The Civil Rules Package as Adopted by the Standing Committee (May, 2014)

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Introduction
The Rules Package

I. Introduction

This Memorandum describes the package of proposed amendments to the Federal Rules of Civil Procedure adopted by the Committee on Rules of Practice and Procedure of the Judicial Conference (the "Standing Committee") at its meeting of May 29, 2014, including several post-Meeting changes.[2] The amendments were recommended by the Civil Rules Advisory Committee (the "Rules Committee") in its Report of May 2, 2014.[3] The vote to approve the full package was unanimous.

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[1] © 2013 Thomas Y. Allman. Mr. Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® WG 1 on E-Discovery and a former Chair of the E-Discovery Committee of Lawyers for Civil Justice.

[2] The principal changes involved a rewording of Rule 37(e), certain changes to Rule 34 made during the meeting itself and changes to the Committee Notes to Rules 26 and 37(e). The changes are referenced in this Memorandum and in Appendix A and B.

[3] The May 2, 2014 Committee Report (hereinafter "2014 RULES REPORT") is currently available only in the Agenda Book for the Standing Committee Meeting, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks.

The amendments reflect, both in the text and proposed Committee Notes, significant evolution and revisions from the original proposals first released in August, 2013.[4]

For example, attempts to reduce the presumptive limits on certain discovery devices was abandoned and the proposal to amend Rule 26(b)(1) to incorporate proportionality factors was revised, as was the proposal to replace current Rule 37(e) with a new provision covering all forms of discoverable information. Instead, the revised proposal is limited to failures to preserve ESI that should have been preserved.

The recommendations of the Rules Committee had been approved by the Rules Committee at its Meeting of April 10-11, 2014 at Portland, Oregon, including a revision of the proposed Rule 37(e) replacement developed the night before its adoption.[5]

The next step is the review by Judicial Conference of the United States in September, 2014, preparatory to review and vote by the Supreme Court. It is our understanding that the Report of the Standing Committee will not be made available publicly until after the Judicial Conference meets. Proceedings of the Conference are not open to the public.

If adopted in full or in part by the Judicial Conference and the Supreme Court, and if submitted to Congress prior to May 1, 2015, any surviving amendments would become effective on December 1, 2015 if legislation is not adopted preventing completion of the process.

To facilitate review of discussions in this Memorandum, the text of the amendments adopted by the Standing Committee appear, together with the known changes made during and after the Meeting, collectively, as Appendices A and B (Rule 37(e) only). For comparison purposes, however, the original 2013 proposal for Rule 37(e) is reproduced in Appendix C.

Background

Despite criticism by some that the Rules Committee "shrinks from boldness,"[6] the package of amendments can be seen as a decisive response to "a steady chorus of complaints from parts of the bar about the increasing costs and delays in federal

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[4] The original 2013 Rules Package released for public comment may be found at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf. The Committee Report of May 2013, as supplemented in June 2013, contains the relevant material beginning at page 259 of 354. That Report is sometimes referred to herein as the "2013 RULES REPORT."

[5] The related Committee Note describing the revised Rule 37(e) was not publically available until release of Agenda Book for the Standing Committee prior to its May 2014 Meeting.

[6] Richard D. Freer, The Continuing Gloom About Federal Judicial Rulemaking, 107 NW. U. L. REV. 447, 453 (2013)(listing difficulties for Committee caused by possibility of congressional interference, political pressures and inconsistent signals from the Supreme Court).

litigation."[7] The process began with the May, 2010 Conference on Civil Litigation held by the Committee at the Duke Law School, which was convened to ascertain whether it was necessary to "totally rethink the current approach taken by the civil rules."[8]

The Duke Conference stimulated a number of scholarly papers and involved highly motivated dialogue stretching over two days.[9] Key "takeaways" were the need for better case management, application of the long-ignored principle of "proportionality" and cooperation among parties. In addition, through the work of the E-Discovery Panel, attention was drawn to the need for uniform national rules regarding preservation and spoliation.[10]

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

Hearings and Public Comments

The Rules Committee conducted three Public Hearings in Washington, D.C, Phoenix and Dallas that involved over 120 testifying witnesses. In addition, the Committee solicited and received 2351 written comments. The comments are available on the "Regulations.gov" website, accessible via the U.S. Courts website, [11] and are summarized in a Committee Agenda book.[12]

There were two phases to the public comment period. During the first, or primary phase, Lawyers for Civil Justice ("LCJ")[13] and the American Association for Justice ("AAJ," formerly "ATLA")[14] provided competing appraisals of virtually all proposals. However, equally expansive comments were also submitted by the Federal

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[7] Hon. Mark B. Kravitz, Examining the State of Civil Litigation, July 2010, available at http://www.uscourts.gov/News/TheThirdBranch/10-07-01/Examining_the_State_of_Civil_Litigation.aspx.
[8] Mary Kay Kane, Pretrial Procedural Reform and Jack Friedenthal, 78 GEO. WASH. L. REV. 30, 38 (2009).
[9] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 540-541 (2010).
[10] Executive Summary, Gregory P. Joseph, May 11, 2010 (with proposed "Elements" of a preservation rule), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Executive%20Summary.pdf.
[11] *See* "Submit or Review Comments on the Proposed Amendments to the Federal Rules of Civil Procedure," at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.
[12] Transcripts of the hearings (D.C., Phoenix and Dallas) are available at http://www.uscourts.gov (scroll to Rules and Policies). Detailed summaries of the Comments and Submissions were included in the April 2014 Agenda Book submitted prior to the Rules Committee meeting in Portland Oregon on April 10-11, 2014, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.
[13] LCJ Public Comment to the Advisory Committee on Civil Rules, August 30, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267, as supplemented, February, 2014, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0540.
[14] AAJ Comments, December 19, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372.

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, national and local Bar Associations.

The bulk of support for the package came from representatives of corporate entities or affiliated advocacy entities. In addition, over 300 General Counsel and executives endorsed a joint Statement of Support. However, individuals and many of the organizations noted above also supported many of the proposals.

The primary opposition was expressed by representatives of individual claimants and members of the academic community, a number of whom also filed joint comments. Opposition was also expressed by some bar entities, certain District and Magistrate Judges and a few members of the House and Senate.[15] Most of the opposition centered on the proposed changes to the scope of discovery in Rule 26(b)(1) and the lowering of presumptive limits, as described in more detail by the Center for Constitutional Litigation ("LCJ"), an appellate firm for the plaintiffs' bar.[16] A few law review articles were published on the merits of the original proposals.[17]

A second phase of public comment occurred in response to the revised Proposals which became available in March, 2014 after the close of the Public Comment period. The two operative subcommittees - the Duke Subcommittee and the Discovery Subcommittee – released recommendations for substantial revisions of certain proposals prior to the April Rules Meeting in Portland.[18] These proposed revisions (and refusals to adopt make other changes) prompted both LCJ[19] and CCL[20] to provide further input to both the Rules Committee and the Standing Committee.[21]

While substantial changes were made to both Proposed Rule 26(b)(1) and to Proposed Rule 37(e), the Standing Committee and the Rules Committee decided that replication of either or both was not required."[22] Under the applicable Judicial Conference Guidelines, republication is not necessary when a rules committee decides that it would not assist the work of the committee.[23]

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[15] *See* U.S. Senate Committee reviews Proposals, at http://www.legalnews.com/Detroit/1382969. The Chair of both the Judiciary Committee and the Subcommittee, joined by three other Senators, subsequently wrote to the Rules Committee on January 8, 2014 to urge that the Committee consider other alternatives.
[16] CCL Preliminary Report on Comments on Proposed Changes to [FRCP], May 12, 2014, 5, copy at http://www.cclfirm.com/files/Report_050914.pdf.
[17] *See, e.g.*, 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, 197 (2013).
[18] The Agenda Book containing the Subcommittee Reports (released on March 21, 2014) may be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.
[19] LCJ Comment, April 4, 2014 (relating to revised Rule 37(e) and LCJ Comment, April 25, 2014 (relating to related Committee Note); both available at http://www.lfcj.com/.
[20] CCL Letter, April 9, 2014, copy at http://www.cclfirm.com/files/040914_Comments.pdf.
[21] LCJ Comment, May 22, 2014 (commenting on final proposals), copy at http://www.lfcj.com/. .
[22] 2014 RULES REPORT, 46 (republication is not necessary).
[23] *See* Procedures Governing the Rulemaking Process, § 440.20.50 (2011)(a rule "should be republished" when substantial changes are made "*unless* the committee determines that it would "not be necessary to achieve adequate public comment and would not assist the work of the rules committee").

II. The Rules Package

We discuss the individual Rule proposals in numerical order based on the primary Rule involved.

(1) Cooperation (Rule 1)

Cooperation was heavily emphasized at the Duke Conference as consistent with the Sedona Conference® Cooperation Proclamation and its effort to change the culture of discovery.[24] Many Local Rules and other e-discovery initiatives currently invoke cooperation as an aspirational standard.[25]

The Standing Committee concurred with the recommendation that Rule 1 be amended so as to be "construed, ~~and~~ administered *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." (new material in italics).

The proposed amendment is intended to emphasize that "parties share the responsibility to employ the rules" to secure the just, speedy and inexpensive determination of every action.[26] The proposed Committee Note observes that "most lawyers and parties cooperate to achieve those ends" and that "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

It was announced during the Standing Committee meeting of May 29, 2014 that the Rules Committee had accepted a suggestion that the Committee Note would also state that nothing in the rule was intended to create a basis for sanctions against parties that did not, if fact, cooperate.[27]

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

The Standing Committee approved the individual recommendations of the Rules Committee designed to increase active case management of discovery by the judiciary, many of which were based on suggestions originally made at the Duke Conference.[28]

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[24] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[25] *See* [MODEL] STIPULATED ORDER (N.D. CAL), ¶ 2, copy at http://www.cand.uscourts.gov/eDiscoveryGuidelines ("[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation covered by the Order]).
[26] Committee Note, 2014 RULES REPORT, 17.
[27] Thomas Y. Allman, Standing Committee Oks Federal Discovery Amendments, Law Technology News, June 2, 2014; copy at http://www.lawtechnologynews.com/id=1202657565227?slreturn=20140505130019 (hereinafter "Allman, *supra*, Stdg. Comm. Mtg.").
[28] *See, e.g.,* Paul W. Grimm and Elizabeth J. Cabraser, The State of Discovery Practice in Civil Cases, 5 ("the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process").

The proposals were not controversial during the Public Comment period, with the exceptions noted below.[29] In several instances, the Rules Committee made changes in response.

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

The time limits in Rule 4(m) governing the service of process are to be reduced in number from 120 to 90 days, rather than the initial proposal to reduce the time to 60 days."[30] Some objections were made and dealt with in the final proposals.

Timing (Shortening of issuance of Scheduling Orders)

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

Additional explanatory material was added to the Committee Note to Rule 16 after Public Comments emphasizing the discretion to provide for extra time in order to establish meaningful collaboration necessary to have a useful scheduling conference.[31]

Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2)("Early Rule 34 Requests")) will be added to allow delivery of discovery requests prior to the "meet and confer" required by Rule 26(f). The response time will not commence, however, until after the first Rule 26(f) conference. Rule 34(b)(2)(A) would also be amended to add a parallel provision for the time to respond. The Committee Note explains that this change is "designed to facilitate focused discussion during the Rule 26(f) Conference."[32]

Scheduling Conference

Rule 16(b) will be modified by striking the reference to scheduling conferences held by "telephone, mail, or other means." The Committee Note urges that the conference be held in person, by telephone, or by more sophisticated electronic means" – not by mail. The Note explains that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[33]

Rule 16(b) would also be amended to authorize the option of inclusion of a requirement in scheduling orders that parties must seek a conference with the court prior

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[29] 2014 RULES REPORT, 14.
[30] *Id*., 15 ("many comments offered reasons why 60 days [was] not enough time to serve process").
[31] Committee Note, 2014 RULES REPORT, 19.
[32] *Id*., 26.
[33] *Id*., 19.

to moving for a discovery order. Whether or not to require such conferences is left to the discretion of the judge in each case.

Preservation Planning

Rules 16(b) will be modified to permit a scheduling order to "provide" for preservation of ESI in conjunction with a similar modification of Rule 26(f) requiring parties to state their views about preservation of ESI in discovery plans. Both rules would also be modified to encourage increased use of agreements authorized by FRE 502.

The proposed Committee Note to Rule 16 observes that "[p]arallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed." The Rules Committee ignored, however, the Sedona recommendation (among others relating to preservation issues) that Rule 26 should also be amended so that protective orders would be explicitly available to a party "who is, or may be, subject to a request to preserve."[34]

(3) Proportionality/ Discovery (Rule 26)

The Standing Committee Rules unanimously approved the recommendation for relocation of the proportionality factors listed in Rule 26(b)(2)(C)(iii),[35] as modified after the public comment period, to Rule 26(b)(1).[36]

The initial impetus for the relocation arose out of the assessment at the Duke Conference that proportionality considerations were often ignored or underutilized during discovery. While the "frequency or extent" of all discovery is limited by Rule 26(b)(2)(C)(iii), the proposal was intended to provide emphasis as to the importance of the concept. During the Public Comment period, however, the proposal evoked strong opposition, with critics disagreeing that the relocation was needed or that the factors were not invoked enough. It was also argued that the change might prevent impede needed discovery in categories of cases involving asymmetric information.

In its May 2014 Report to the Standing Committee, the Rules Committee noted that while it had "considered" the comments "carefully" it had nonetheless concluded that (with some modifications) the transferring of the factors to the scope of discovery "would constitute a significant improvement to the rules governing discovery."[37] Several

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

[35] Rule 26(b)(2)(C)(iii)(courts must impose limits on discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues").

[36] Allman, *supra*, Stdg. Comm. Mtg.

[37] 2014 RULES REPORT, 5 -8 (explaining Duke findings and history of proportionality of Rule 26(b)(1)).

changes were made in the text, however, including the re-arrangement of the first two factors and addition of a new factor.[38] The "amount in controversy" factor was moved behind "the importance of the issues at stake in the action." In addition, a reference to "the parties' relative access to relevant information" was added to the list of considerations.

In its revised form, Rule 26(b)(2)(1) will permit a party to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." (New material underlined).

The proposed Committee Note, as materially revised by the Duke Subcommittee,[39] now provides a detailed summary of the historic treatment of proportionality factors in the rules, including the related Rule 26(g) obligation of the parties to consider the factors in making discovery requests, responses, or objections.

The Note explains that the amendment "does not change" the existing responsibilities of courts and parties and, in particular, "does not place on the party seeking discovery the burden of addressing all proportionality considerations"[40] nor "permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." Instead, "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."

The Committee Note also explains that the need to consider the fact of "information asymmetry" under which the burden of responding "lies heavier on the party who has more information, and properly so."[41]

The Center for Constitutional Litigation ("CCL") clearly stated its continued objection to the revised proposal prior to adoption of the revised rule, noting the opposition by "the vast majority of scholars and judges who commented on it" and the preference for use of proportionality as a "limit enforced by the court."[42]

During the Standing Committee meeting, the Chair of the Rules Committee stated that the relocation "will not limit proportional discovery" nor change the burden of proof

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[38] Conforming amendments will also be made to Rule 26(b)(2)(C)(iii)(court must limit frequency or extent of discovery if it is "outside the scope permitted by Rule 26(b)(1)").
[39] Committee Note, 2014 RULES REPORT, 21-25.
[40] It had been argued that relocation would unfairly "shift the burden" associated with demonstrating a lack of proportionality. *See, e.g.,* AAJ Comment, December 19, 2013, at 11.
[41] The explanatory portion of the Report states the new factor is "drawn from the Utah discovery rules." *See* 2014 RULES REPORT, 8.
[42] Letter, CCL to Hon. David G. Campbell, Chair, April 9, 2014.

involved.[43] It was also noted that when assessing burden or expense of proposed discovery, courts and parties "should be willing to consider" the opportunities to reduce costs by use of reliable "computer-based methods of searching" information, especially in cases involving large volumes" of ESI. A comment to that effect will be included in the Committee Note as forwarded to the Judicial Conference.[44]

Deletions

The Standing Committee approved the deletion from Rule 26(b)(1) of examples of types of relevant evidence that are discoverable, along with deletion of the authority to order subject matter discovery for good cause.

The Standing Committee also agreed to delete the statement in Rule 26(b)(1) to the effect that "[r]elevant information need not be admissible at trial if it is "reasonably calculated to lead to admissible evidence" and to replace it with the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.[45]

During the Standing Committee meeting, it was announced that portions of the lengthy explanation in the Committee Note were to be deleted.[46]

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

Standing Committee Members informally expressed their agreement during the Standing Committee meeting with the decision of the Rules Committee to accept its Subcommittee's recommendations to withdraw proposals for new and reduced presumptive limits for discovery under Rules 30, 31, 33 and 36.[47] The proposals were withdrawn prior to the April 2014 Meeting of the Rules Committee.[48]

The Rules Committee had initially proposed to lower these presumptive limits as an indirect form of proportionality in order to "decrease the cost of civil litigation, making it more accessible for average citizens."[49] It had relied upon research by the FJC

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[43] Allman, *supra*, Stdg. Comm. Mtg..
[44] Memo, Campbell to Sutton, Proposed Addition to Rule 26 Committee Note, May 27, 2014 (copy on file with author)("Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.")
[45] 2014 RULES REPORT, 24-25 (addressing reasons for deletions).
[46] *Id.*
[47] The original 2013 Rules Package as released for public comment is found at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf. The relevant text and Committee Notes for Rules 30, 31, 33 & 36 are at (unnumbered) pages 300-304, 305 & 310-311.
[48] The Duke Subcommittee Report is found in the Agenda Book for the April 2014 Rules Committee Meeting (released on March 21, 2014), at 79. Copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.
[49] 2013 RULES REPORT, at (unnumbered) page 268 of 354.

to the effect that most cases would not be affected by such a change. A proposal to limit requests for production in Rule 34 had been dropped earlier.[50]

The specific changes would have included:

- Rule 30: From 10 oral depositions to 5, with a deposition limited to one day of 6 hours, down from 7 hours;
- Rule 31: From 10 written depositions to 5;
- Rule 33: From 25 interrogatories to 15; and
- Rule 36: No more than 25 requests to admit, including all discrete subparts (except as to requests to admit the genuineness of any described document).

However, while the proposals garnered some public support, they also "encountered fierce resistance" on grounds that present limits worked well and might have the effect of limiting discovery unnecessarily.[51]

As a result, the Rules Committee ultimately concluded that it was best not to press forward and that other changes, such as the renewed emphasis on proportional and steps to prompt earlier and more informed case management, will achieve many of the objectives of the proposed presumptive limits.[52]

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

The Standing Committee approved the Rules Committee recommendation that Rule 26(c)(1) be amended to acknowledge that a protective order issued for good cause to protect against undue burden or expense may also include provisions for the "allocation of expenses."

The Committee Note was amended after Public Comments, however, to add that "recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice" and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[53]

The Report of the Rules Committee to the Standing Committee noted that the Discovery Subcommittee plans to explore "whether it may be desirable to develop more detailed provisions to guide the determination whether a requesting party should pay the costs of responding."[54]

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[50] *Id.*, at 267.
[51] 2014 RULES REPORT, 12 -13 (summarizing objections). A detailed CCL Report of May, 2014 summarizes the objections. *See* CCL Preliminary Report on Comments on Proposed Changes to [FRCP], May 12, 2014, 5, copy at http://www.cclfirm.com/files/Report_050914.pdf.
[52] 2014 RULES REPORT, 12 -13.
[53] Committee Note, 2014 RULES REPORT, 26.
[54] 2014 RULES REPORT, 11.

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

The Standing Committee approved, with minor change, proposals by the Rules Committee to amend Rule 34 to better facilitate requesting and producing discoverable information. The changes include.[55]

First, any "grounds for objecting to [a] request" under Rule 34 must be stated "with specificity."

Second, a party must indicate whether it "will produce copies of documents or [ESI] instead of permitting inspection." It is not currently required to do anything other than state if it will permit inspection.[56] [Rule 37(a)(3)(B)(iv) would also be changed to authorize motions to compel for *both* failures to permitting inspection and failures to produce.] The Committee Note to Rule 34 explains that these changes merely "reflect[s] the common practice of producing copies of documents or [ESI] rather than simply permitting inspection."

The production must be completed no later than the time for inspection already established. Based on a question from a Standing Committee Member, the Rules Committee Chair agreed at the meeting of May 29, 2014 to revise that requirement to refer to a time "specified," not one which is "stated."[57]

Third, Rule 34(b)(2)(C) will require a party to state, as part of any objection to a request to produce, "whether any responsive materials are being withheld on the basis of [an] objection." This is intended to end the practice of making general objections accompanied by what may or may not be a partial production. However, when an objection is made that the request is overbroad, the requirement to state what is being withheld can be satisfied by an objection stating that what is being "withheld" is material beyond the limits of searches for documents or ESI and thus "specifying the bounds of the search it plans to undertake."[58]

The Committee Note provides as an example of such a statement that "the responding party will limit the search to documents or [ESI] created within a given period of time prior to the events in suit, or to specified sources."

The intent is not to generate a "detailed description or log of all documents withheld" but to alert the other party to that fact and thereby facilitate an informed discussion.[59]

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[55] 2014 RULES REPORT, 28-29 (text of amended rules and revised Committee Note); *id*. at 11 (explaining reasons for the amendments).
[56] Under Rule 34(b)(2)(C), a party stating an objection to only part of a request must specify the part and permit inspection of the rest. No mention is made of production.
[57] *See* Appendix A (incorporating changes based on oral comments at the meeting)..
[58] 2014 RULES REPORT, 11 (explain reasons for changes after Public Comments).
[59] Committee Note, 2014 RULES REPORT, 29.

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

The Standing Committee unanimously approved a revised proposal to replace Rule 37(e) at its meeting of May 29, 2014 without requiring republication for further comment.[60] The final Rule, as amended after the meeting,[61] provides as follows:

(e) Failure to Preserve Electronically Stored Information.

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

(1) upon a 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.

The rule (also reproduced in Appendix B) differs substantially from the initial proposal of August, 2013, which is set forth in Appendix C.

Background

Under the original 2013 proposal, which applied to the failure to preserve any form of discovery information, "sanctions" or an adverse-inference jury instruction were to be made available *only* when a failure to preserve caused substantial prejudice in the litigation and was the result of "willful or bad faith" conduct *or* "irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation.[62]

The original Proposal also authorized imposition of measures which could be applied without any showing of culpability or prejudice such as "additional discovery,"

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[60] Allman, *supra*, Std. Comm. Mtg; copy at http://www.lawtechnologynews.com/id=1202657565227?slreturn=20140505130019.

[61] The text is based on the "Proposed Rule 37(e)" reproduced for Standing Committee in the May 2, 2014 Report of Rules Committee (2014 RULES REPORT), 47, but also includes certain stylistic changes involving the placement and use of the word "may" which were made after publication of the rule in that report.

[62] Rule 37(e)(1)(B)(i)&(ii), 2014 RULES REPORT, 25 (reproducing text of Rule 37(e) as included in the initial Request for Comment (August 2013), original copy at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf).

"curative measures" or an order that "the party [must] pay the reasonable expenses, including attorney's fees, caused by the failure."[63] The rule also listed "factors" to be considered in assessing a party's conduct.[64]

Concerns were expressed during Public Comments about the uncertainties in defining "willful or bad faith" conduct; the impact of allowing "irreparable" deprivation to excuse culpability requirements and the lack of distinctions between curative measures and sanctions. A variety of proposed solutions were expressed in comments and testimony and in response to five questions posed by the Committee. Some suggested dropping provisions dealing with "sanctions" in favor of a focus on curative measures and others suggested that the listed factors should be dropped entirely or confined to the Committee Note.[65]

After the Public Comment period ended, the Discovery Subcommittee met and developed a completely revised proposal for Rule 37(e) for consideration by the Rules Committee at the April 2014 Rules Committee meeting in Portland, Oregon.[66] The new proposal focused only on losses of ESI but retained the "factors" for use in assessing conduct.[67] The proposed Committee Note was also extensively revised.

However, after further review and comments,[68] a substantially revised text was developed for the second day of the Rules Committee meeting.[69] The text was distributed by hand to attendees[70] and unanimously approved by the full Committee after discussion. The Committee authorized development of another version of the Committee Note.

A slightly revised version of the final text and a new Committee Note were included in the May 2, 2014 Report of the Rules Committee (described heretofore as the "2014 RULES REPORT") prepared for the May, 2014 Standing Committee Meeting.[71]

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[63] Rule 37(e)(1)(A).
[64] Rule 37(e)(2).
[65] An 83 page summary of the Comments and Submissions regarding Rule 37(e) was included in the April 2014 Rules Committee Agenda Book (453 -535 of 580); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.
[66] The Subcommittee Report, Minutes and the revised proposal for Rule 37(e) and a draft Committee Note were included in the April 2014 Rules Committee Agenda Book.
[67] *See* Appendix B, Thomas Y. Allman, The 2013 Civil Rules Package After the Public Comments: The Portland Finale, copy at http://www.aceds.org/wp-content/uploads/2014/03/2014-Comments-on-Rule-Package-Portland-Memo-Thomas-Allman.pdf.
[68] LCJ Comment, April 4, 2014 (suggesting possible clarifications for revised Rule 37(e)); copy available at http://www.lfcj.com/.
[69] *See* Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/.
[70] *See* Last-Minute Revision Brings Forth Streamlined Proposal for Rule 37(e) at Advisory Committee Meeting, Legalholdpro.com, copy at https://www.legalholdpro.com/Resources/Blog/2014/4/14/streamlined-37e.
[71] The 2014 RULES REPORT was included in the Agenda Book for the Standing Committee Meeting; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks. LCJ provided comments on the possible contents of the new Committee

At that meeting, Judge David S. Campbell (D. Ariz.), Chair of the Rules Committee, described the background to the revised proposal and then responded with alacrity to a series of difficult hypotheticals testing the application of the Rule.[72]

Application of the Rule

As revised, Rule 37(e) applies only to losses of ESI that "should have been preserved in the anticipation or conduct of litigation."[73] This exists when relevant and otherwise discoverable ESI is lost because of a failure to take "reasonable steps" and when the loss cannot be remedied by "additional discovery" designed to replace or restore the ESI.[74] The assessment will be based on common law principles which suggests the possibility that conflicting approaches to these threshold issues among the Circuits may continue.

The Rule can be seen as "gap filler" in Rule 37 that deals explicitly, for the first time, with authority to deal with failures to "preserve" ESI, not simply to fail to produce it.[75] Thus, while intended to exclude measures imposed through inherent sanctioning power,[76] it does not preclude resort to other provisions of Rule 37, such as Rule 37(b) and (c).

Reasonable Steps

If a party employs reasonable steps in response to a failure to preserve ESI, it cannot be sanctioned for the loss.[77] This is intended, according to the Committee Note, to reflect that "perfection in preserving all relevant [ESI] is often impossible."[78] The Rule "does not call for perfection."[79]

Note (LCJ Comment on the Note to Proposed Rule 37(e), April 25, 2014) and, after its release in the Agenda Book, on the implications for Standing Committee Review (LCJ Comment, May 22, 2014. Copies of both LCJ Comments are available at http://www.lfcj.com/.

[72] Allman, *supra*, Std. Comm. Mtg.

[73] Restricting revised Rule 37(e) to losses of ESI makes is justified because of the belief that case law outside that sphere is well developed. If necessary, and if the rule is successful, the Rules Committee will assess the value of expanding coverage to other forms of discoverable information.

[74] The additional requirements were added to the existing introductory (predicate) language of the Rule in the last minute revisions adopted on April 11, 2014 in Portland. Minutes, Rules Committee Meeting, April 10-11, 2014, lines 597-614 ("[t]he new draft . . . limits the rule to settings in which a party "failed to take reasonable steps to preserve" [and] "[i]f the information cannot be restored or replaced").

[75] The existing Rule 37(e) speaks, somewhat ambiguously, of the failure to "provide" ESI.

[76] Committee Note, 2014 RULES REPORT, 47-48 (the rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used"); *see also* U.S. Aleo, 681 F.3d 290, 310 (6th Cir. 2012)("a judge may not use inherent power to end-run a cabined power").

[77] Committee Note, 2014 RULES REPORT, 49.

[78] *Id.*

[79] *Id.*

Courts will turn to "existing case law" to help guide their decision, where the jurisprudence is "far from uniform."[80] Some courts advocate an approach bordering on strict liability,[81] which leaves open the possibility that the current Circuit split on the topic will survive. At the Standing Committee meeting, it was explained that the "reasonable steps" requirement rejects the concept of strict liability for failures to preserve because "reasonable conduct is as much as you can ask of people."[82] More recent case law should be helpful, moreover, in tempering any tendency avoid the intent of the new Rule.[83]

At the Portland Meeting, it was explained that the requirement "embrace[s] a form of 'culpability.'"[84] It is intended to "encourage reasonable preservation behavior" and "[p]roportionality is party of the calculus of reasonableness."[85]

Subdivision (e)(1) Measures

If the attempt to cure the loss of ESI by additional discovery fails, the central focus is on prejudice[86] and curative measures.[87] Subsection (e)(1) authorizes courts to impose measures not barred by subsection (2) which are "no greater than necessary to cure the prejudice" which is the pre-condition of such authority to act. No explicit finding of culpability is required. According to the Committee Note, the decision as who has the burden of "proving or disproving prejudice" is not governed by the rule but by the discretion of the judge.[88]

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

[81] *See, e.g.*, Zubulake v. UBS ("Zubulake IV"), 220 F.R.D. 212, 220 (S.D. N.Y. Oct. 22, 2003), which holds that "[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."

[82] Allman, *supra*, Std. Comm. Mtg.

[83] Favro, *supra* (citing Micron v. Rambus, 645 F. 3d 1311, 1322 (Fed. Cir. 2011)(referencing 'good housekeeping' actions and Brigham Young U. v. Pfizer, 282 F.R.D. 566, 572 (D. Utah 2012)("good faith business procedures"); *see also*, Mastr Adjustable Rate Mortgages, 2013 WL 5745855, at *7 (S.D. N.Y. Oct. 23, 2013), *aff'd on other grounds*, 2013 WL 6840282 (S.D. N.Y. Dec. 27, 2013)(finding it 'reasonable" that substantive emails were selected and printed out and thus not subject to autodeletion policy); and Brown v. West Corporation, 2013 WL 6263632, at *2-3 (D. Neb. Dec. 4, 2013)(refusing to find spoliation because party used "good faith" in repurposing former employee computers after preserving relevant information).

[84] Minutes, Rules Committee Meeting, April 10-11, 2014, lines 631-633.

[85] *Id*., lines 599-600.

[86] Minutes, Rules Committee Meeting, April 10-11, 2014, lines 631-633.

[87] *Cf*. Proposal by Hon. James C. Francis IV, summarized at Agenda Book, April 2014 Rules Committee Meeting, at 462-463 of 580 (advocating a rule which would provide if a party failed to preserve, a court may impose a remedy no more severe than necessary to cure any prejudice unless the court finds that the party acted in bad faith).

[88] Committee Note, 2014 RULES REPORT, 50 (requiring the party seeking curative measures to prove prejudice may be reasonable under some circumstances but unfair in others).

The Committee Note lists examples of "serious measures" which may be "appropriate"[89] as well as ones which may be "inappropriate."[90] The Note cautions that "[c]are must be taken" that measures adopted "do not have the effect of measures" that are permitted under subdivision (e)(2) "only on finding of intent to deprive another of the lost information's use in the litigation."

Some had proposed, alternatively, that the list in subdivision (e)(2) should be expanded to include the striking of pleadings[91] adopted for punitive purposes so as to preclude any implied implication that a heightened culpability requirement did not apply.[92] There is authority, for example, that orders imposing awards of attorney's fee for punitive purposes are required to meet such a standard in some Circuits.[93]

Subdivision (e)(2) Measures

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

The authority under (e)(2) is not, strictly speaking, an alternative to the authority to act under subdivision (e)(1). This is explained at the Standing Committee Meeting by noting the use of "only" in the introductory portion of subsection (2).[94] While it was also conceded during discussion that the Committee could have separated the two clauses by the use of "but" instead of the current phrase "or," as some have advocated,[95] it was felt that "but" could be misinterpreted to imply that Subsection (2) is a subset of (1), which it is not.[96]

The intent of subdivision (e)(2) is to reject *Residential Funding* logic in regard to the minimal culpability required for harsh measures.[97] A Member of the Discovery

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[89] *Id*. (barring evidence, permitting evidence and argument "regarding the loss of information" or giving instructions to assess jury's evaluation of such evidence or argument).
[90] *Id.* (striking pleadings related to or precluding evidence in support of "the central or only claim or defense as compared to excluding a specific piece of evidence to offset contradictory information).
[91] Rimkus Consulting v. Cammarata, 688 F. Supp.2d 598, 614 (S.D. Tex. Feb. 19, 2010) ("in this circuit, the severe sanctions of . . . striking pleadings . . . may not be imposed unless there is evidence of 'bad faith'" [collecting cases]).
[92] LCJ Comment, April 4, 2014 at 3 (proposed text); 5-6 (discussion).
[93] Joseph v. LineHaul Logistics, 2013 WL 6406323, at 1 (9th Cir. Dec. 9, 2013)("[b]ad faith must be found before a federal court can award attorneys' fees as a sanction under its inherent authority"); *but c.f.* Pension Committee v. Banc of America Securities, 685 F. Supp. 2d 456, 471 (S.D. N.Y. May 28, 2010)(implying that awarding monetary sanctions to punish and deter requires no showing of culpability).
[94] Allman, *supra*, Std. Comm. Mtg.
[95] LCJ Comment, May 22, 2014, 4.
[96] Allman, *supra*, Std. Comm. Mtg.
[97] Residential Funding Corp. v. DeGeorge, 306 F.3d 99 (2d Cir. Sept. 26, 2002)(adverse inferences may be imposed if evidence was destroyed "knowingly, even if without intent [to breach a duty to preserve it], or *negligently*") (emphasis in original).

Subcommittee described it as a "rifle shot" aimed at replacing *Residential Funding* in order to "take some very severe measures of[f] the table"[98] without a showing of intent equivalent to "bad faith.

The Subcommittee opted to use a functional definition of "bad faith" consistent with *Rimkus Consulting* rather than the term itself.[99] Some have raised a concern that proof of "intent to deprive" might be shown by merely reckless or willful conduct.[100] This would be inconsistent with the intent to required conduct "akin to bad faith, but defined even more precisely."[101] The language used invokes the "historical rationale for adverse inferences" under which conduct must be shown to have been for the purpose of hiding adverse information, not merely intentional.[102]

However, a showing of prejudice is not required under subdivision (e)(2).[103] During the Standing Committee discussion, it was noted that a finding of elevated intent necessarily assumes the existence of prejudice but requiring an explicit finding to that effect would risk rewarding a party who has destroyed evidence so successfully that it leaves no evidence of its content.[104] The Standing Committee was also notified the Committee Note had been amended to more clearly deal with the fact that Subdivision (2) does not include a requirement that the court find prejudice to the party deprived of the ESI at issue.[105]

Under subdivision (e)(2), there must be a finding of intent to deprive before a jury may be permitted to infer from the loss of information that it was in fact unfavorable to the party that lost it. That finding may be made by the court or by the jury. If the court chooses to have the jury make the finding, the jury instruction should make it clear that the jury may draw an inference only if it first finds that the party acted with the intent to deprive. However, courts may instruct a jury that it can "consider" evidence of a party's

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

[99] Discovery Subcommittee Notes, February 8, 2014 Meeting, at 416 (rule should not use the term ["bad faith"] but only the definition); Notes, March 4, 2014 Meeting, at 438 (the proposed definition is "very similar to the one used by Judge Rosenthal"); *see* Rimkus Consulting *supra*, 688 F. Supp.2d 598, 618 (S.D. Tex. Feb. 19, 2010)(citing the destruction "of evidence to prevent its use in litigation" as justifying severe sanctions).

[100] Favro, *supra*, The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments, EDDE Journal (ABA)(citing Pension Committee, 685 F .Supp. 2d 456, 464-65 (S.D.N.Y. 2010) for the proposition that "*willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly like to occur")(emphasis in original).

[101] 2014 RULES REPORT, 42 (in order to "eliminate the circuit split on when a court may give an adverse jury instruction for the loss of ESI" since some permit it upon a showing of "negligence or gross negligence, while others require a showing of bad faith").

[102] *Id*. (citing Aramuru v. Boeing, 112 F.3d 1398, 1407 (10th Cir. 1997). *See also* Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013)(bad faith requires – in addition to showing intentional conduct – that the material was destroyed "for the purpose of hiding adverse information").

[103] The text of the Committee Note (reproduced at 2014 RULES REPORT, 52) was subsequently modified by to explain this position. *See* Memo, May 22, 2014, Campbell to Sutton (copy on file with author).

[104] Allman, *supra*, Std. Comm. Mtg.

[105] See Memo, Campbell to Sutton, May 22, 2014, Revision to Proposed Rule 37(e) Committee Note (copy on file with author)(explaining that change from text in Agenda Book was recommended based on question by a Standing Committee member).

conduct and its "likely relevance" along "with all the other evidence in making its decision" without such a showing.[106] The Committee Note states that "[t]hese measures, which would not involve instructing a jury that it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice."[107]

Comment

It has been argued that after the rule goes into effect, the standards applicable to adverse inferences applied in the Fifth, Seventh, Eighth, Tenth and Eleventh Circuit will become the law of the land, and "even if a party's handling of data was not perfect, they may still be able to avoid an adverse inference instruction."[108]

To test this assertion, the author studied a random sample of sixty-one (61) opinions rendered during 2013 to determine whether the sanctioned party had "acted with the intent to deprive another party of the information's use in the litigation" in instances when use of adverse inferences had been authorized.[109]

The difference made by the new rule would have been substantial. In twelve of the sixty-one (20%) opinions in the sample, subsection (2) would probably have compelled denial of the adverse inference instruction authorized in those cases. Only six of the cases where an adverse inference was authorized would subsection (2) have authorized its use. It can be presumed, of course, that some form of lesser measures designed to cure the prejudice would have been imposed, but it would not have been a potentially a case-decisive adverse inference.

The viability of these observations assumes, however, that *Mali v. Federal Insur. Co.,*[110] would have been decided differently under the rule had it involved losses of ESI. In that Second Circuit opinion, a jury instruction[111] permitted a jury to draw an inference

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[106] *C.f.* Herrman v. Rain Link, 2013 WL 4028759, at *6 (D. Kan. Aug. 7, 2013).
[107] Subdivision (e)(2) also "does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."
[108] ACC Lexology, April 22, 2014, Proposed revised FRCP 37(e) seeks to clarify and standardize ESI Spoliation, Fish & Richardson PC, copy at http://www.lexology.com/library/detail.aspx?g=8e766542-bc5b-42b5-8f94-9baf1a9a6179.
[109] Typical examples include: SJS Distribution v. Sam's East, 2013 WL 5596010, at *5 (E.D.N.Y. Oct. 11, 2013)("no evidence of bad faith"); Gatto v. United Air Lines, 2013 WL 1285285, at *4 (D.N.J. March 25, 2013)(court not persuaded that evidence "intentionally suppressed"); Food Services v. Carrington, 2013 WL 4507593, at *21 (D. Ariz. Aug. 23, 2013)(even if "did not intend to deprive an opposing party of relevant evidence"); Zest IP Holdings v. Implant Direct Mfg, 2013 WL 6159177, at n.6 & *9 ("unsure" if party acted intentionally but "at least" negligent); Montoya v. Orange Co. Sheriff's Dept., 2013 WL 6705992, at *13 (C.D. Cal. Dec. 19, 2013)("no suggestion of bad faith or deliberate destruction of evidence").
[110] 720 F.3d 387 (2nd Cir. June 13, 2013)(asserting that an adverse inference instruction issued as "a sanction, or in other words, a punishment for misconduct" is "fundamentally different" from the type of adverse inference that is "simply an explanation to the jury of its fact-findings powers").
[111] *Id*., at 391 ("you may infer, though you are not required to do so, that if the photograph had been produced in court, it would have been unfavorable to the [party that did not preserve it]").

of unfavorability from lost (tangible) evidence without any showing of culpability because it was deemed not to be a "sanction" but was merely intended to explain jury functions.[112]

If, on the other hand, a *Mali* type instruction is routinely available and not barred by Subsection (2), it could be expected to largely negate the uniformity sought to be achieved by the Rule.

[112] *Compare* Arch Insur. V. Broan-Nutone, 509 Fed. Appx. 453, 2012 WL 66334323 (6th Cir.. Dec. 21, 2012)(noting that a permissive jury instruction punishes behavior since it is "dressed in the authority of the court, giving it more weight than if merely argued by counsel").

APPENDIX A

Rules Text (as approved at Standing Committee Meeting of May 29, 2014)[113]

Rule 1 Scope and Purpose

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

Rule 4 Summons

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

Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

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[113] (New material in bold italics) The text is based on the contents of the "Duke Rules Package" reproduced for Standing Committee in May 2, 2014 Report of Rules Committee (2014 RULES REPORT), 17 -29. The text of Rule 34(b) reflects oral changes made during the Standing Committee Meeting of May 29, 2014. During the meeting, the Members were also advised that after the May Report was submitted, the Committee Note to Rule 26 had been revised to state that "[c]ourts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available." They were also informed of certain deletions from the same Committee Note.

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

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

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

* * *

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

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

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

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

(b) DISCOVERY SCOPE AND LIMITS.

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

~~cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

* * *

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

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

* * *

(c) PROTECTIVE ORDERS.

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

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

(2) Early Rule 34 Requests.

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

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

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

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

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

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

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

* * *

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

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

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

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

Rule 30 Depositions by Oral Examination

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

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

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

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

Rule 31 Depositions by Written Questions

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

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

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

(1) *Number.*

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

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

(b) PROCEDURE. * * *

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

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

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ***with specificity the grounds for objecting to the request, ~~with specificity,~~*** 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 ~~stated~~ in the request or another ~~later~~ reasonable time specified ~~stated~~ in the response.***[114]

[114] Bracketed changes indicated reflect oral changes made during Standing Committee meeting of May 29, 2014.

(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.

APPENDIX B[115]

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.

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

(1) upon finding of 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.

[115] The text is based on the "Proposed Rule 37(e)" reproduced for Standing Committee in the May 2, 2014 Report of Rules Committee (2014 RULES REPORT), 47, but also includes certain stylistic changes which were made after publication of the rule in that report. The Committee Note was to Rule 37(e) was also amended after the Report issued to delete and replace a paragraph dealing with the fact that Subdivision (2) does not include a requirement that the court find prejudice for the subdivision to apply.

APPENDIX C

(Original Proposal 2013)

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

* * * * *

~~(e) **FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic system,~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

(1) *Curative measures; sanctions.* If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the ~~a~~ claims in the litigation.

(2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good-faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

* * * * *