the same process as amending the rules themselves.<sup>109</sup>

The Committee rejected concerns that abrogation was inappropriate because the forms had become such an “integral” part of the rules they illustrated that abrogating the form also abrogated the Rule. It decided that the publication process and the opportunity to comment on the proposal “fully satisfies the Rules Enabling Act requirements.”<sup>110</sup>

The Chief Justice, in his 2015 year-end Report, 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.”<sup>111</sup> The revised forms are available on the federal judiciary website.<sup>112</sup>

## Failure to Preserve ESI (Rule 37(e))

Spoliation involves the destruction or significant alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation in violation of a duty to preserve.<sup>113</sup> The duty is owed to the courts, not the parties, and does not support a cause of action for damages.

Prior to 2006, the civil rules were silent on the treatment of spoliation, leaving courts to rely on their inherent authority to deal with pre-litigation or pre-court order spoliation.<sup>114</sup> Rule 37(f), as adopted in 2006 and subsequently renumbered as Rule 37(e),

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<sup>108</sup> 2016 WL 1718135, at \*2 (N.D. Cal. April 29, 2016).

<sup>109</sup> June 2014 RULES REPORT (Abrogation of Rule 84), 305 F.R.D. 457, 530-531 (2015).

<sup>110</sup> September 2014 Report, Standing Committee to the Chief Justice and the Judicial Conference, 305 F.R.D. 457, 491 at 506.

<sup>111</sup> Chief Justice Roberts, 2015 Year End Report, 8-9 (December 31, 2015), available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>

<sup>112</sup> Pro Se Forms, available at <http://www.uscourts.gov/forms/pro-se-forms>.

<sup>113</sup> *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2<sup>nd</sup> Cir. 1999).

<sup>114</sup> Iain D. Johnston, *Federal Courts’ Authority to Impose Sanctions for PreLitigation or Pre-Order Spoliation of Evidence*, 156 F.R.D. 313, 322 (1994)(describing inadequacies in reliance on then-existing

merely limited use of rule-based sanctions for a narrow class of failures to preserve ESI and was widely regarded as ineffectual.

The E-Discovery Panel at the 2010 Duke Litigation Conference recommended taking a new approach to deal with systemic spoliation issues. The Committee responded, after an inadequate initial attempt,<sup>115</sup> with a creative revision of Rule 37(e) which *affirmatively* provides authority to impose measures for failures to preserve covered by the Rule and meets Rules Enabling Act concerns.<sup>116</sup>

In its final form, Amended Rule 37(e) provides:

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

Rule 37(e) excluded spoliation of “documents” and “tangible” things from its coverage because of concerns that the loss of unique tangible objects were too difficult to capture in a rule.

This limitation has created confusion at the margins. Many courts do not apply the Rule to disputes involving the loss of digital information in the form of video or audio recordings, including surveillance tapes in retail stores or prisons.<sup>117</sup> Moreover, in instances where documents and ESI are lost in the same case, courts and parties must apply “two standards for spoliation” – often with different outcomes.<sup>118</sup>

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Rule 37 and concluding that “inherent authority will generally provide a more efficient process to allow a court to impose the appropriate remedy).

<sup>115</sup> Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 THE SEDONA CONF. J. 1, 28-32 at n. 1 (2015)(according to the Subcommittee Chair, the initial 2013 proposal was ‘not the best that we can do’’).

<sup>116</sup> A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2032 & n. 137 (2011)(synthesizing Supreme Court requirements under Rules Enabling Act).

<sup>117</sup> *Orologio of Short Hills v. The Swatch Group*, 653 Fed. Appx. 134 (3<sup>rd</sup> Cir. June 24, 2016)(videotape); *Buren v. Crawford County*, 2017 WL 168156 (E.D. Mich. Jan. 17, 2017); *but compare Hsueh v. N.Y.*, 2017 WL 1194706, at \*4 (S.D.N.Y. March 31, 2017)(“no reason” why digital recording “would not be ESI”).

<sup>118</sup> The court in *Best Payphones v. City of New York*, 2016 WL 792396, at \*4 (E. D.N.Y. Feb. 26, 2016) engaged in laborious analyses yielding conflicting results as to each form of evidence.

## Foreclosure of Inherent Powers/Other Rules

The Committee Note states that the Rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used.”<sup>119</sup> In *CAT3 v. Black Lineage*, the court suggested that the Committee Note refers to situations such as where a court might be asked to “dismiss a case for a sanction for merely negligent destruction of evidence.”<sup>120</sup> However, the Supreme Court has also made it clear that the civil rules do not displace use of inherent authority when a rule is not “up to the task” because of bad-faith conduct in the course of litigation.<sup>121</sup>

The Rule does not displace the use of remedies available under other subsections of Rule 37, such as Rule 37(b).

## Threshold Requirements

Rule 37(e) takes the onset and nature of the duty to preserve as established by the common law as its starting point; it does not create a new duty. However, before a court is empowered to impose any of the measures under the Rule, it must first determine that

- Relevant ESI which “should have been preserved” has been “lost;”
- *after* a duty to preserve attached;
- because a party failed to take “reasonable steps” to preserve; and
- it cannot be “replaced or restored” through additional discovery.

In *Konica Minolta Business Solutions v. Lowery Corp*, the court described these as “predicate elements” that must be met “before turning to the [measures available under] sub-elements of (e)(1) and (e)(2).”<sup>122</sup> Sanctions are not automatic.<sup>123</sup>

## ESI which “Should Have Been Preserved”

The lost ESI which should have been preserved must have been relevant to a claim or defense for Rule 37(e) to apply. Relevance for the purposes of the Rule means only “relevance for purposes of discovery, which is broadly defined.”<sup>124</sup> It includes what a party knows, or reasonably should know, is or may be relevant to potential claims or defenses or is the subject of a pending discovery request.

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<sup>119</sup> Committee Note.

<sup>120</sup> 164 F. Supp. 3d 488, 497-98 & 501 (S.D.N.Y. Jan. 12, 2016); *accord* Agility Public Whsg. v. DOD, 2017 WL 1214424 (D.D.C. March 30, 2017)(the rule forecloses reliance on inherent authority “at least in factual situations to which the rule applies”).

<sup>121</sup> *Chambers v. NASCO*, 501 U.S. 32, 50 (1991). *See also* *Cohn v. Guaranteed Rate*, 2016 WL 71573358, at \*2 (N.D. Ill. Dec. 8, 2016)(inherent power exists “over and above” Rule 37(e)).

<sup>122</sup> 2016 WL 4537847 (E.D. Mich. Aug. 31, 2016).

<sup>123</sup> *Id.*, at 6.

<sup>124</sup> *Cf. Orbit One Communications v. Numerex*, 271 F.R.D. 429, 436, 438 (S.D. N.Y. 2010)(distinguishing the definition from the unique requirement under Residential Funding logic that the destroyed evidence must be shown to have been favorable to the movant to justify sanctions [306 F.3d 99, 108-109]).

As noted in *FTC v. DirectTV Inc.*,<sup>125</sup> it is not enough that “potentially relevant” ESI may have existed to support the rule’s application. In contrast, in a decision which ignored Rule 37(e) without explanation, the court found that a “very slight showing” of relevance sufficed.<sup>126</sup>

While the rule does not alter the normal burden of the moving party to establish relevance, courts have shifted the burden of proof on the issue when appropriate. In *GN Netcom v. Plantronics*,<sup>127</sup> the court placed the burden on the corporate employer to show the lost ESI was not relevant because an executive deleted a massive amount of email with an intent to deprive.

### “In the Anticipation or Conduct of Litigation”

The onset (“trigger”) of the duty to preserve is determined in the pre-litigation context by whether “litigation is reasonably foreseeable.” The Committee Note observes that “a variety of events may alert a party to the prospect of litigation,” but cautions that they may provide only “limited information.” In the absence of such notice, the duty must be “predicated on something more than an equivocal statement of discontent.”<sup>128</sup>

A duty to preserve may also arise from statutory requirements, administrative regulations or a party’s own information-retention protocols.<sup>129</sup> However, the mere fact of “an independent obligation to preserve” does not mean that the party also had such a duty with respect to the litigation.<sup>130</sup>

### “Reasonable Steps”

Rule 37(e) applies only when a party makes a showing that the “loss” of ESI occurred because of a failure to take “reasonable steps.” As the Committee Note puts it, “reasonable steps to preserve suffice; it does not call for perfection.” When reasonable steps are taken, they can provide a “real” safe harbor.<sup>131</sup>

In *Marten v. Platform Advertising*, the court refused to use a “‘perfection’ standard or apply “hindsight” in assessing the conduct.<sup>132</sup> In contrast, in *Living Color v. New Era Acquastucture*, the failure to disable an auto-delete function prevented the court from finding that the party had acted reasonably.<sup>133</sup> A “good faith” adherence to pre-existing

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<sup>125</sup> 2016 WL 7386133, \*5 (N.D. Cal. Dec. 21, 2016),

<sup>126</sup> *Nunnally v. District of Columbia*, 2017 WL 1080900 (D.D.C. March 22, 2017).

<sup>127</sup> 2016 WL 3792833 (D. Del. July 12, 2016),

<sup>128</sup> *Cache La Poudre Feeds v. Land O’Lakes*, 244 F.R.D. 614, 623 (D. Colo. March 2, 2007).

<sup>129</sup> *See also Harmon v. United States*, 2017 WL 1115158, at \*7 (D. Idaho March 24, 2017)(finding breach of Federal Records Act sufficient to support use of inherent authority).

<sup>130</sup> *Cf. Rockman Company (USA) v. Nong Shim Company*, 2017 WL 275405, at \*11 (N.D. Cal. Jan. 19, 2017)

<sup>131</sup> James S. Kurz & Daniel D. Mauler, *A Real Safe Harbor: The Long-Awaited Proposed FRCP Rule 37(e), It’s Workings, and Its Guidance for ESI Preservation*, 62-AUG FED. LAW. 62 (2015).

<sup>132</sup> 2016 WL 492743, at \*10 (D. Kan. Feb. 8, 2016).

<sup>133</sup> *Living Color v. New Era Aquaculture*, 2016 WL 1105297 (S.D. Fla. March 22, 2016).

policies and practices<sup>134</sup> weighs in favor of finding “reasonable steps.”<sup>135</sup> This is similar to the role of business judgment in retrospective assessments of compliance<sup>136</sup> and in regard to efforts to prevent or detecting corporate misconduct.<sup>137</sup>

In *Zubulake v. UBS Warburg*, (“Zubulake IV”), the court famously held that once a party anticipates litigation, it “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”<sup>138</sup> However, courts have rejected the argument that a failure to use a written litigation hold constitutes gross negligence *per se*. Rather, “the better approach is to consider [the failure to adopt good preservation practices] as one factor” to consider in assessing conduct.<sup>139</sup>

The Committee Note emphasizes that “proportionality” is a factor in any analysis of preservation conduct under the Rule. The effort should be proportional to the burdens and costs involved. Decisions prior to the Rule indicate, for example, that it may be reasonable under some circumstances for a party to delay in imposing litigation holds<sup>140</sup> or to fail to retain ephemeral ESI unlikely to be sought in discovery<sup>141</sup> or to fail to interrupt auto-deletion functions when alternative methods are available.<sup>142</sup>

In *Shaffer v. Gaither*,<sup>143</sup> however, a party failed to take reasonable steps under Rule 37(e) because it did not print out or make an electronic copy of text messages of considerable importance to the case.

### “Restore or Replace”

Before any measures are available under the Rule, the court must first find that the missing ESI “cannot be restored or replaced through additional discovery.” Only if the ESI is actually “lost” is the rule applicable.<sup>144</sup> The Note explains that “[b]ecause

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<sup>134</sup> Committee Note.

<sup>135</sup> See, e.g., The Sedona Conference® *Commentary on Legal Holds: The Trigger and the Process*, 11 SEDONA CONF. J. 265, 270 (2010)( recommendations for effective legal hold policies in Guidelines 8-11).

<sup>136</sup> John J. Jablonski and Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure*, 82 DEF. COUNS. J. 411, 427 (2015)(should be assessed by the business judgment rule).

<sup>137</sup> USCG Guidelines Manual, §8B2.1, Para. (b)(a failure to prevent a violation does not necessarily mean that the program is not effective).

<sup>138</sup> 220 F.R.D. 212 (S.D. N.Y. Oct. 22, 2003).

<sup>139</sup> *Chin v. Port Authority*, 685 F.3d 135, 162 (2<sup>nd</sup> Cir. 2012)(“Contra Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am Secs., LLC, 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010)”).

<sup>140</sup> *Siggers v. Campbell*, 2014 WL 4978655, at \*3 (E.D. Mich. Oct. 6, 2014).

<sup>141</sup> *Paice LLC v. Hyundai Motor Company*, 2015 WL 4984198 (D. Md. Aug. 18, 2005).

<sup>142</sup> *Mead v. Travelers*, 2014 WL 6832914, at \*2 (E.D. Pa. Dec. 4, 2014)(failure to interrupt auto-destruction of notice of intent to cancel).

<sup>143</sup> 2016 WL 6594126 (W.D.N.C. Sept. 1, 2016),

<sup>144</sup> *Agility Public Whsg. Co. v. DOD*, 2017 WL 1214424, at \*2 (D.D.C. March 30, 2017)(Rule applies “where the information cannot be substituted from another source”). See also *Montoya v. Newman*, 2015 WL 4095512, at \*7 (D. Colo. 2015)(Mix, M.J.)(collecting cases exercising inherent power where parties were unable to produce a substantial replacement for missing evidence).

electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.”

In *Fiteq v. Venture Corporation*, the moving party failed to present “persuasive evidence” that the ESI could not be restored or replaced.<sup>145</sup> In *CAT3 v. Black Linage*, email was not deemed to be “restored” or “replaced” where questions about the authenticity of both the original and subsequently produced email remained at issue.<sup>146</sup>

## Prejudice

Prejudice to the moving party’s ability to present or defend a claim or defense is an essential prerequisite to a court’s authority to act under Rule 37(e). Subdivision (e)(1) explicitly states that its measures are available only “upon finding prejudice,” and its presence is presumed under subdivision (e)(2) once the requisite “intent to deprive” showing is made.<sup>147</sup>

It is left to a court’s inherent authority to deal, if at all, with abusive practices of counsel or parties that violate the threshold conditions but do not result in prejudice.<sup>148</sup>

Prejudice results from conduct which has “impair[ed] the ability to go to trial” or “threaten[s] to interfere with the rightful decision of the case.”<sup>149</sup> The burden of proof on the topic may vary based on the circumstances. According to the Committee Note, it may be reasonable to require the party seeking curative measures to prove prejudice when the content is fairly evident, or may appear to be unimportant or the abundance of preserved information may appear sufficient to meet the needs of all parties. Or not.

In *Core Laboratories v. Spectrum Tracer Services*,<sup>150</sup> the court found “prejudice” because it inferred that a party had been deprived of valuable information. In contrast, in *Marshall v. Dentfirst*, the loss of the internet browsing history of a terminated employee was not prejudicial because it was not relied upon in making termination decisions.<sup>151</sup>

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<sup>145</sup> *Fiteq v. Venture Corporation*, 2016 WL 1701794, at \*3 (N.D. Cal. April 28, 2016).

<sup>146</sup> *CAT3, Inc. v Black Linage et al*, 2016 WL 154116, at \*7(S.D. N.Y. Jan. 12, 2016).

<sup>147</sup> The Standing Committee approved the draft Committee Note adopted by the Rules Committee only after it deleted the statement that “~~there may be rare cases where a court concludes that a party’s conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice~~” at the suggestion of a member of the Standing Committee. Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2. *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”).

<sup>148</sup> *Cf. Greg Joseph, Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 41 (2015)(there is no requirement that the adverse party actually be prejudiced by prejudiced to receive potentially outcome-determinative sanctions in (e)(2) – which is “a change in the law”).

<sup>149</sup> *Burton v. Walgreen*, 2015 WL 4228854, at \*3 (D. Nev. July 10, 2015)(failure to preserve did not “prejudice plaintiff’s ability to prove causation”).

<sup>150</sup> 2016 WL 879324 (W.D. Okla. March 7, 2016).

<sup>151</sup> 313 F.R.D. 691 (N.D. Ga. March 24, 2016).

In *TLS Mgt/t and Mktg Services v. Rodriguez-Toledo*, it was sufficient that the party made a “plausible” suggestion that relevant information “might have existed” to demonstrate prejudice.<sup>152</sup>

## Selection of Measures

Rule 37(e) leaves it to the discretion of the Court to select measures once the threshold requirements of the Rule are satisfied and prejudice is found to exist or is implied by the presence of an “intent to deprive.” However, severe measures are only available upon a showing of intent to deprive a party of the use of the ESI.<sup>153</sup>

## Subdivision (e)(1): Addressing Prejudice

Subdivision (e)(1) authorizes courts to order curative measures which are “no greater than necessary to cure the prejudice.” The focus is on “solving the problem, not punishing the malefactor.”<sup>154</sup>

## Monetary Sanctions/Fines

While no reported decisions have yet imposed token fines or monetary sanctions, they would be appropriate under the Rule if designed to address prejudice.<sup>155</sup> In *GN Netcom v. Plantronics*,<sup>156</sup> a court levied a “punitive” monetary sanction” of \$3M in response to the bad-faith conduct of a senior executive and an unwillingness of the party to initially acknowledge wrongdoing. While a stretch, it is plausible that the court was addressing economic prejudice; more likely, however, it is an example of a court exercising inherent authority to address egregious litigation abuse whether or not the rule applied.

## Attorney’s fees and costs

Monetary sanctions in the form of a recovery of reasonable costs (including attorney’s fees) are routinely awarded. While regarded as a “commonplace” remedy by the Discovery Subcommittee, it was noted that this approach “doesn’t really cure the loss” of the ESI.<sup>157</sup> In *CAT3 v. Black Lineage*, the court acted under subdivision (e)(1) to

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<sup>152</sup> 2017 WL 115743, (D. Puerto Rico March 27, 2017).

<sup>153</sup> Thomas Allman, *Standing Committee Ok's Federal Discovery Amendments*, Law Technology News (Online), June 2, 2104 (available on LEXIS NEXIS), at 4 (the insertion of “only” at the outset of (e)(2) was done to make the point that the harsh measures cabined by that rule are *not* a subset of the broad remedies of subsection (e)(1)).

<sup>154</sup> ABA Litigation News, Summer 2014, 18, *Less is More: Proposed Rule 37(e) Strikes the Right Balance*.

<sup>155</sup> See, e.g., *Cache La Poudre v. Land O’Lakes*, 244 F.R.D 614, 625-636 (D. Colo. 2007)(imposing \$5000 fine). More recently, in *Transystems Corp. v. Hughes Assocs.*, 2016 WL 3551474 (M.D. Pa. June 30, 2016), a “nominal” monetary sanction (\$1000) was imposed for the negligent failure to preserve ESI in a decision not citing Rule 37(e).

<sup>156</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>157</sup> Minutes, March 4, 2014, at Agenda Book, Rules Comm. April 10-11, 2014, 440 of 580.

ameliorate the “burden and expense of ferreting out the malfeasance and seeking relief from the court.”<sup>158</sup>

Other courts assert their inherent powers.<sup>159</sup> In *Chambers v. NASCO*, the Supreme Court affirmed an award of monetary sanctions in the form of attorney’s fees for bad faith conduct<sup>160</sup> despite the availability of rules on the topic.<sup>161</sup> Yet other courts rely on Rule 37(a),<sup>162</sup> especially when additional ESI is produced after the filing of the motion for sanctions.<sup>163</sup> One court has recently expressed a willingness to allocate a share of the attorney’s fees and costs imposed on parties to their counsel, even though the Rule is directed at parties alone.<sup>164</sup>

## Forensic Examination

In *TLS Mgt. and Mktg. Services v. Rodriguez-Toledo*,<sup>165</sup> a court ordered, at the non-moving party’s expense, “a forensic examination” of an external hard drive because it “may ameliorate the prejudice caused by the spoliation of ESI.”

## Preclusion of Evidence or Arguments

According to the Committee Note, preclusion of evidence is available to prevent unfair negative inferences from missing ESI. In *Ericksen v. Kaplan*,<sup>166</sup> the use of an email at trial was precluded because of the failure to preserve ESI which might have rebutted its authenticity. Similarly, in *Wali Muhammad v. Mathena*, jurors were instructed they should not assume that the lack of corroborating objective evidence undermined certain testimony.<sup>167</sup>

## Admitting Spoliation Evidence/Instructions

Courts may allow evidence and argument about failures to preserve, and may also instruct the jury that they may consider that evidence along with all the other evidence in

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<sup>158</sup> 164 F. Supp. 3d 188 (S.D.N.Y. Jan. 12, 2016).

<sup>159</sup> *Friedman v. Phila. Parking Auth.*, 2016 WL 6247470 (E.D. Pa. March 10, 2016).

<sup>160</sup> 501 U.S. 32, 40 (1991) (awarding “attorney’s fees and expenses”).

<sup>161</sup> *Id.*, at 49.

<sup>162</sup> *Ericksen v. Kaplan*, 2016 WL 695789 (D. Md. Feb. 22, 2016) and *Marshall v. Dentfirst*, 2016 WL 1222270 (N.D. Ga. March 24, 2016).

<sup>163</sup> *Best Payphones v. City of New York*, 2016 WL 792396, at \*8 (E.D. N.Y. Feb. 26, 2016); *contra Wal-Mart Stores v. Cuker Interactive*, 2017 WL 239341 (W.D. Ark. Jan. 19, 2017).

<sup>164</sup> *Alabama Aircraft Industries v. Boeing*, 2017 WL 930597 (N.D. Ala. March 9, 2017). Most courts “apply a mild de facto presumption against sanctioning counsel” in that context. Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection With The Resolution of E-discovery Misconduct*, 15 RICH. J. L. & TECH. 9, 21 (2009).

<sup>165</sup> 2017 WL 115743 (D. P.R. March 27, 2017).

<sup>166</sup> 2016 WL 695789, at \*2 (D. Md. Feb. 22, 2016).

<sup>167</sup> 2017 WL 3955225 (W.D. Va. Jan. 27, 2017),

the case if no greater than necessary to cure the prejudice.<sup>168</sup> This is “is not a punishment. It is simply an explanation to the jury of its fact-finding powers.”<sup>169</sup>

In *Security Alarm Financing v. Alarm Protection*, the court could not conclude that a party had acted with intent to deprive, but decided to admit spoliation evidence so that the jury “could assess it.”<sup>170</sup> In *Nuvasive v. Madsen Medical*, the court allowed both parties to present evidence regarding the loss, while instructing the jury it could consider the evidence along with other evidence in the case.<sup>171</sup>

The practice is not without practical risks. A jury hearing evidence of spoliation may come to see the non-moving party in a light which unduly prejudices its ability to fairly resolve the issues on the merits, making the admission of evidence counterproductive.<sup>172</sup> FRE 403 gives court discretion, however, to limit evidence to prevent “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

In *Delta/AirTran Baggage Fee Antitrust Litigation*, for example, the court barred introduction of such evidence because it would “transform what should be a trial about [an] alleged anti-trust conspiracy into one on discovery practices and abuses.”<sup>173</sup>

### Subdivision (e)(2): Cabining Harsh Measures

In order to help address “over-preservation,”<sup>174</sup> and to resolve the conflict among the Circuits as to the degree of culpability required for harsh measures, Subsection (e)(2) bars the following in the absence of a showing of “intent to deprive.”<sup>175</sup>

- presumptions that lost ESI was unfavorable when ruling on pretrial motions or presiding at a bench trial,
- instructions to a jury that they may or must conclude that lost ESI was unfavorable to the party, and
- dismissal of the action or entry of a default judgment.

The rule also bars use of functionally equivalent measures without the finding of specific intentionality as spelled out in the rule.

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<sup>168</sup> Committee Note.

<sup>169</sup> *Mali v. Federal Insurance*, 720 F.3d 387, 393 (2<sup>nd</sup> Cir. June 13, 2013).

<sup>170</sup> 2016 WL 7115911, at \*7 (D.Alaska Dec. 6, 2016).

<sup>171</sup> 2016 WL 305096 (S.D. Cal. Jan. 26, 2016).

<sup>172</sup> *Gorelick et al, Destruction of Evidence § 2.4 (2014)*(“DSTEVID s. 2.4”)(once a jury is informed evidence has been destroyed the “jury’s perception of the spoliator may be unalterably changed” regardless of the intent of the court).

<sup>173</sup> 2015 WL 4635729, at \*14 (N.D. Ga. Aug. 3, 2015).

<sup>174</sup> Committee Note (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”). *See also Hsueh v. New York*, 2017 WL 1194706, at \*4 (S.D.N.Y. March 31, 2017).

<sup>175</sup> The Rule 37(e) requirement, in full, is that the measures are available only “upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”

## Adverse Inference Jury Instructions

The Rule specifically rejects the holding in *Residential Funding*, 306 F.3d 99 (2<sup>nd</sup> Cir. 2002) that the culpability requirement for an adverse inference may be satisfied by a finding of negligence because a party should “bear the risk of its own negligence.”<sup>176</sup> As explained by the Committee Note, “the better rule for the negligent or grossly negligent loss of [ESI] is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.”

In *Mazzei v. The Money Store*, a Circuit Court panel confirmed that amended Rule 37(e) superseded existing Circuit precedent.<sup>177</sup>

Of the thirty post-enactment decisions in which adverse inferences were at issue, the court in twenty-two instances denied the request because the party was not found to have acted with an “intent to deprive.” Moreover, twelve of the fifteen decisions where the court ignored the Rule would have been decided differently if Rule 37(e) had been applied.<sup>178</sup> As one court in the Second Circuit has noted, litigants seeking adverse inferences “face a tougher climb than in years past.”<sup>179</sup>

## Dismissals or Default Judgments

Subdivision (e)(2) of Rule 37(e) also requires a predicate showing of an “intent to deprive before the imposition of a dismissal or default judgment (including summary judgments).

In *Roadrunner Transportation v. Tarwater*, however, the Ninth Circuit affirmed a dismissal based on findings of the lower court which would have justified a finding of intent to deprive under Rule 37(e) had it been applied.<sup>180</sup> In *Global Material Tech. v. Dazheng Metal Fibre*, a default judgment was imposed because the non-moving party had been affirmatively deceitful to the opposing party and an adverse inference would not be sufficient to punish the party for their dishonesty.<sup>181</sup>

Dismissal or defaults have been sparingly granted under the Rule given the preference for trial on the merits. In *BMG Rights Management v. Cox Communications*, a court cited Fourth Circuit case law suggesting that dismissal is “reserved for only the most

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<sup>176</sup> 306 F.3d 99, 108 (2<sup>nd</sup> Cir. 2002). Under Residential Fund logic, an adverse inference “did not require the finder of fact to impute any particular state of mind to the spoliator” since it merely “fill[ed] the evidentiary gap created by the party that destroyed evidence.” *Orbit One Communications v. Numerex Corp.*, 271 F.R.D. 429 at n. 12 (S.D.N.Y. 2010).

<sup>177</sup> 656 Fed. Appx. 558 (2<sup>nd</sup> Cir. July 15, 2016).

<sup>178</sup> Thomas Y. Allman, *Amended Rule 37(e): Appendices*, April 8, 2017 (updated copy available from Author).

<sup>179</sup> *Jaffer v. Hirji*, 2017 WL 1169665, at \*6 (S.D. N.Y. March 28, 2017).

<sup>180</sup> 642 F. Appx. 759 (9<sup>th</sup> Cir. March 18, 2016).

<sup>181</sup> 2016 WL 4765689, at \*9 (N.D. Ill. Sept. 13, 2016).

egregious circumstances.”<sup>182</sup> In *Blasi v. United Debt Services*, a court ordered additional discovery to see if some or all of the prejudice could be cured by lesser sanctions.<sup>183</sup> Use of Circuit authority in such a manner is appropriate since it is consistent with the rule and is not contrary to an express grant of or limitation on the district court’s authority under Rule 37(e).

## Intent to Deprive

The “intent to deprive” requirement overrules or modifies contrary precedent in the Fourth,<sup>184</sup> Sixth,<sup>185</sup> Ninth<sup>186</sup> and D.C. Circuits.<sup>187</sup> As the Sixth Circuit put it in *Applebaum v. Target*, “a showing of negligence or even gross negligence will not do the trick” in supporting use of measures under Rule 37(e)(2).<sup>188</sup> It is similar to the definition of “bad faith” in use in some Circuits.<sup>189</sup> The Seventh Circuit, for example, has held that proof of bad faith requires destruction “for the purpose of hiding adverse information.”<sup>190</sup>

The Committee Note explains that it is not logical to draw an inference about a party’s consciousness of the weakness of its case - the basis for the adverse evidentiary inference - merely from negligent loss or destruction.<sup>191</sup> Indeed, do so could “tip the balance at trial in ways the lost information never would have.” Nor is it logical to make that assumption based on the fact that a party acted willfully<sup>192</sup> or recklessly.<sup>193</sup> Neither finding necessarily includes an intent to deprive another party of the evidence.

Courts necessary must utilize circumstantial evidence in assessing the intent. In *Brown Jordan v. Camicle*,<sup>194</sup> a court found the requisite “intent to deprive” to justify harsh

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<sup>182</sup> 199 F.Supp.3d 958 (E.D. Va. Aug. 8, 2016).

<sup>183</sup> 2017 WL 680496 (S.D. Ohio Feb. 21, 2017).

<sup>184</sup> *Buckley v. Mukasey*, 538 F.3d 306 (4<sup>th</sup> Cir. 2008)(destruction, though not conducted in bad faith, could yet be “intentional,” “willful,” or “deliberate”).

<sup>185</sup> *Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 554 (6<sup>th</sup> Cir. 2010)(“the evidence was destroyed ‘knowingly even if without intent to [breach a duty to preserve it], or negligently’”).

<sup>186</sup> *Glover v. BIC*, 6 F.3d 1318, 1329 (9<sup>th</sup> Cir. 1993)( bad faith is not the only basis).

<sup>187</sup> *Grosdidier v. Broadcasting Board*, 709 F.3d 19, 28 (D.C. Cir. 2013)(inference appropriate notwithstanding that the destruction was negligent).

<sup>188</sup> 831 F.3d 740 (6<sup>th</sup> Cir. Aug. 2, 2016).

<sup>189</sup> *Guzman v. Jones*, 804 F.3d 707 (5<sup>th</sup> Cir. 2015)(“[b]ad faith, in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence”); *Micron v. Rambus*, 645 F.3d 1311, 1327 (Fed. Cir. 2011)(the party must have “‘intended to impair the ability of the [moving party] to defend itself’”[citing *Schmid v. Milwaukee Elec. Tool*, 13 F.3d 76, 80 (3<sup>rd</sup> Cir. 1994)].

<sup>190</sup> *Bracey v. Grondin*, 712 F.3d 1012, 1020 (7<sup>th</sup> Cir. 2013)(in addition to “intentionality” a finding of “bad faith” requires a showing of “destruction for the purpose of hiding adverse information”).

<sup>191</sup> *See, e.g., Aramburu v. Boeing*, 112 F.3d 1398, 1407 (10<sup>th</sup> Cir. 1997)(“[m]ere negligence . . . is not enough because it does not support an inference of consciousness of a weak case”); *accord McCormick*, Evidence § 273 at 660-61 (1972).

<sup>192</sup> *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 530 (D. Md. 2010)(to find “willfulness,” it is sufficient that the actor merely intended to destroy the evidence”).

<sup>193</sup> 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).

<sup>194</sup> 2016 WL 815827 (S.D. Fla. March 2, 2016).

measures when a party with substantial IT experience deleted information.<sup>195</sup> In *DVComm v. Hotwire*, the court found that the “double deletion” of crucial information was done with an intent to deprive.<sup>196</sup> In *O’Berry v. Turner*, the loss of the only copy of subsequently deleted ESI could “only” have resulted if defendants had “acted with the intent to deprive.”<sup>197</sup>

In *Barnett v. Deere & Co.*, however, the court refused to find that destruction pursuant to a routine document retention policy occurred with an intent to deprive.<sup>198</sup> In *Living Color Enterprises v. New Era Aquaculture*,<sup>199</sup> the court declined to find an “intent to deprive” merely because a party failed to negate the auto-delete feature of his cell.<sup>200</sup> In *Nuvasive v. Madsen Medical*, deletion of text messages was not indicative of an intent to deprive.<sup>201</sup> A similar conclusion was reached in *SEC v. CKB168 Holdings*.<sup>202</sup>

In *Orchestrator v. Trombetta*, the court refused to find an intent to deprive based on “equivocal evidence” about a party’s state of mind at the time emails were deleted.<sup>203</sup> In *Accurso v. Infra-Red Services*, the court refused to find “intent to deprive” but left the issue open for renewal at the trial.<sup>204</sup>

## Role of the Jury

In most cases, the court determines whether or not a showing of “intent to deprive” has been made. The Committee Note suggests that a jury may be asked to do so, without specifying when or why that should occur. It has been pointed out, however, that the court must first determine as a preliminary matter that a reasonable jury could conclude that the non-preserving party acted in that manner.<sup>205</sup>

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<sup>195</sup> *Id.* at \*36 (“Carmicle was familiar with the preservation of metadata and forensic copies of electronic data in light of his educational and professional background and [the] fact that he has at all relevant times been represented by counsel”).

<sup>196</sup> *DVComm v. Hotwire*, 2016 U.S. Dist. LEXIS 133661, at ¶¶37, 38, 52-62 (Feb. 3, 2016).

<sup>197</sup> *O’Berry v. Turner*, 2016 WL 1700403, \*4 (M.D. Ga. April 27, 2016)(“the loss of the at-issue ESI was beyond the result of mere negligence” and such “irresponsible and shiftless behavior can only lead to one [adverse] conclusion”).

<sup>198</sup> 2016 WL 4544052, at \*4 and n. 1) (S.D. Miss. Aug. 31, 2016).

<sup>199</sup> 2016 WL 1105297 (S.D. Fla. March 22, 2016).

<sup>200</sup> *Id.* at \*6.

<sup>201</sup> 2015 WL 4479147, at \*2 (S.D. Cal. July 22, 2015).

<sup>202</sup> 2016 U.S. Dist. LEXIS 16533, at \*14 (E.D. N.Y. Feb. 2, 2016)(“the existing record is not sufficiently clear” but permitting SEC to renew its motion at trial based on evidence there adduced).

<sup>203</sup> 2016 WL 1555784, at \*12 (N.D. Tex. April 18, 2016).

<sup>204</sup> 2016 WL 930686, at \*4 (E.D. Pa. March 11, 2016).

<sup>205</sup> See Greg Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 40 (2015).

## APPENDIX

### Final Rules Text

#### 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

(1) Requesting a Waiver. [A plaintiff may notify a defendant and request waiver in a manner which must]

\* \* \* \*

(C) [be accompanied by] 2 copies of ~~a~~ **the** waiver form **appended to this Rule 4**, and a prepaid means for returning the form;

(D) [and inform] the defendant, ~~using text prescribed in Form 5~~ **the form appended to this Rule 4**, of the consequences of waiving and not waiving service.<sup>206</sup>

\* \* \*

#### Rule 4 Summons

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

#### Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

(1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge – or a

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<sup>206</sup> For the full text of the appended forms, see 305 F.R.D. 457, 582-587 (2015).

magistrate judge when authorized by local rule – must issue a scheduling order:

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

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

(2) *Time to Issue.* The judge must issue the scheduling order

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

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

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

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

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

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

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

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, [~~considering the amount in controversy, the importance of the issues at stake in the action,~~] considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties'**

~~resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. —including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

\* \* \*

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

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

\* \* \*

(c) PROTECTIVE ORDERS.

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

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

**(2) Early Rule 34 Requests.**

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

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

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

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

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

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

\* \* \*

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

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

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

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

## Rule 30 Depositions by Oral Examination

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

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

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

(1) **Duration.** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7

hours. The court must allow additional time consistent with Rule 26(b)(1) **and** (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

### **Rule 31 Depositions by Written Questions**

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

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

### **Rule 33 Interrogatories to Parties**

(a) IN GENERAL.

(1) *Number.*

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

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

\* \* \*

(b) PROCEDURE. \* \* \*

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

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

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

*electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.*

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

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

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

(3) *Specific Motions.* \* \* \*

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

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

\* \* \* \*

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

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

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

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

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

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

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

### **Rule 55. Default; Default Judgment**

\* \* \*

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

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

\* \* \*

### **Rule 84. Forms**

**[Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015.)]**

\* \* \*

### **APPENDIX OF FORMS**

**[Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015.)]**