

The 2015 Civil Rules Package As Transmitted to Congress

By: Thomas Y. Allman

Thomas Y. Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® Working Group I on E-Discovery and the E-Discovery Committee of Lawyers for Civil Justice.



THIS article provides an overview of the “package” of amendments to the Federal Rules of Civil Procedure, which were collectively forwarded to Congress for evaluation this spring. A copy of the text of each of the proposals is included in the Appendix to this article. The amendments will become effective on December 1, 2015 if Congress does not adopt legislation to reject, modify, or defer them.¹

I. History of the Amendments

A. Background

The amendments to the Federal Rules of Civil Procedure, which were collectively forwarded to Congress by the Supreme Court on April 29, 2015,² culminated a

¹ The amendments “govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” Order, April 29, 2015, found in the Transmittal Memo and Exhibits, April 29, 2015 (collectively referred to as the “Rules Transmittal”) at unnumbered page 15, available at <http://www.uscourts.gov/file/document/congress-materials>.

² Citations to the text and Committee notes found in the Rules Transmittal are to the

four-year effort by the Civil Rules Advisory Committee (the “Rules Committee”) operating under the supervision of the Committee on Rules of Practice and Procedure of the Judicial Conference (the “Standing Committee”).

The process began with the 2010 Conference on Civil Litigation held by the Rules Committee at the Duke Law School (the “Duke Conference”). The Duke Conference was held in response to concerns about the “costs of litigation, especially discovery and e-discovery.”³ A number of studies, surveys and empirical

internally numbered pages of the Memorandum, dated September 26, 2014, which commences at (unnumbered) page 45. References to the Rules Committee Report of June, 2014 (“June 2014 RULES REPORT”) are from the copy attached as an Appendix to the Standing Committee Report (ST09-2014), available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>. All urls provided were last accessed August 21, 2015.

³ Minutes, Rules Committee Meeting, April 20-21, 2009, at 30, available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2009>.

studies were submitted in advance, and panels discussed the relevant issues.⁴

Key “takeaways” from the Duke Conference included the need for improved case management, application of the long-ignored principle of “proportionality” and cooperation among parties in discovery.⁵ 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.”⁶

The Rules Committee divided the task of developing individual rule proposals between the “Duke” Subcommittee, chaired by the Hon. John Koeltl, and the Discovery Subcommittee, subsequently chaired by the Hon. Paul Grimm. The Discovery Subcommittee focused on a replacement for Rule 37(e).⁷ Both subcommittees vetted alternative draft rule proposals at “mini-conferences.”

An initial “package” of the proposals resulting from these efforts was released for public comment in August 2013.⁸ After a

⁴ Links to the submissions, together with the Conference Agenda, Panelists and Report to the Chief Justice are available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil>.

⁵ Report to the Chief Justice, September 10, 2010, available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (scroll to Report to Chief Justice).

⁶ John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 544 (2010).

⁷ The Discovery Subcommittee work was initially led by Judge David Campbell prior to his becoming Chair of the Rules Committee after Judge Mark Kravitz became Chair of the Standing Committee in November 2011.

⁸ The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil

robust public comment period, the subcommittees recommended revisions, which were adopted by the Rules Committee at its April 2014 meeting in Portland, Oregon. The Standing Committee unanimously approved the revised proposals at its May 29, 2014 meeting.

The revised proposals were then submitted with recommendations for approval to the Judicial Conference,⁹ which approved the rules on their “consent calendar” and forwarded them to the Supreme Court for its review.¹⁰ The Supreme Court adopted the proposed amendments without change and forwarded the full package to Congress after having suggested certain minor changes in several Committee Notes.¹¹

B. Hearings and Public Comments

The Rules Committee conducted Public Hearings on the initial proposals in late 2013 and early 2014 that involved 120

Rules (“2013 PROPOSAL”) is available at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>.

⁹ Report of Standing Committee, ST09-2014, *supra* note 1, at 17 (recommending approval of “Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms”).

¹⁰ See Minutes, Rules Committee Meeting, October 30, 2014, 2, available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-october-2014>.

¹¹ The changes suggested by the Supreme Court involved the Committee Notes for Rules 4 and 84 and in regard to the Abrogation of the Appendix of Forms.

testifying witnesses.¹² The first hearing was held by the Committee in Washington, D.C. on November 7, 2013 and was followed by a second hearing on January 9, 2014 in Phoenix, and a third and final hearing on February 7, 2014 at the Dallas (DFW) airport. In addition, the Committee received over 2,300 written comments.¹³

Lawyers for Civil Justice (“LCJ”)¹⁴ and the American Association for Justice (“AAJ,” formerly “ATLA”) provided expansive comments.¹⁵ The AAJ urged rejection of rules that added proportionality factors to the scope of discovery, imposed reduced presumptive limits and “made sanctions less likely in instances of spoliation,” whereas LCJ supported limiting sanctions, adding proportionality to the scope of discovery, acknowledging cost-allocation and making reductions in presumptive numerical limits on use of discovery devices.

Individual comments were submitted by representatives of corporate entities and affiliated advocacy groups and law firms as well as attorneys and representatives of plaintiff advocacy groups for individual claimants. Members of the academic community testified and submitted written

comments. Commentators have described doubts expressed by some academics about whether those advocating changes were being candid about their motives.¹⁶

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

C. Post-Submission Comments

Since adoption of the post-hearing revisions by the Supreme Court, published assessments by critics of the initial proposals have indicated substantial satisfaction with the final versions.¹⁷ That has not been true of some members of the academic community,¹⁸ as will be noted where relevant.

¹⁶ Henry J. Kelston, *FRCP Discovery Amendments Prove Highly Controversial*, LAW360, February 27, 2014 (quoting views of Professors Carrington and Miller and arguing that others shared the views but declined to express them “as a matter of discretion”), available at <http://www.law360.com/articles/512821/frcp-discovery-amendments-prove-highly-controversial>.

¹⁷ John W. Griffin Jr., *A Voice for Injured Plaintiffs*, August 2015 TRIAL (“[w]hile the new rules do not exactly level the playing field for parties with limited resources, our clients have at least avoided being at a grossly unfair disadvantage”).

¹⁸ Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the [FRCP] and the Pro-Defendant Composition of the Federal Rulemaking Committees* (hereinafter “Anti-Plaintiff Pending Amendments”), __ UNIV. OF CINTI L. REV. __, n. 154 (“[t]he Committee ignored all academic input”), (Forthcoming)(June 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621895.

¹² Transcripts of the three are available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees>.

¹³ The written comments are available at <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>.

¹⁴ LCJ Comments, August 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267>, as supplemented. LCJ a coalition of defense trial lawyer organizations, law firms and corporations.

¹⁵ AAJ Comments, December 19, 2013, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372>.

II. The “Duke” Amendments

The Duke Subcommittee was primarily responsible¹⁹ for developing rule-based proposals other than those dealing with pleadings or the replacement for current Rule 37(e).²⁰ The Subcommittee worked from suggestions floated at the Duke Conference and developed additional ones, which were whittled down as needed. We turn first to the proposals loosely described as the “Duke” amendments.

A. Cooperation (Rule 1)

The Subcommittee proposed to amend Rule 1, which speaks of the need to achieve the “just, speedy, and inexpensive determination of every action and proceeding” so as to require that it be “construed, administered and employed by the court and the parties to secure” its goals. The Committee Note provides that “the parties share the responsibility to employ the rules” in that matter.²¹

The Note further observes that “most lawyers and parties cooperate to achieve those ends” and that “[e]ffective advocacy is consistent with – and indeed depends

upon – cooperative and proportional use of procedure.”²²

I. Cooperation

The Subcommittee considered but ultimately refused to recommend that Rule 1 should be amended to require that parties “should cooperate” to achieve the goals of Rule 1.²³ The concept was deemed to be “too vague, and thus fraught with the mischief of satellite litigation.”²⁴ A similar attempt was rejected in 1978.²⁵

Participants at the Duke Conference emphasized cooperation in achieving the goals of Rule 1, after the proposal had assumed prominence as a result of the Sedona Conference® Cooperation Proclamation.²⁶ Proponents argued that cooperation could go a long way towards achieving proportional discovery and reducing the need for judicial management. Many local rules²⁷ and other e-discovery

¹⁹ A separate Rule 84 (“Forms”) subcommittee functioned during the relevant period and its recommendations were folded into the Duke proposals as the process evolved.

²⁰ Minutes, Rules Committee Meeting, November 7-8, 2011 (“Pleading issues have been left on a separate track, and issues relating to preservation and spoliation of discoverable information have been left with the Discovery Subcommittee. This Subcommittee deals with the ‘great other’”), available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-november-2011>.

²¹ Committee Note, 2.

²² Committee Note, 1-2.

²³ 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.

²⁴ *Id.*

²⁵ Steven S. Gensler, *Some Thoughts on the Lawyer’s E-Volving Duties in Discovery*, 36 N. KY. L. REV. 521, 547 (2009)(language was proposed in 1978 authorizing sanctions for failure to have cooperated in framing an appropriate discovery plan).

²⁶ *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

²⁷ See, e.g., Local Rule 26.4, Southern and Eastern District of N.Y. (the expectation of cooperation of counsel must be “consistent with the interests of their clients”).

initiatives²⁸ invoke cooperation as an aspirational standard.

The difficulty with adding “cooperation” to the text of Rule 1 was the possibility of “collateral consequences.”²⁹ Opponents argued that it was unclear whether “cooperation” means something more than a willingness to take opportunities to discuss defensible positions in good faith³⁰ – in short, whether it mandates compromise.³¹ Some questioned whether “cooperation” included an obligation to settle on reasonable terms, as considered by a court,³² and the experience with mandated cooperation is not favorable.³³

2. Public Comments

Some respondents raised concerns during the public comment period about the references to “cooperation” in the Committee Note, especially as to the “proper balance” between cooperative actions and

²⁸ See [MODEL] STIPULATED ORDER (N.D. CAL), ¶ 2, (“[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation]).

²⁹ Minutes, November 2012 Rules Committee Meeting, at lines 616-622, available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-november-2012>.

³⁰ Gensler, *supra* note 25, at 546 (the correctness of the inference “turn[s] on the definition of cooperation”).

³¹ *Id.* (the view that cooperation means “a willingness to move off of defensible positions – to compromise – in an effort to reach agreement” is not what Rules 26(f), 26(c) or 37(a) actually demand).

³² Initial Sketch (2012), *infra*, note 59.

³³ Richard Marcus, *Cooperation and Litigation: Thoughts on the American Experience*, 61 U. KAN. L. REV. 821, 827- 839 (2013) (“The Challenges of Mandated Cooperation”).

the professional requirements of effective representation.³⁴ Others, however, suggested that “cooperation” should be incorporated in the Rule.³⁵ The Sedona Conference® was not among them, having concluded that language along the lines of the Committee proposal would be sufficient.³⁶

3. Revised Committee Note

At the May 2014 Standing Committee meeting, the Subcommittee announced that the Committee Note would be amended to clarify that the change to the rule was not intended to serve as a basis for sanctions for a failure to cooperate.³⁷ The final version of the Note adds 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.”³⁸

B. Case Management

A series of amendments were proposed collectively to help ensure that judges

³⁴ LCJ Comment, *supra* note 14, at 20.

³⁵ Transcript of Testimony, Ariana Tadler, Milberg LLP, February 7, 2014 (personal views of former Chair, Sedona Conference WG1) at 328.

³⁶ Letter, Sedona Conference® to Hon. David Campbell, October 3, 2012 (suggesting that the rules “should be construed, complied with, and administered to secure the just, speedy and inexpensive determination”).

³⁷ Minutes, Standing Committee Meeting, May 29-30, 2014, at 5 (“[t]he added language would make it clear that the change was not intended to create a new source for sanctions motions”); see also June 2014 RULES REPORT at B-13 (“[o]ne concern was this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate”), available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-may-2014>.

³⁸ Committee Note, 2.

“manage [cases] early and actively.”³⁹ These changes include amendments to Rules 4(m), 16, 26, 34, and 55.

1. Timing (Service of Process) (Rule 4(m))⁴⁰

The time limits in Rule 4(m) governing the service of process will be reduced from 120 to 90 days. The intent is to “reduce delay at the beginning of litigation.”⁴¹ The subdivision does not apply to service in a foreign country “or to service of a notice under Rule 71.1(d)(3)(A).”

In response to a request by the Supreme Court, the Note no longer makes the observation that shortening the presumptive time for service will increase the occasions to extend the time “for good cause.”⁴²

2. Default Judgment

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

3. Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2) (“Early Rule 34 Requests”)) will allow delivery of

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

The Committee Note explains that this relaxation of the existing “discovery moratorium” is “designed to facilitate focused discussion during the Rule 26(f) Conference,” since discussion may produce changes in the requests.⁴³

4. Scheduling Conference

Rule 16(b)(1) will be modified by striking the reference to conducting scheduling conferences by “telephone, mail, or other means” to encourage direct discussions among the parties and the Court. The Rule will merely refer to the duty to issue a scheduling order after consulting “at a scheduling conference.” The Committee Note observes that the conference may be held “in person, by telephone, or by more sophisticated electronic means” and “is more effective if the court and parties engage in direct simultaneous communication.”⁴⁴

5. Scheduling Orders: Timing

In the absence of “good cause for delay” a judge will be required by an amendment to Rule 16(b)(2) to issue the scheduling order no later than 90 days after any defendant has been served or 60

³⁹ June 2014 Rules Report, B-12.

⁴⁰ For changes to Rule 4(d), see Section 2(G), *supra*.

⁴¹ Committee Note, 4.

⁴² The April 3, 2015 Memorandum from the Judicial Conference to the Supreme Court acknowledged receipt of the request and approval of the change without explaining the reason for doing so. Rule Transmittal, *supra* note 1, at unnumbered page 129 of 144.

⁴³ Committee Note, 25.

⁴⁴ *Id.* at 7 (excluding the use of “mail” as a method of exchanging views).

days after any appearance of a defendant, down from 120 and 90 days, respectively, in the current rule. The Committee Note provides that in some cases, parties may need “extra time” to establish “meaningful collaboration” between counsel and the people who may provide the information needed to participate in a useful way.⁴⁵

6. Scheduling Orders: Pre-motion Conferences

Rule 16(b)(3)(B) (“Contents of the Order”) will be amended in subsection (v) to permit a court to “direct that before moving for an order relating to discovery the movant must request a conference with the court.” The Committee Note explains that “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion.”⁴⁶

7. Scheduling Orders: Preservation

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

The Committee Note to Rule 16 observes that “[p]arallel amendments of Rule 37(e) [will] recognize that a duty to

preserve discoverable information may arise before an action is filed.” The Note to Rule 37(e) states that “promptly seeking judicial guidance about the extent of reasonable preservation may be important” if the parties cannot reach agreement about preservation issues. The Note also opines that “[p]reservation orders may become more common” as a result of the encouragement to address preservation.

8. Scheduling Orders: FRE 502 Orders

In parallel to changes in Rule 26(f)(3)(D) requiring parties to discuss whether to seek orders “under Federal Rules of Evidence 502” regarding privilege waiver, Rule 16(b)(3)(B)(iii)(iv) will permit an order to include agreements dealing with asserting claims of privilege or of protection as trial-preparation materials, “including agreements reached under Federal Rule of Evidence 502.”

9. Sequence of Discovery

The unrestricted sequence of discovery specified under Rule 26(d)(3) will apply unless “the parties stipulate” the court orders otherwise, and the requirement that a party act “on motion” is stricken.

C. Scope of Discovery/ Proportionality (Rule 26(b))

The scope of discovery under Rule 26(b)(1) – which has long focused on relevancy – was first explicitly limited by what has come to be called the principle of “proportionality” in 1983. As amended and renamed at the time, Rule 26(b)(1) [“Discovery Scope and Limits”] required courts to limit the “frequency or extent of

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 9. See also Steven S. Gensler and Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 861 (2013) (noting that many have moved to a system of pre-motion conferences to resolve discovery disputes).

use” of discovery methods if the discovery was “unduly burdensome or expensive, taking into account the needs of the case” and other considerations.⁴⁷ The Committee Note spoke of limiting “redundant or disproportionate discovery” of matters which were “otherwise proper subjects of inquiry.”⁴⁸

The same 1983 amendments also introduced proportionality concepts as part of a new Rule 26(g) [“Signing of Discovery Requests, Responses, and Objections”] which related to the conduct of parties and counsel in regard to discovery filings.⁴⁹

In 1993, the Rules Committee introduced the now familiar concept of balancing burden and benefit to justify imposing limitations,⁵⁰ replacing the reference to undue burden or expense. As subsequently

⁴⁷ *Hardrick v. Legal Services Corp.*, 96 F.R.D. 617, 618 (D. D.C. 1983) (“courts have become concerned about “discovery abuse and inordinate expense involved in overbroad and for-ranging discovery requests”).

⁴⁸ 97 F.R.D. 165, 213-217 (1983). The Committee Note explained that the grounds for “limiting discovery” reflect “the existing practice of many courts in issuing protective orders under Rule 26 (c). *Id.*, at 217. *See also* *Advanced Semiconductor Products v. Tau Laboratories*, 1986 WL 215149, at *2 (N.D. Cal. 1986)(it introduces “subtle questions” about whether material sought is “likely to be sufficiently useful to justify the burden imposed by the discovery request”).

⁴⁹ 97 F.R.D. at 215-16 & 218-19. *Mancia v. Mayflower Textile*, 253 F.R.D. 354, 358, 360 (D. Md. 2008) (Rule 26(g)(1)(B)(iii) requires that pretrial discovery be conducted so that it is “proportional to what is at issue in the litigation and if it is not, the judge is expected to impose appropriate sanctions”).

⁵⁰ Rule 26(b)(2)[“Limitations”] (1993) (also adding a new consideration dealing with the importance of the discovery in resolving the issues). 146 F.R.D. 401, 438 (1993).

renumbered in 2006,⁵¹ the rule mandates that courts limit discovery when “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.”

The 2015 Amendments further amend Rule 26(b)(1) to state that parties may obtain discovery of non-privileged matter “that is relevant to any party’s claim or defense and proportional to the needs of the case, considering [a re-arranged and slightly modified list of the current factors].”

I. Background

The impetus for the proposed change can be directly traced to the conviction that proportionality limitations have been under-utilized in addressing what many regard as excessive and costly over-discovery. A “principal conclusion” of the Duke Conference was that “discovery in civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality,” citing the need for more active case management.⁵²

The onset of e-discovery, especially in the decade since the 2006 Amendments were first considered, has exacerbated concerns about over-discovery. An FJC survey of closed cases presented at the 2010 Duke Conference⁵³ suggested that

⁵¹ Rule 26(b)(2)(C)(iii)(2006) (as renumbered to accommodate insertion of new Rule 26(b)(2)(B)). 234 F.R.D. 219, 334 (2006).

⁵² June 2014 Rules Report, B-6.

⁵³ Emery G. Lee III and Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 765, 773-774 (2010) (“[discovery] costs are generally proportionate” to client stakes in the litigation).

for “a great many cases,” discovery is held within limits “proportional to the needs of the case.”⁵⁴ However, in a significant number of cases, that has not been the case.⁵⁵ A number of surveys discussed at the Duke Conference documented substantial dissatisfaction with excessive costs of discovery, in part because of inadequate attention paid to proportionality limitations.⁵⁶

The Duke Subcommittee addressed alternatives approaches to enhance the awareness and effectiveness of proportionality. Among the options considered was to order that the scope of discovery in Rule 26(b)(1) be limited to what is “proportional to the reasonable needs of the case.”⁵⁷ Ultimately, the Committee concluded that it would be best to transfer the list of proportionality considerations from the existing rule to Rule

26(b)(1) to provide “suitably nuanced guidance” to a reference to proportionality in the rule.⁵⁸

2. The Initial Proposal

Accordingly, the Committee proposed that Rule 26(b)(1) provide that “[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering [the then existing list of factors].” Rule 26(b)(2)(C)(iii) will require that courts limit the frequency or extent of discovery when “the proposed discovery is outside the scope permitted by Rule 26(b)(1).”⁵⁹

The proposal also deleted a number of other provisions in existing Rule 26(b)(1). These included deletion of the reference to obtaining discovery of material “relevant to the subject matter” for good cause⁶⁰ as well as the statement that “[r]elevant information need not be admissible at

⁵⁴ Minutes, Rules Committee, November 7-9, 2011, *supra* note 20, at 8.

⁵⁵ Critics downplay the significance of these cases for rulemaking purposes. See, e.g., Suja A. Thomas and Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rule-making Process* (hereinafter “*Atypical Cases*”), 15 NEVADA LAW JOURNAL, 2014-15 (Forthcoming), copy at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563047.

⁵⁶ The American College of Trial Lawyers (“ACTL”) and the Institute for the Advancement of the American Legal System (“IAALS”) suggested rule language to address the topic. See Pilot Project Rules, ACTL & IAALS (2009), PPR 1.2 (Scope) (“the process and costs [must be] proportionate to the amount in controversy and the complexity and importance of the issues”) and PPR 10.2 (Discovery) (“discovery must . . . comport with the factors of proportionality in PPR 1.2), available at http://iaals.du.edu/sites/default/files/documents/publications/pilot_project_rules2009.pdf.

⁵⁷ Report of Advisory Committee to Standing Committee, December 5, 2010, 136.

⁵⁸ *Id.* at 137. See also Duke Conference Subcommittee Call Notes, October 22, 2012, *supra* note 23, at 5-6 (“adding the (iii) factors to explain what ‘proportional’ means relieves the risk of uncertain meaning”).

⁵⁹ 2013 PROPOSAL, *supra* note 8, at 289-293 of 354.

⁶⁰ Until the 2000 Amendments, Rule 26(b)(1) permitted discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of [either party]” and gave examples. In 2000, this was amended to authorize discovery “that is relevant to the claim or defense of any party that is relevant to the claim or defense of any party,” and added that for “good cause” a court could order discovery of “any matter relevant to the subject matter involved in the action.” 192 F.R.D. 340, 388 (2000).

trial if [it] appears reasonably calculated to lead to admissible evidence.”⁶¹

The draft Committee Note explained that the “scope of discovery is changed in several ways,” including a revision to Rule 26(b)(1) which “limit[s] the scope of discovery to what is proportional to the needs of the case.” It also explained that discovery of matters relating to the subject matter involved is deleted because “[p]roportional discovery relevant to any party’s claim or defense suffices.”

The Note also explained that deletion of the “reasonably calculated to lead” phrase was necessary since discovery should not extend beyond the permissible scope simply because “reasonably calculated” to lead to the discovery of admissible evidence.⁶²

3. Public Comments

The initial proposal kicked off a firestorm of opposition by plaintiff advocacy groups, who viewed it as an unfair attempt to restrict discovery important to constitutional, civil rights or employment claims.⁶³ Concerns were expressed that characterizing proportionality as part of the scope of discovery would place the

burden of justifying the request as proportional on the requesting party.⁶⁴

The AAJ⁶⁵ argued, for example, that the change would “fundamentally tilt the scales of justice in favor of well-resourced defendants” because a producing party could “simply refuse reasonable discovery requests” and force requesting parties to “*prove* that the requests are not unduly burdensome or expensive.”⁶⁶

Witnesses and commentators also challenged the assertion that discovery was typically excessive or out of control. Professor Arthur Miller, for example, criticized the proposal as erecting “stop signs” to discovery without empirical evidence of a need to do so.⁶⁷ He also argued that the original formulation had treated proportionality as a mere “safety valve.”

Some comments predicted that the change would trigger a massive increase in assertions of disproportionality and motions to compel, which would increase costs and likely deter filings in federal courts.⁶⁸

⁶¹ The 2000 Amendments inserted the word “relevant” to try to address concerns that it might “swallow” limitations such as proportionality. *Id.* at 390.

⁶² 2013 PROPOSAL, *supra* note 8, at 296-297 of 354.

⁶³ A forty-five page summary of the Comments, pro and con, on the transfer of proportionality factors to Rule 26(b)(1) was prepared by the Reporter of the Rules Committee. See copy at https://law.duke.edu/sites/default/files/centers/judicialstudies/iii_summary_public_comments.pdf.

⁶⁴ Minutes, April 2014 Rules Committee Meeting, at 3 (lines 108-109) (hereinafter “April 2014 Minutes”) available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014>.

⁶⁵ AAJ Comment, *supra* note 15, December 19, 2013.

⁶⁶ *Id.* at 11 (emphasis in original).

⁶⁷ Prof. Miller has described the inclusion of proportionality in the 1983 rules (“on his watch”) as based on merely “impressionistic” evidence of discovery abuse. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 354 & n. 261 (April 2013).

⁶⁸ Hon. Shira A. Scheindlin Comment, January 13, 2014, at 3.

4. The Revised Proposal

After close of the public comment period, the Duke Subcommittee met to consider the objections to the initial proposal. After acknowledging the “quite unintended interpretations of the proportionality proposal,”⁶⁹ the Subcommittee nonetheless recommended⁷⁰ and the Committee made only minor modifications to the text of the Rule (the considerations are “slightly rearranged and with one addition”).⁷¹

As revised, Rule 26(b)(1) will provide:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery

⁶⁹ April 2014 Minutes, *supra* note 64, at 4-5 (lines 176-177) (quoting Chair of Duke Subcommittee).

⁷⁰ Report of the Duke Conference Subcommittee (undated), copy in April 2014 Rules Committee Agenda Book, at 79-87 of 580, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014>.

⁷¹ Committee Note, 17.

need not be admissible in evidence to be discoverable.

Two changes were made in the text to be added to (b)(1). First, the “amount in controversy” factor was moved to a secondary position behind “the importance of the issues at stake in the action” when the list was transferred from Rule 26(b)(2)(C)(iii). Second, the rule now requires consideration of “the parties’ relative access to relevant information” in order to deal with information asymmetry.

The revised Committee Note explains that the reference to “information asymmetry” invokes considerations already implicit in the Rules and acknowledges that “the burden of responding to discovery “lies heavier on the party who has more information, and properly so.”⁷²

5. Changes in the Committee Note

A greatly expanded Committee Note reflects the primary Committee response to public criticisms of the additions and deletions in Rule 26(b)(1). The Note explains that the present amendment “restores” the proportionality factors to their original place in Rule 26(b)(1) while “reinforcing” the Rule 26(g) obligation on requesting parties to consider proportionality in making discovery requests, responses or objections. It does not “place on the party seeking discovery the burden of addressing all proportionality concerns.” The parties and the court have a “collective responsibility”

⁷² Committee Note, 21.

to consider the proportionality of discovery.⁷³

Further, the rule is “not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”⁷⁴ The Note repeats excerpts from the 1983 and 1993 Committee Notes that emphasize that party managed discovery calls for continuing and close judicial management.

The Note also expands on the reason for deletion of “subject matter” discovery. Rule 26(b)(1) had long permitted discovery regarding any matter relevant “to the subject matter involved in the pending action,” although the 2000 Amendments had restricted that somewhat by adding a required showing of “good cause.”⁷⁵ The Committee Note explains that the authority “is rarely invoked” and that proportional discovery suffices “given a proper understanding of what is relevant to a claim or defense.”⁷⁶

The Note justifies deletion of the examples of discoverable matter which illustrated the scope of discovery as unnecessary since they are already “deeply entrenched in practice” and are permitted

“when relevant and proportional to the needs of the case.”⁷⁷

The Note also expands on the reasons for deletion of the “reasonably calculated” phrase and its replacement by the statement that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”⁷⁸ The original phrase – when removed from its context – has been used to define the scope of discovery without regard to relevancy limitations.⁷⁹ Despite attempts to address that issue in the 2000 Amendments,⁸⁰ the Committee concluded that it “has continued to create problems” and needed to be removed.⁸¹

6. Assessment

On balance, restricting the scope of discovery under Rule 26(b)(1) to material “relevant to any party’s claim or defense and proportional to the needs of the case” should make no material difference in the obligations already imposed on litigants, their counsel, and the court.⁸² As a recent

⁷³ The Duke Subcommittee Meeting Notes reflect that the Subcommittee concluded that a party protesting that a request is too burdensome to be proportional will “have to explain what the burden is and why it is not proportional.” March 3, 2014, Notes, at 51 (April 2014 Agenda Book, *supra* note 70, at 132 of 580).

⁷⁴ Committee Note, 19.

⁷⁵ 192 F.R.D. 340, 388 (2000) (“[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action”).

⁷⁶ Committee Note, 23. The Note explains that the examples used to justify inclusion of “subject matter” jurisdiction in 2000 would “not [be] foreclosed by the amendments.”

⁷⁷ Committee Note, 23.

⁷⁸ Committee Note, 24.

⁷⁹ June 2014 RULES REPORT, B-10 (“[s]ome even disregard the reference to admissibility, suggesting that any inquiry ‘reasonably calculated’ to lead to something helpful in the litigation is fair game in discovery”).

⁸⁰ The 2000 Committee Note warned that use of the phrase to define scope “might swallow any other limitation on the scope of discovery.” 192 F.R.D. 340, 390 (2000) (“information must be relevant to be discoverable, even though inadmissible”).

⁸¹ Committee Note, 24.

⁸² Craig B. Shaffer and Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 195 (2013).

article in an AAJ magazine noted, it is a “mistaken belief that the changes dictate severe limitations on discovery.”⁸³

The burdens of proof involved remain the same. As in the case of objections based on relevancy or undue burden,⁸⁴ the burden of persuasion as to proportionality is not sustainable by “bald generalizations” when a protective order or motion to compel is filed.⁸⁵ Regardless of how the issue is raised, a party seeking discovery must be prepared to make a facially relevant showing of benefit, and a party asserting disproportionate burdens must be able to demonstrate them by specific proof.⁸⁶ Ultimately, relying on all the information available, the court has the responsibility to decide if the discovery sought is relevant and proportional.

It is unlikely that the rule will “motivate withholding or not searching in situations where such behavior did not occur previously.”⁸⁷ The “self-designa-

tion” of information not to be produced is a normal feature of party-managed discovery,⁸⁸ and a party may not unilaterally limit its responses to what it considers proportional.⁸⁹

The deletion of the “reasonably calculated” language from Rule 26(b)(1) will, at a minimum, require courts to more carefully state their rationale for permitting discovery.⁹⁰ However, there may also be more subtle impact. Observers have noted that “‘reasonably calculated’ has taken on a life of its own” and that many lawyers “seek to use it to expand the scope of discovery arguing that virtually everything is discoverable because it might lead to admissible evidence.”⁹¹ Dropping that phrase may encourage more resistance to

“[u]nder the new rule, a party can choose not to search or produce documents that they deem ‘not proportional to the needs of the case’”).

⁸⁸ See, e.g., Rules Committee Report (2006), 234 F.R.D. 219, 333 (2006) (“[o]ne criticism leveled against the proposal [Rule 26(b)(2)(B)] is that it allows the responding party to ‘self-designate’ information not produced because it is not reasonably accessible. All party-managed discovery and privilege invocation rests on ‘self-designation’ to some extent”).

⁸⁹ April 2014 Minutes, *supra* note 64, at 7 (lines 273–276) (Judge Koeltl). A party may not refuse discovery by making “a boilerplate objection that [the discovery being refused] is not proportional.” Committee Note, 19.

⁹⁰ Cf. Giegerich v. National Beef Packing, 2014 WL 1655554, at *2 (D. Kan. April 25, 2014) (citing the wrong reason (“could lead to the discovery of admissible evidence”) in achieving the right result (allowing discovery of other accident claims because of the “low threshold for relevancy at the discovery stage of litigation”). The same result will likely occur under the revised Rule.

⁹¹ Minutes, April 2013 Rules Committee Meeting, at 9 (lines 393-397).

⁸³ Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, July 2015 TRIAL 37 (“the actual rule amendments do not support [the] perspective [of severe restrictions on discovery]”).

⁸⁴ See *Stinson v. City of New York*, 2015 WL 4610422, at *3 (S.D.N.Y. July 23, 2015) (resolving dispute under Rule 26(b)(2)(B) by assessing burdens without describing process as imposing “proportionality”).

⁸⁵ *Cartel Asset Management v. Ocwen Financial*, 2010 WL 502721, at *14-15 (D. Colo. Feb. 8, 2010) (refusing motion for protective order because of failure to present facts sufficient to evaluate burdens said to outweigh the likely benefits).

⁸⁶ *Folger v. Medicalodges*, 2013 WL 6244155, *2 (D. Kan. Dec. 3, 2013) (“once facial relevance is established, the burden shifts to the party resisting discovery”).

⁸⁷ *Thomas and Price, Atypical Cases*, *supra* note 55 (criticizing revised Rule 26(b)(1) because

such demands and thus lead to less disproportionate discovery.⁹²

Ultimately, of course, the impact of the changes to Rule 26(b)(1) will depend on the degree to which courts and parties accept and implement the rule. The Rules Committee will undertake education efforts, and the Duke Judicial Center has sponsored an attempt to develop “Guidelines and Suggested Practices” for implementation.⁹³

7. Impact on Preservation Conduct

One open issue is whether the change in the scope of discovery permits parties to unilaterally limit steps undertaken in execution of a duty to preserve on the basis of a lack of proportionality. The scope of preservation and production are undoubtedly linked,⁹⁴ and revised Rule 37(e) acknowledges the role of proportionality in determining whether the party has taken “reasonable steps.”⁹⁵

A similar concern about possible “slacking off” was expressed at the time of the 2006 amendments when Rule 26(b)(2)(B) presumptively limited production of ESI from inaccessible source. The Committee amended the Committee Note to state that whether a party is required to preserve sources “it believes are not reasonable accessible depends on the circumstances of each case” and it is “often useful for the parties to discuss” the issue early in the case.⁹⁶

A party proceeds at its own risk in unilaterally determining the scope of preservation, especially prior to commencement of litigation.⁹⁷ Parties would be wise to discuss proportionality limitations at early Rule 26(f) conferences and to seek an agreement or a court order establishing or acknowledging limits that have been applied.⁹⁸

8. Computer Assisted Review

The Committee Note endorses use of “computer-based methods of searching” information to address proportionality concerns in cases involving large volumes of ESI. The Note states that “[c]ourts and parties should be willing to consider the

⁹² Some worry about the cost and delay of the additional motions involved. See BloombergBNA eDiscovery Resource Center (Proportionality), July 31, 2015, quoting Hon. Shira Scheindlin at ABA Panel, Chicago (“I hope judges will be tough about allowing motions”), available at <http://www.bna.com/ediscovery-resource-center-p17179870199/>.

⁹³ See Public Comment Draft (August 2015), Duke Judicial Center.

⁹⁴ Pippins v. KPMG, 279 F.R.D. 245, 255 (S.D.N.Y. 2012) (“proportionality is necessarily a factor in determining a party’s preservation obligations;” accord, *In re Ethicon, Inc.*, 299 F.R.D. 502, 518 (S.D. W. Va. 2014)).

⁹⁵ Rule 37(e) Committee Note, 41 (“a factor in evaluating the reasonableness of efforts to preserve proportionality”).

⁹⁶ Rule 26 Committee Note (2006), 234 F.R.D. 219, 337 (2006).

⁹⁷ *Orbit One Communications v. Numerex*, 271 F.R.D. 429, 436 n. 10 (S.D.N.Y. 2010) (“[p]roportionality is particularly tricky in the context of preservation” because it is “highly elastic” and “cannot be assumed to create a safe harbor”).

⁹⁸ Many local rules and sample protocols encourage such discussion and the amendments include proposals to amend Rule 16(b) to include such agreements as part of scheduling orders.

opportunities” as “reliable means” of doing so become available.”⁹⁹

This provision – added after the public comment period¹⁰⁰ – This is intended to help reduce “possible proportionality concerns that might arise in ESI-intensive cases.”¹⁰¹ These include, for example, TAR methods (“technology assisted review or predictive coding”).¹⁰²

The Committee Note reflects the fact that “at least in big cases,” acceptance of TAR methods has meant that “formal document requests are becoming less and less relevant” and are displaced in pretrial conferences by discussions of custodians, sources of ESI and search methods¹⁰³ in which the role of proportionality plays a prominent role.¹⁰⁴ The case law “recognizes that manual search costs can be devastating, so reasonable technological search and production efforts” may need to be considered.¹⁰⁵

⁹⁹ Committee Note, 22. *See, e.g.*, *Malone v. Kantner Ingredients*, 2015 WL 1470334, at n. 7 (D. Neb. March 31, 2015) (“predictive coding” is being promoted as “not only a more efficient and cost effective method of ESI review, but a more accurate one”).

¹⁰⁰ Minutes, Standing Committee Meeting, May 29-30, 2014, *supra* note 57, at 4.

¹⁰¹ *Id.*

¹⁰² David J. Walton, *Litigation and Trial Practice in the Era of Big Data*, LITIGATION, Vol. 41, No. 4, 55 (2015).

¹⁰³ *Id.*, 57.

¹⁰⁴ *See, e.g.*, *Kleen Products v. Packaging Corporation of America*, 2012 WL 4498465, at *10 (N.D. Ill. Sept. 28, 2012) (denying motion to compel response to interrogatory based on the “Rule 26 proportionality test” since the burden outweighs any benefits and the party was able to get much of the information in a less burdensome way).

¹⁰⁵ *FDIC v. Bowden*, 2014 WL 2548137, at *7 & *13 (S.D. Ga. June 6, 2014) (ordering parties

Indeed, this has led some courts to use proportionality principles in the resolution of “categorical document requests” which are part of a process of encouraging a “mutually acceptable ESI search regime.”¹⁰⁶ There are risks involved in deviating from traditional document requests and simply agreeing to turn over all relevant material based on broad search criteria not subject to proportionality criteria.¹⁰⁷

9. Related State Developments

Both Utah and Minnesota have included explicit consideration of proportionality concerns in their civil rules. Minnesota amended its Rule 1 to require “the process and the costs [of civil actions] are proportionate to the amount in controversy and complexity and importance of the issues” involved.¹⁰⁸ Utah integrated proportionality into the scope

to “consider the use of predictive coding” in the event parties are unable to agree on ESI protocol).

¹⁰⁶ *Fort Worth Employees’ Retirement Fund*, 297 F.R.D. 99, 104-105 (S.D.N.Y. Dec. 16, 2013).

¹⁰⁷ *Bagley v. Yale University*, 307 F.R.D. 59, 65-66 (D. Conn. 2015) (denying relief from further review under broad search protocol yielding very small percentage of relevant evidence in favor of a “conventional discovery request” because it “does not yet violate” the proportionality limitations under Rule 26(b)(2)(C)).

¹⁰⁸ MINN. R.C.P. Rule 1 (2013). The scope of discovery is limited to “matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [as listed].” MINN. R.C.P. Rule 26.02(b)(2013).

of discovery.¹⁰⁹ Pennsylvania also amended its commentary to emphasize that discovery is “governed by a proportionality standard” in order to achieve the “just, speedy and inexpensive” determination of litigation.

D. Presumptive Limits (Rules 30, 31, 33 and 36)

The initial package included amendments which lowered the presumptive limits on the use of discovery devices in Rules 30, 31, 33 and 36¹¹⁰ in order to “decrease the cost of civil litigation, making it more accessible for average citizens.”¹¹¹ An earlier proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.¹¹²

The proposal grew out of efforts to address the perceived lack of implementation of proportionality limitations, as expressed at the Duke Conference. The proposed changes would have included the following:

- Rule 30: From 10 oral depositions to 5, with a deposition limited to one day of 6 hours, down from 7 hours;
- Rule 31: From 10 written depositions to 5;
- Rule 33: From 25 interrogatories to 15; and

- Rule 36 (new): No more than 25 requests to admit.

However, the proposals encountered “ferce resistance”¹¹³ on grounds that the present limits worked well and that new ones might have the effect of limiting discovery unnecessarily.¹¹⁴ The opposition came from the organized bar as well as from testimony and comments from individual lawyers and included concerns that courts might view the presumptive numbers as hard ceilings. If so, any failure to agree on reasonable limits could result in motion practice.¹¹⁵

After review, the Duke Subcommittee recommended,¹¹⁶ 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.”¹¹⁷

The Committee expressed the hope that most parties “will continue to discuss reasonable discovery plans at the Rule

¹⁰⁹ UTAH Rule 26(b)(1) (Discovery Scope in General) (“Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below”).

¹¹⁰ 2013 PROPOSAL, *supra* note 8 at 300-304, 305 & 310-311 [of 354].

¹¹¹ *Id.* at 268.

¹¹² *Id.* at 267.

¹¹³ June 2014 RULES REPORT, B-4 (“[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect”).

¹¹⁴ A detailed CCL Report of May, 2014 summarizes the objections. See *CCL Preliminary Report on Comments on Proposed Changes to [FRCP]*, May 12, 2014, 5; copy at http://www.cclfirm.com/files/Report_050914.pdf.

¹¹⁵ April 2014 Minutes, *supra* note 64, at 7 (lines 307-310).

¹¹⁶ The Duke Subcommittee Report is in the April 2014 Rules Committee Meeting Agenda Book, copy at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>.

¹¹⁷ Minutes, Rules Committee Meeting, April 10-11, 2014, at lines 466-467.

26(f) conference and with the court initially, and if need be, as the case unfolds.”¹¹⁸ The Committee expects that it will be possible to “promote the goals of proportionality and effective case management through other proposed rule changes” without raising the concerns spawned by the new presumptive limits.¹¹⁹

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

E. Cost Allocation (Rule 26(c))

At the Duke Conference, some suggested that Rules 26 and 45 should be amended to make the reasonable costs of preserving, collecting, reviewing and producing electronic and paper documents the responsibility of requesting parties (“requester party pays”).¹²⁰ Recent scholarship pegs the costs of search and review as the largest component of discovery costs, at least in larger cases.¹²¹

¹¹⁸ *Id.* (at lines 467-470).

¹¹⁹ June 2014 RULES REPORT, B-4.

¹²⁰ LCJ /DRI/FDCC/IADC Comment, *Reshaping the Rules of Civil Procedure for the 21st Century*, May 2, 2010, at 55-60 (also recommending amendment to Rule 54(d) to same effect).

¹²¹ 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) available at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

While a partial draft along those lines¹²² was circulated, the Subcommittee was not enthusiastic about cost-shifting and declined propose adoption of new rules. Instead, the Subcommittee agreed that a proposal making cost-shifting a more “prominent feature of Rule 26(c) should go forward.”¹²³ Accordingly, Rule 26(c)(1)(B) will be amended so that a protective order issued for good cause may specify terms, “including time and place or the allocation of expenses, for the disclosure or discovery.”

The Committee Note explains that the “[a]uthority to enter such orders [shifting costs] is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.”¹²⁴ There is well-established Supreme Court support for the statement.¹²⁵

After public comments that the addition to Rule 26(c) would garner “undue

¹²² Duke Conference Subcommittee, *Rules Sketches*, at 17-19, Agenda Materials for Rules Committee Meeting, March 22-23, 2012 (requiring a requesting party to “bear part or all of the expenses reasonably incurred in responding [to a discovery request]”) available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012> (beginning at 375 of 644).

¹²³ Duke Conference Subcommittee, *Initial Rules Sketches*, at 37, as modified after mini-conference, available at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.

¹²⁴ Committee Note, 25.

¹²⁵ June 2014 RULES REPORT (4. RULE 26(c)(1): Allocation of Expenses) (citing *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978), Rules Transmittal, *supra* note 1.

weight,”¹²⁶ the Committee amended the Note to add that it “does not mean that cost-shifting should become a common practice” and that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”¹²⁷

Some argued that this prejudged any continuing study of “requester pays” proposals. The Chair of the Subcommittee stated that the work of the Committee will continue, but “it will not be easy.”¹²⁸ The Committee has recently indicated that it continues to have the “requester pays” topic on its agenda.¹²⁹

F. Production Requests/ Objections (Rule 34, 37)

The Committee proposed to amend Rule 34 and 37 to facilitate requests for and production of discoverable informa-

tion and to clarify some aspects of current discovery practices.

First, Rule 34(b)(2)(B) will be modified to confirm that a “responding party may state that it will produce copies of documents or of [ESI] instead of permitting inspection.” Rule 37(a)(3)(B)(iv) will also be changed to authorize motions to compel for *both* failures to permitting inspection and failures to produce.¹³⁰ As the Committee Note observes, it is a “common practice” to produce copies of documents or ESI “rather than simply permitting inspection.”¹³¹ Rule 34(b)(2)(B) will also be amended to require that if production is elected, it must be completed no later than the time specified “in the request or another reasonable time specified in the response.”

Second, Rule 34(b)(2)(B) will require that an objection to a discovery request must state “with specificity the grounds for objecting to the request, including the reasons.” The Committee Note explains that “if the objection [such as overbreadth] recognizes that some part of the request is appropriate, the objection should state the scope that is not [objectionable].”¹³²

¹²⁶ AAJ Comments, *supra* note 15, 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* note 14, August 30, 2013, at 19-20 (endorsing proposal as “a small step towards our larger vision of reform”).

¹²⁷ Committee Note, 25.

¹²⁸ April 2014 Minutes, *supra* note 64, at 6 (lines 234-238).

¹²⁹ May 2, 2015 Report of the Rules Committee, 27 (noting that “[t]he Discovery Subcommittee continues to have the ‘requester pays’ topic on its agenda” and outlining questions involved in further information gathering efforts); available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2015> (scroll to 171-175 of 504).

¹³⁰ Committee Note, 38 (“[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling ‘production, or inspection’”).

¹³¹ Committee Note, 34 (“the response to the request must state that copies will be produced”). For a useful summary of the contrasts in the discovery process between former and current contexts, see *Anderson Living Trust v. WPX Energy Production*, 298 F.R.D. 514, 521-527 (D. Mass. 2014).

¹³² Committee Note 33.

Third, Rule 34(b)(2)(C) will require that any objection must state “whether any responsive materials are being withheld on the basis of [an] objection.”¹³³ This is intended to “end the confusion” when a producing party states several objections but still produces information. A producing party need not provide a detailed description or log but must “alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion.”¹³⁴ The AAJ, among others, hailed this as an “extremely positive new change,” which should substantially reduce stonewalling on the issue.¹³⁵

The requirement is inapplicable when the responding party does not know whether anything has been withheld beyond the search made.¹³⁶ In that case, an objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld” on the basis of the objection.¹³⁷ The parties should discuss the response and if they cannot resolve the issue, seek a court order.

¹³³ The new language continues to be followed by the current requirement that “[a]n objection to part of a request must specify the part and permit inspection of the rest.”

¹³⁴ Committee Note, 34.

¹³⁵ Arthur Bryant, *Access to Justice at Stake with Federal Rule Changes*, June 5, 2014, available at <https://www.justice.org/blog/access-justice-stake-federal-rules-changes>.

¹³⁶ April 2014 Minutes, *supra* note 64, at 7 (lines 276-285).

¹³⁷ Committee Note, 34.

G. Forms (Rules 4(d), 84, Appendix of Forms)

Rule 84 currently states that “the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” In parallel to other aspects of potential rules reforms, and in response to the relative lack of use of the forms, the Rules Committee concluded that it is time “to get out of the forms business.”¹³⁸

As a result, both Rule 84 and the Appendix of Forms appended to the Civil Rules will be abrogated, although certain of the forms will be integrated into Rule 4(d). Thus, Rule 4(d) will incorporate the forms “appended to this Rule 4.”¹³⁹ The phrase “[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]” will appear in place of the current text of Rule 84 and the separate list of “Appendix of Forms.”

Alternative sources of civil procedure forms will be available from a number of sources.¹⁴⁰ At the Supreme Court’s suggestion,¹⁴¹ the reference to the Administrative Office in the Note was expanded to include reference to websites of district courts and local law libraries as potential sources.

The Committee rejected concerns that abrogation was inappropriate under the Rules Enabling act.¹⁴² The expanded Note

¹³⁸ June 2014 RULES REPORT, B-19.

¹³⁹ *See generally*, material at Committee Note, 52-57.

¹⁴⁰ Committee Note, 49.

¹⁴¹ Memorandum, April 2, 2015, Judicial Conference to Supreme Court, Rules Transmittal, *supra* note 1, at 129 of 144.

¹⁴² Excerpt, September 2014 Report of the Judicial Conference, at (unnumbered) page 107 of 144 of Rules Transmittal, *supra* note 1.

also states that the “abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”¹⁴³

III. Rule 37(e)

A. Failure to Preserve/ Spoliation (Rule 37(e))

The Federal Rules do not generally deal with preservation and spoliation issues, including pre-litigation failures to preserve. Remedies for violations of the duty to preserve under Rule 37(b) and (d), the most likely applicable rules, are unavailable unless a prior order has been violated.¹⁴⁴ An effort in 2006 to address some issues involving spoliation of ESI led to current Rule 37(e), which was understood to be only a starting point in regard to the impact of electronic discovery.

Rule 37(e) provides that:

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

The rule addresses only sanctions issued “under these rules,” leaving it open to courts to avoid its limitations by the exercise of inherent authority under *Cham-*

bers v. NASCO.¹⁴⁵ The rule does “not adequately address” serious problems caused by the adoption of “significantly different standards for imposing sanctions or curative measures” for failures to preserve.¹⁴⁶

At the 2010 Duke Conference, the E-Discovery Panel recommended adoption of a uniform national rule spelling out preservation and spoliation requirements as a way of addressing those issues. The panel focused on the trigger, duration and nature of the obligation and the consequences of a failure to act.¹⁴⁷

After the Conference, the Discovery Subcommittee was assigned the task of developing alternative rule proposals, including ones that articulated preservation obligations.¹⁴⁸ The Committee understood the desire of organizations to

¹⁴⁵ Phillip Favro, *The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments*, 21 RICH. J. L. & TECH. 8, ¶¶ 4-9 (2015).

¹⁴⁶ Committee Note, 38 (leading to 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”).

¹⁴⁷ “Elements of a Preservation Rule,” E-Discovery Panel, available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (scroll to “Elements of A Preservation Rule”).

¹⁴⁸ Proposed Rule 26.1 provided that parties should take “actions that are reasonable” considering proportionality, but “presumptively” excluded certain forms of information [ESI] and limited the scope of the duty to a reasonable number of key custodians. Compliance with those requirements would have barred sanctions even if discoverable information was lost. See *Memo for Mini-Conference Participants*, September 9, 2011, 1-13, available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/dallas>.

¹⁴³ *Id.*

¹⁴⁴ *cf.* *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (acts of spoliation prior to issuance of discovery orders violate Rule 37(b) because the inability to comply is “self-inflicted”).

understand their obligations, but acknowledged that the “collective angst” behind over-preservation would be difficult to deal with by rule-making.¹⁴⁹

After conducting a mini-conference in October 2011, the Committee decided to pursue a “sanctions-only” approach to a new rule. It concluded that drafting a preservation rule, either “in detail or by simply exhorting reasonable behavior,” was too difficult and could “easily be superseded by advances in technology.”¹⁵⁰

B. The Initial Proposal

The initial proposal for a revised Rule 37(e) applied to losses of all forms of discoverable information which “should have been” preserved.¹⁵¹ It included a list of “factors” for courts to consider in making that determination and advocated good faith consultation by parties about the scope of preservation with resort to the court to resolve remaining disputes.¹⁵² The Committee Note cross-referenced the amendments to Rules 16(c) and 26(f) which “invite provisions on this subject in the scheduling order.”

The initial proposal also identified the remedies available if a court determined

that a failure to preserve had occurred. A court could choose to impose “additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney’s fees caused by the failure.” No showing of prejudice or culpability was required for these measures, which the Committee Note described as “a variety of measures that are not sanctions.”¹⁵³

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

C. Public Comments

While the community accepted the need for a uniform national rule dealing with the topic,¹⁵⁴ some argued that there was no need to act since sanctions represented a significant threat only to those who failed to make reasonable and good faith efforts to comply.¹⁵⁵ Others opposed adoption of a heightened culpability standard for sanctions as an unwarranted restriction on court discretion. A prominent District Judge argued that

¹⁴⁹ Minutes, Rules Committee Meeting, November 15-16, 2010, 14-16.

¹⁵⁰ Minutes, Rules Committee Meeting, March 22-23, 2012, 15-16.

¹⁵¹ 2013 PROPOSAL, *supra* note 8, at 314-317 of 354.

¹⁵² Rule 37(e)(2)(Factors A-E). Reasonable conduct and proportionality concerns were mentioned as key to determining a breach of duty. In addition, one factor emphasized that parties should consult in “good faith” about the scope of preservation” and a party should seek court “guidance” on “any unresolved disputes about preserving discoverable information.

¹⁵³ 2013 PROPOSAL, *supra* note 8, at 320 of 354.

¹⁵⁴ The Reporter has summarized the content of the testimony and (most) of the written comments. See *2013-2014 Public Commentary on Proposed Rule 37(e)*, in Agenda Book, April 2014 Rules Committee Meeting, beginning at pages 453.

¹⁵⁵ Milberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 4 FED. CTS. L. REV. 131, 182 (2011).

enactment of the proposal would only “encourage sloppy behavior.”¹⁵⁶

The defense bar and corporate counsel generally supported the proposal, but questioned of the choice of “willfulness” as a limitation on spoliation sanctions. In some jurisdictions, a party acts “willfully” if it merely acts intentionally - quite apart from the purpose of the action. Some also questioned the fairness, completeness and efficacy of the listed “factors” in assessing conduct and suggested that they be dropped or modified.

Many criticized the exception from culpability requirements for sanctions involving “irreparable” deprivation. Their concern was that the exception had the potential to “swallow” the entire rule limiting the imposition of harsh measures,¹⁵⁷ prompting some to suggest it should be dropped and the rule confined to ESI.

Members of the judiciary pushed back on the notion that severe restrictions on discretion of courts were needed to deal with over-preservation. Some urged a focus on “curative measures” in the absence of bad faith.¹⁵⁸ Others noted that

¹⁵⁶ *Sekisui American v. Hart*, 945 F. Supp.2d 494, 504, n.51 (S.D.N.Y. 2013) (the proposed rule “creates perverse incentives”) (Scheidlin, J).

¹⁵⁷ The Committee considered (but eventually dropped) conditioning the availability of such relief on a minimal showing of “negligent or grossly negligent” conduct. See Thomas Y. Allman, *Digital Discovery & e-Evidence*, 13 DDEE 9 (2013).

¹⁵⁸ Hon. James C. Francis IV, letter to Rules Committee, 5-6 (January 10, 2014), available at http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_usdc_southern_district_of_new_york_james_francis_1_10_14.pdf (proposing that Rule 37(e) authorize remedies “no more severe than that necessary to cure any

a focus on “curative measures” logically required some prior showing of prejudice.¹⁵⁹

D. The Revised Proposal

After the close of the public comment period, the Subcommittee developed a revised version of Rule 37(e) and amended the proposal shortly before the April 2014 Rules Committee meeting. At the April 2014 meeting, the Committee adopted it.¹⁶⁰

The revised Rule replaces the 2006 rule and applies only to ESI. It specifies the measures available when ESI is “lost” and the findings necessary to justify those measures, foreclosing reliance on inherent authority as to “when certain measures should be used.”¹⁶¹ It seeks to address the “significantly different standards for imposing sanctions or curative measures” that have caused confusion and contributed to over-preservation.¹⁶²

In doing so, the Committee pulled back from imposing broad limitations on

prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith”).

¹⁵⁹ John K. Rabiej, Director, Duke Law Center for Judicial Studies, September 11, 2013 (noting that “it seems a bit odd not to refer to a prejudice standard for a curative measure”).

¹⁶⁰ See Tera Brostoff, *Advisory Committee Makes Unexpected Changes to 37(e)*, Approves Duke Package, BNA EDISCOVERY RESOURCE CENTER, April 14, 2014, available at <http://www.bna.com/advisory-committee-makes-n17179889550/>.

¹⁶¹ Committee Note, 38.

¹⁶² *Id.* (“[t]hese developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough”).

court discretion.¹⁶³ As a result, the revised culpability standard became a “rifle shot” aimed at rejecting the logic of *Residential Funding*¹⁶⁴ only as to harsh measures with case-terminating potential.

As revised, Rule 37(e) will provide:

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

Rule 37(e) is applicable only to losses of ESI that “should have been preserved in anticipation or conduct of litigation.” This is based on the common-law duty and

“does not attempt to create a new duty to preserve.”¹⁶⁵

E. Breach of Duty to Preserve

In ascertaining whether a common law duty to preserve has been triggered, the Committee Note notes that a “variety of events may alert a party to the prospect of litigation” which may be “triggered or clarified by a court order in the case.”¹⁶⁶ The Note also predicts that “preservation orders may become more common,” in part because of the new amendments to Rules 16 and 26 which encourage discovery plans and scheduling orders that address preservation.¹⁶⁷ The Note encourages the prompt seeking of judicial guidance if the parties cannot reach agreement about preservation issues.¹⁶⁸

The Note also alludes to the role of counsel in becoming familiar with client information systems and digital data (“including social media”) and emphasizes that specificity about such matters may need to be provided in discussions of “the appropriate” preservation regime.¹⁶⁹

¹⁶⁵ Committee Note, 39.

¹⁶⁶ Committee Note, 39 - 40 (also noting that an independent obligation does not necessarily mean that a party had a duty with respect to the litigation).

¹⁶⁷ Proposed Rules 16(b)(3)(B)(iii) and 26(f)(3)(C), discussed at Section (2), *infra*.

¹⁶⁸ Committee Note, 40. The Note tempers the one-sided nature of the initial “factor” which seemed to place the burden on the preserving party. It also drops the reference, in earlier drafts, to the fact that “[u]ntil litigation commences, reference to the court is not possible.” Draft Rule 37(g) and Committee Note, 22 (copy in March 2012 Rules Committee Agenda Book, at 270 of 644).

¹⁶⁹ Committee Note, 42.

¹⁶³ Subcommittee Report, 4 (2014), April 2014 Rules Committee Agenda Book (at 372) (witnesses critical of high costs of preservation were unable to “provide any precise prediction of the amount that would be saved by reducing the fear of sanctions”).

¹⁶⁴ *Residential Funding Corp v. DeGeorge*, 306 F.3d 99, 108 (2nd Cir. 2002) (the culpable state of mind factor is satisfied by a showing that the evidence was destroyed “knowingly, even if without intent to [breach a duty to preserve it] or negligently”) (emphasis in original).

In order to establish a breach of duty, a party must also demonstrate that the contents of the missing ESI would have been both relevant to the claims or defenses in the action and that its absence is prejudicial.¹⁷⁰ A finding of culpable conduct may also be required.¹⁷¹ Prevailing Circuit precedent and the amended scope of discovery in revised Rule 26(b)(1) will influence these requirements.¹⁷² Rule 37(e) provides that its provisions are available only if the missing ESI “should have been preserved.”

Rule 37(e) bars any imposition of remedies under the rule unless the loss was caused by a failure to take “reasonable steps,” a requirement which “embrace[s] a form of ‘culpability.’”¹⁷³ As the Note explains, because of the “ever-increasing volume of [ESI] and the multitude of devices that generate such information, perfection in preserving all relevant [ESI] is often impossible.”¹⁷⁴

F. Reasonable Steps

The Committee Note makes it clear that a finding of “reasonable steps” may be

made even where “the loss of information occurs despite the party’s reasonable steps to preserve.” In contrast, some courts apply the logic that any loss of discoverable information, regardless of the circumstances, establishes a negligent breach of the duty to preserve.¹⁷⁵

Under Rule 37(e), courts must make the assessment of reasonability without blind adherence to “bright-line” rules, since the Rule should not automatically impose sanctions if information is lost.¹⁷⁶ The Committee Note calls for the use of proportionality in assessing the reasonableness of the steps undertaken¹⁷⁷ and acknowledges the relevance of routine, good faith conduct in the operation of information systems. In so doing, the Note

¹⁷⁵ *Quraishi v. Port Authority*, 2015 WL 3815011, at *6 (S.D. N.Y. June 18, 2015) (“once a duty to preserve arises, any destruction of [discoverable] evidence is, as a minimum, a negligent act” citing *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)). In *Quraishi*, the court inferred that the missing evidence was relevant, imposed a permissive spoliation inference, and used the inference of spoliation as justification for the denial of a motion for summary judgment.

¹⁷⁶ Minutes, May 2014 Standing Committee Meeting, 6 (Campbell, J.) (the “reasonable steps” language is intended to emphasize rejection of strict liability). Compare *Apple v. Samsung Electronics*, 888 F. Supp.2d 976, 991-992 (N.D. Cal. 2012) (a failure to suspend any applicable policy involving deletion is a *per se* of breach of duty) with *Automated Solutions v. Paragon Data Sys.*, 756 F.3d 504, 516 (6th Cir. 2014) (“we have declined to impose bright-line rules, leaving it to a case-by-case determination of whether sanctions are necessary”).

¹⁷⁷ Committee Note, 41-42 (“[a] party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms”).

¹⁷⁰ *Eli Lilly and Co. v. Air Express*, 615 F.3d 1305, 1318 (11th Cir. 2010) (the destroyed evidence must be “relevant to a claim or defense such that the destruction of that evidence resulted in prejudice”).

¹⁷¹ *Scott v. Moniz*, 2015 WL 3823705 (W.D. Wash. June 19, 2015) (a court must determine the level of culpability of the spoliator as well as “the prejudice suffered by the non-spoliating party”).

¹⁷² See discussion at Section (3), *infra*.

¹⁷³ Minutes, April 10-11, 2014 (quoting Judge Grimm) (at lines 940-943).

¹⁷⁴ Committee Note 40-41.

adopts the advice of Commentaries like that of the Sedona Conference¹⁷⁸ and reflects existing case law rejecting absolutist approaches to litigation holds.¹⁷⁹

While the 2006 Committee Note implied a *per se* requirement as to use of formal litigation holds once the duty to preserve attaches,¹⁸⁰ the current Note emphasizes that perfection is not required and that “the prospect of litigation may call for reasonable steps to preserve information by intervening in [a] routine operation.” A tolerance of imperfect compliance exists in other relevant contexts which require “reasonable steps” to ensure compliance.¹⁸¹ As noted in cases applying the business judgment rule, compliance efforts “must be reasonable,

not perfect.”¹⁸² In the typical case, “[r]esponding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving” their own ESI.¹⁸³ However, some caution that the wide discretion of the courts to determine the meaning of “reasonable steps” makes the requirement meaningless.¹⁸⁴

G. Additional Discovery

If the court identifies a breach of duty to preserve, the court must first determine whether “additional discovery” could mitigate the prejudice by restoring or replacing the missing ESI before invoking the authority to act under Rule 37(e). The Committee Note flatly states that “[i]f the

¹⁷⁸ *The Sedona Conference® Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 291 (2010); see also *Interim Final version*, 14 SEDONA CONF. J. 155 (2013). The initial draft of the Duke “Guidelines and Suggested Practices” (2015), in contrast, focuses on the implications of proportionality for discovery, not preservation. See <https://law.duke.edu/judicialstudies/research/>.

¹⁷⁹ See e.g., *Chin v. Port Authority*, 685 F.3d 135, 162 (2nd Cir. 2012) (“[we] reject the notion that a failure to institute a ‘litigation hold’ constitutes gross negligence *per se*. *Contra* Pension Comm.”).

¹⁸⁰ 234 F.R.D. 219, 374 (2006) (“intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold’”). See, e.g., *Skyline Steel v. Pilepro*, 2015 WL 1881114, at *12, n. 8 (S.D. N.Y. April 24, 2015) (citing the 2006 Committee Note in finding breach of duty to preserve ephemeral data ordinarily overwritten).

¹⁸¹ Thomas Y. Allman, *‘Reasonable Steps’: A New Role for a Familiar Concept*, 14 DDEE 591 (2014) (parties that take “reasonable steps” to make compliance programs effective are entitled to benefits under the U.S. Sentencing Guidelines even when efforts fail to prevent breaches).

¹⁸² *Lyondell Chemical v. Ryan*, 970 A.2d 235, 243 (Del. Sup. 2009) (instead of questioning whether a party “did everything that they (arguably) should have done,” the proper inquiry is “whether [they] utterly failed to attempt” to meet their responsibilities).

¹⁸³ *Cache La Poudre v. Land O’Lakes*, 244 F.R.D. 614, 628 (D. Colo. 2007) (citing SEDONA CONFERENCE® BEST PRACTICE RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, 31 (2nd Ed. 2007) [Sedona Principle Six]).

¹⁸⁴ BloombergBNA eDiscovery Resource Center (Proportionality), July 31, 2015, *supra* note 92, quoting remarks of the Hon. Shira Scheindlin at a Panel at the ABA Annual Meeting in Chicago to the effect that every judge will have a different view of what constitutes ‘reasonable steps’ to preserve information.

information is restored or replaced, no further measures should be taken.”¹⁸⁵

This principle has solid roots in the common law. For example, in the *Delta/AirTran Baggage Fee Litigation*, the court held that sanctions were not warranted because the parties were afforded the opportunity to depose all relevant Delta employees who may have played a role in the decisions at issue.¹⁸⁶ In the current era of storage of ESI in “common source” locations, shared areas and with email exchanged between multiple senders and recipients, many copies may be retrieved from other sources, including those otherwise “inaccessible.”¹⁸⁷

The order of any additional discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.¹⁸⁸

H. Subdivision (e)(1)

In the event that “additional discovery” does not restore or replace the missing ESI, Subdivision (e)(1) authorizes a court

to order curative measures *only* “upon finding prejudice to another from the loss of information.”¹⁸⁹ The rule permits a court to “order measures no greater than necessary to cure the prejudice.” The goal is the familiar one of restoring the prejudiced party to the same position it would have been in absent the failure to preserve the missing ESI.¹⁹⁰

This reflects the principle that a lack of prejudice precludes a finding of spoliation and entitlement to sanctions. Moreover, a finding of prejudice “does not require the court to adopt measures to cure every possible prejudicial effect.”¹⁹¹ The burden is on the moving party to demonstrate prejudice, unless the court determines otherwise in the exercise of its discretion. The Committee Note observes that placing the burden on moving parties can be fair in some circumstances and not in others.¹⁹²

Courts may choose from a broad range of measures such as those listed in 37(b)(2)(A)¹⁹³ or craft a case-specific remedy, such as a monetary award designed to reduce financial prejudice. In most cases, this will mean an award of

¹⁸⁹ Committee Note, 43.

¹⁹⁰ *West v. Goodyear Tire & Rubber*, 167 F.3d 776, 779 (2nd Cir. 1999) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998)).

¹⁹¹ Committee Note, 44.

¹⁹² Committee Note, 43 (“[r]equiring the party seeking curative measures to prove prejudice may be reasonable”).

¹⁹³ Rule 37(b)(2)(A) suggests (i) establishing designated facts as established; (ii) precluding support of claims or defenses or introduction of evidence; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing the action in whole or in part; (vi) rendering default judgment; or treating failure to obey an order as contempt of court.

¹⁸⁵ Committee Note, 42. This is akin to results in cases such as *In re Pfizer*, 288 F.R.D. 297, 318 (S.D.N.Y. Jan. 8, 2013) where “partially inadequate preservation efforts” were cured by additional efforts once other sources were identified although the efforts “may not have been perfect.”

¹⁸⁶ *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 770 F. Supp.2d 1299, 1311 (N.D. Ga. 2011).

¹⁸⁷ *In re Ethicon*, 299 F.R.D. at 523 (describing alternative sources of ESI other than “custodial files,” which consist of hard copy documents and ESI collected from personal computers).

¹⁸⁸ Committee Note, 42.

reasonable expenses, including attorneys' fees, as is common today.¹⁹⁴ It seems unlikely that a court will be authorized to impose a "fine" untethered to remediation of prejudice to punish for failure to meet preservation obligations.¹⁹⁵

The Committee Note explains that it would be inappropriate to strike pleadings or preclude evidence of the "central or only" claim or defense in a case, given the limitations under Subdivision (e)(2). Measures which have the "effect" of the prohibited measures are themselves excluded.¹⁹⁶ In *Haley v. Kolbe & Kolbe Millwork*,¹⁹⁷ for example, a court refused to instruct a jury that a party had "breached their duty to preserve evidence" because "there would be no purpose [for it] except to invite the jury to draw such an [adverse] inference."

Subdivision (e)(2) apparently does not prevent a court from allowing a party to present evidence of spoliation and "to argue whatever inferences they hope the jury will draw."¹⁹⁸ According to the

Committee Note, an instruction which merely allows a jury to consider spoliation evidence "along with all the other evidence in the case" does "not involve instructing a jury it may draw an adverse inference from loss of information" if it is "no greater than necessary to cure prejudice."¹⁹⁹

This appears to embrace the practice of some courts to admit evidence of a failure to preserve where there is insufficient proof of culpability to impose an adverse inference.²⁰⁰ By definition, moving parties will have already shown that a breach of duty – involving both a failure to take reasonable steps (a form of culpability) and actual prejudice – has occurred.

However, the Committee did not justify the imposition of a permissive adverse inference as to missing ESI by simply describing it as not intended to "punish."²⁰¹ Despite assertions to the contrary,²⁰² jury instructions about missing evidence do not always restore the

acted in bad faith while finding negligent spoliation caused prejudice in the action).

¹⁹⁹ Committee Note, 46 (also acknowledging viability of "traditional missing evidence" instructions relating to material a party has "in its possession at the time of trial").

²⁰⁰ *Russell v. U. of Texas*, 234 Fed. Appx. 195, 208 (5th Cir. 2007) ("the jury heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit").

²⁰¹ *Mali v. Federal Insurance*, 720 F.3d 387, 393 (2nd Cir. 2013) ("[s]uch an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers").

²⁰² *Cf. Hon. Shira A. Scheindlin and Natalie M. Orr, The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 *FORDHAM L. REV.* 1299, 1315 (2014) ("courts may issue a *Mali*-type permissive instruction that leaves all factual findings, including whether spoliation occurred, to the jury").

¹⁹⁴ *Geiger v. Z-Ultimate Self Defense Studios*, 2015 WL 176224 (D. Colo. Jan. 13, 2015) (awarding a "monetary sanction" where "impossible to fashion a proportional evidentiary sanction").

¹⁹⁵ *Cf. Passlogix v. 2FA Technology*, 708 F. Supp.2d 378, 422 (S.D.N.Y. 2010) (imposing a \$10K fine payable to court to punish for failure to institute a litigation hold) *with Haeger v. Goodyear Tire, ___ F3d ___, 2015 WL 4393767*, at *15 (9th Cir. July 20, 2015) (monetary award to compensate for damages suffered by bad faith conduct where "[n]ot one dime was awarded to the government or the court" is not punitive).

¹⁹⁶ Committee Note, 44.

¹⁹⁷ 2014 WL 6982330, at *2 (W.D. Wisc. Dec. 10, 2014).

¹⁹⁸ *See, e.g., Montoya v. Newman*, 2015 WL 4095512, at *12 (D. Colo. July 7, 2015) (declining imposition of severe sanctions because of failure to demonstrate that defendant

evidential balance and when they do, it is only “by serendipity.”²⁰³ An adverse inference instruction “may tip the balance in ways the lost evidence never would have”²⁰⁴ and impose a “heavy penalty for losses” of ESI, creating “powerful incentives to over-preserve, often at great cost.”²⁰⁵

Courts must, in any event, take care that the probative value of such a practice is not outweighed by the danger of undue prejudice or misleading the jury.²⁰⁶ In *Decker v. GE Healthcare*, for example, jury instructions on missing evidence were refused because to do so would give the issue “a lot more importance that it has had in this trial.”²⁰⁷

I. Subdivision (e)(2) Limitations

Subdivision (e)(2) limits court authority to impose harsh and potentially case determinative measures by requiring a

showing of heightened culpability. A party must have “acted with the intent to deprive another party of the information’s use in the litigation” before a court may: (1) presume that lost ESI was unfavorable or (2) instruct a jury that it “may or must presume” that lost ESI was unfavorable or (3) dismiss the action or enter a default judgment.²⁰⁸

The “intent to deprive” requirement rejects the logic in *Residential Funding* that merely negligent behavior (or even grossly negligent conduct) is sufficient to justify an adverse inference jury instruction.²⁰⁹ The goal is to achieve a uniform national rule, based on the approach historically used in other Circuits.²¹⁰ The *Residential Funding* approach does not supply sufficient indicia of knowledge of the impropriety to constitute an evidentiary admission based on consciousness of guilt.²¹¹

The Committee Note also cautions that severe measures should not be used if lesser measures would be sufficient to redress the loss. The remedy should fit the wrong, and sanctions should be proportional to the prejudice involved. Severe measures should not be used when the information lost was relatively unim-

²⁰³ Dale A. Nance, *Adverse Inference About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering By Parties to Litigation*, 90 BOSTON U. LAW REV. 1089, 1128 (2010)(courts confuse the deterrent and protective functions of sanctions with the almost invariably ephemeral goal of eliminating the unknowable evidential damage from negligent destruction of evidence).

²⁰⁴ Committee Note, 45.

²⁰⁵ June 2014 RULES REPORT, B-18.

²⁰⁶ GORELICK ET AL., DESTRUCTION OF EVIDENCE § 2.4 (2014) (“DSTEVID s 2.4”) (Once “a jury is informed [by the court] that evidence has been destroyed, the jury’s perception of the spoliator may be unalterably changed,” regardless of the intent of the Court).

²⁰⁷ *Decker v. GE Healthcare*, 770 F.3d 378, 397-398 (6th Cir. 2014).

²⁰⁸ Committee Note, 44.

²⁰⁹ *Id.*, at 45 (the rule “rejects cases such as *Residential Funding Corp.*”).

²¹⁰ See, e.g., *Aramburu v. Boeing*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“the adverse inference must be predicated on the bad faith of the party destroying the records”).

²¹¹ Committee Note, 45 (“negligent or even grossly negligent behavior does not logically support that inference”).

portant or lesser measures would be sufficient to redress the loss.²¹²

J. Intent to Deprive

The “intent to deprive” requirement is “akin to bad faith, but defined even more precisely.”²¹³ It reflects a focus on the reasons for purposeful action.²¹⁴ Some have expressed concern, however, that a showing of reckless or willful conduct will suffice.²¹⁵ That is unlikely.²¹⁶ A showing of such action merely requires intentional conduct, regardless of the specific intent involved.²¹⁷ The requirement of intent to deprive “is the toughest standard to prove

that the Advisory Committee could have adopted.”²¹⁸

It will remain possible, of course, as in cases involving “bad faith,” to infer the presence of an “intent to deprive” where the totality of the circumstances warrant that finding.²¹⁹ This may be comparatively obvious in cases of egregious conduct.²²⁰ However, it will not be possible to do so when the more logical inference is the party was disorganized, distracted, technically challenged, or overextended.²²¹ Mere suspicions will not be enough.²²²

K. Assessment: The Impact of Rule 37(e)

Analysts have described the new rule as “equitable” since, while retaining authority to sanction in some cases, the focus is on “solving the problem, not punishing the malefactor.”²²³ However, Rule 37(e)(1) will still permit the imposition of significant measures based on limited or

²¹² Committee Note, 47. See, e.g., *Schmid v. Milwaukee Elec. Tool*, 13 F.3d 76, 79 (3rd Cir. 1994) (courts should “select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim”).

²¹³ June 2014 RULES REPORT, B-17.

²¹⁴ *Rimkus Consulting v. Cammarata*, 688 F. Supp.2d, 598, 647 (S.D. Tex. 2010) (adverse inference permissible only if “the jury finds that the defendants deleted emails to prevent their use in litigation”). See Discovery Subcommittee Meeting Notes, March 4, 2014, 2) (the formulation is “very similar to the one used by Judge Rosenthal in *Rimkus*”). See also *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013) (destruction “for the purpose of hiding adverse information”).

²¹⁵ Favro, *The New ESI Sanctions Framework*, *supra* note 145, at, ¶¶ 25-26 (citing Pension Comm. v. Banc. of Am. Sec., 685 F. Supp.2d 456, 465 (S.D.N.Y. 2010)).

²¹⁶ As one Committee Member put it “[n]ot even [a] reckless loss will support those measures.” April 2014 Minutes, 18 (lines 785-786).

²¹⁷ *Victor Stanley Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 530 (D. Md. 2010) (“[c]onduct that is in bad faith must be willful, but . . . for willfulness, it is sufficient that the actor intended to destroy the evidence”).

²¹⁸ Patricia W. Moore, *Civil Procedure & Federal Courts Blog*, September 12, 2014.

²¹⁹ *Weitzman v. School District 89*, 2014 WL 4269074, at *3 (N.D. Ill. Aug. 29, 2014) (bad faith inferred since it was “highly unlikely” that evidence was “unknowingly or innocently deleted”).

²²⁰ *Hosch v. BAE Systems*, 2014 WL 1681694, at *5 (E.D. Va. April 24, 2014).

²²¹ *Victor Stanley*, 269 F.R.D. at 526.

²²² *Sherwin-Williams v. JB Collision Services*, 2015 WL 4077732, at *4 (S.D. Cal. July 6, 2015) (“suspicion notwithstanding” the court “cannot conclude that [the party] acted with intentional bad faith”).

²²³ Charles S. Fax, *Less is More: Proposed Rule 37(e) Strikes the Right Balance*, ABA Litigation News, 18 (Summer 2014) available at http://apps.americanbar.org/litigation/litigationnews/civil_procedure/073114-federal-rules-balance.html.

non-existent findings of culpability.²²⁴ To some, this means that the rule has not been “watered down” and courts may “sanction” parties who negligently destroyed evidence.²²⁵

An obvious question, therefore, is whether the Rule will cause compliant parties to suspend costly over-preservation practices. After all, perfection is not required provided that the party has undertaken “reasonable steps.”²²⁶

One hesitates to predict that courts accustomed to applying *per se* sanction standards will react differently under the new rule in cases of missing ESI. Those courts may continue to apply cases like *Pension Committee*,²²⁷ for example, while applying the “reasonable steps” logic. If that proves to be the case, the goal of reducing over-preservation will be hard to achieve.

Be that as it may, the “intent to deprive” culpability standard in Subsection (e)(2) could have consequences for courts accustomed to applying *Residential*

Funding. It should reduce the reflexive imposition of adverse inference jury instructions like those in *Zubulake V*,²²⁸ *Pension Committee*²²⁹ and *Sekisui v. Hart*²³⁰ under the circumstances described in those cases. However, that may be of limited comfort, since there is every reason to suspect that those courts will readily conclude that the same facts support a finding of “intent to deprive.”²³¹

Moreover, even courts that decline to impose adverse inference jury instructions may choose to permit juries to hear evidence and receive argument about possible inferences from the conduct to address possible prejudice.²³² It is difficult to predict the impact of Rule 37(e) in jurisdictions that currently adhere to *Residential Funding*.

Finally, while Rule 37(e) applies only to losses of ESI, its underlying principles may well be applied to disputes involving missing hard copy communications, reports, surveillance videos and the like. There is no principled difference involved,

²²⁴ As one astute in-house observer puts it, “[s]o we will still have a system where mere negligence or human error (viewed with hindsight) may form the basis for very significant sanctions/penalties.” (Communication, April 2014, copy on file with author).

²²⁵ Griffin, *A Voice for Injured Plaintiffs*, *supra* note 17, at 20, 22 (“[i]n the end, the committee preserved the rights of district court judges to remedy the negligent spoliation of evidence”).

²²⁶ See, e.g., *Malone*, 2015 WL 1470334 at *3 (refusing to sanction mistakes, since the “standard is, after all, reasonableness, not perfection”).

²²⁷ *Pension Committee*, 685 F. Supp.2d at 465 (failure to utilize written litigation hold is grossly negligent); *abrogated* by *Chin*, 685 F.3d at 162 (rejecting “the notion that a failure to institute a ‘litigation hold’ constitutes gross negligence *per se*”).

²²⁸ *Zubulake v. UBS Warburg* (“Zubulake V”), 229 F.R.D. 422, 439-440 (S.D. N.Y. 2004).

²²⁹ *Pension Committee*, 685 F. Supp.2d at 496.

²³⁰ *Sekisui American*, 945 F. Supp.2d at 509-510.

²³¹ See, e.g., *HM Electronics v. R.F. Technologies*, 2015 WL 4714908, at *12 & *30 (S.D. Cal. Aug. 7, 2014) (acknowledging that the new Rule does not require perfection but imposing adverse inference because “even if [revised Rule 37(e) applied] the Court would reach the same result”).

²³² See, e.g., *Savage v. City of Lewisburg, Tenn.*, 2014 WL 6827329, at *3 (M.D. Tenn. Dec. 3, 2014) (“Plaintiff may argue that the jury should infer that the unavailable audio recordings contain evidence that Plaintiff’s fellow patrol officers failed to provide her adequate backup assistance after she filed sexual harassment complaints.”).

and uniformity of result is a logical goal. However, *Silvestri v. GM* persuasively illustrates the wisdom of continuing to exclude tangible property loss cases from the requirement of heightened culpability “when “the prejudice [to the party seeking relief] is extraordinary, denying it the ability to adequately defend its case.”²³³

²³³ 271 F.3d 583, 593 (4th Cir. 2001) (GM was denied “the only evidence from which it could develop its defenses adequately.”).

APPENDIX

Approved Rules Text (as transmitted to Congress)

Rule 1 Scope and Purpose

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

Rule 4 Summons

(d) Waiving Service. [NOTE: TEXT OF AMENDED RULE AND THE APPENDED FORMS ARE NOT REPRODUCED HERE]

Rule 4 Summons

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

Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

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

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

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

(iii) provide for disclosure, ~~or~~ 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 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.*

aside a final default judgment under Rule 60(b).

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

Rule 84. Forms

[Abrogated (Apr. ____, 2015, eff. Dec. 1, 2015.)

APPENDIX OF FORMS

[Abrogated (Apr. ____, 2015, eff. Dec. 1, 2015.)