Assessing the 2015 Amendments

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I. Introduction

This White Paper evaluates four key proposals in the "package" of amendments to the Federal Rules of Civil Procedure now pending before the Supreme Court. The four proposals discussed here have been and will undoubtedly remain a focus of further controversy.

Rules 26(b)(1) and 37(e), as revised after public comments, arguably provide for a more proportional preservation and discovery process, and include a *de facto* "safe harbor" from unfair sanctions for losses of ESI. The proposed amendment to Rule 1, while well-intentioned, implies that parties and their counsel have a duty to cooperate, risking unintended consequences. Rule 26(c), although merely confirming existing authority to allocate costs, serves as a harbinger of a "requester pays" discussion.

These provisions will become effective on December 1, 2015 unless legislation is adopted to reject, modify, or defer them, which seems unlikely.

A Note on Resources

The amendment process began with the May, 2010 Conference on Civil Litigation held by the Committee at the Duke Law School, which involved spirited dialogue stretching over two days.[2] The primary description of that Conference is contained in the Report to the Chief Justice issued in September, 2010.[3]

Three Rules Committee Reports are of particular significance. They include the May 2013 Report (as supplemented)[4] which accompanied the release of the original "package" of amendments for public comment; the May 2014 Report[5] prepared after public comments and adoption of the revised package; and the June 2104 Report,

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[1] © 2014 Thomas Y. Allman.
[2] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 540-541 (2010).
[3] Memo, Rules Committee to The Chief Justice, September 10, 2010, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf.
[4] Committee Report, May 8, 2013, as supplemented June 2013, as part of Memo Request for Comments, August 15, 2013, at 259; copy at file:///C:/Users/PC/Downloads/USC-RULES-CV-2013-0002-0001.pdf.
[5] The May 2014 Rules Committee Report ("May 2014 RULES REPORT"), is available in the Agenda Book for the May Standing Committee Meeting, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf

prepared for and incorporated into the Report to the Judicial Conference, which reflects the final form of the text and Committee Notes.[6]

However, since nuances abound, attention throughout this Memorandum is drawn to the work product of the subcommittees that "split" the drafting tasks. Both the Discovery Subcommittee and the Duke Subcommittee met extensively and each vetted their respective interim draft rule proposals at "mini-conferences."[7]

A merged "package" of rules was released for public comment in August, 2013. After three Public Hearings and over 2300 written comments,[8] the Subcommittees prepared revised recommendations in separate Reports.[9] Following a last minute rewrite of Rule 37(e),[10] the re-merged proposals were adopted by the Rules Committee at its April 10-11, 2014 meeting in Portland, Oregon. Minutes of that meeting and of the Standing Committee which approved the revised package on May 29, 2014 are also important references.[11]

I. Cooperation

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

The Committee deleted a further proposed addition that would have required that parties "should cooperate to achieve these ends."[12] It was dropped because of concerns over the "collateral consequences" of its inclusion.[13] Lawyers for Civil Justice ("LCJ") successfully opposed that effort at the time as adding an "untested concept" which added

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[6] A copy of the June 2014 Rules Committee Report ("June 2014 RULES REPORT") is found at http://www.law.georgetown.edu/cle/materials/eDiscovery/2014/thusmorndocs/JudicialConfSep2014_Campbell_.pdf.

[7] The Discovery Subcommittee, originally chaired by Judge Campbell, but ultimately chaired by Judge Grimm, developed what became the new Rule 37(e); the Duke Conference Subcommittee chaired by Judge Koeltl was responsible for everything else.

[8] Copies of transcripts of the individual public hearings are available on the US Courts website. The written comments are archived at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

[9] The April 2014 Agenda Book containing the two Subcommittee Reports may be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[10] Advisory Committee Makes Unexpected Changes to 37(e), April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/.

[11] The Minutes of the both meetings are found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-10.pdf.

[12] *See* Duke Subcommittee Initial Sketch for Rule 1, March, 2012, at 42, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf. The stated intent was to establish "cooperation among the parties as one of the aspirational goals identified in Rule 1." *Id*. at 8.

[13] Minutes, November 2, 2012 Meeting, at lines 616-622.

"one more point on which parties can disagree and blame the other when it is to their advantage."[14]

At the time of adoption of the amended rule (without the duty to cooperate) in April 2014,[15] the Chair of the Subcommittee noted that while some feared that "'Rule 1 motions' will be made as a strategic means of increasing costs and delay" but "still others – including the Sedona Conference – think the proposal gets it just right."[16]

The Committee Note

However, while a duty to cooperate was deleted from the text of the proposed rule, the Committee Note observes that "most lawyers and parties cooperate to achieve those ends" and "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."[17] LCJ criticized that language as an "exhortation" to cooperate which had no place in the Committee Note and risked opening up the issues which led the Committee to drop the reference from the text.[18]

Ultimately, at the Standing Committee meeting, the Note was further amended to clarify that the change was not a basis for sanctions for a failure to cooperate.[19] It now states, somewhat ambiguously, that "[t]his [rule] amendment does not create a new or independent source of sanctions" and "neither does it abridge the scope of any other of these rules."[20]

Observations

It remains to be seen if the last minute caveat added to the Committee Note has adequately addressed concerns about the amendment. As LCJ put it, "[u]ntil the concept of 'cooperation can be defined so as to provide objective ways to evaluate a party's compliance – including the proper balance between cooperative actions and the ethics rules and professional requirements of effective representation – the Committee Note should not be amended to include an unlimited exhortation to cooperation."[21]

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[14] LCJ Comment, The Need for Meaningful Rule Amendments, June 5, 2012, 4; copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_duke_proposals_060512.pdf.

[15] A favorable mention of "cooperation" or "collaboration" also occurs at two other places in the proposed Committee Notes supporting the proposed "package." Committee Note, June 2014 RULES REPORT at B-28 ("meaningful collaboration") and Committee Note, at B-41 ("cooperative management").

[16] Minutes, April 2014 Rules Committee Meeting, at lines 390-395.

[17] Committee Note, June 2014 RULES REPORT at B-21-22. The Note stresses that "discussions of the ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay").

[18] LCJ Comment, Reducing the Costs and Burdens of Modern Discovery, August 30, 2013, at 19, (the Note "could reasonably be read as enshrining a duty to cooperate" just as if the "drafters had written the duty to cooperate directly into the rule itself"), copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267.

[19] Committee Report, 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").

[20] *Id.*, at B-22.

[21] LCJ Comment, *supra*, August 30, 2013, at 20.

As early as 1978, the Rules Committee rejected an attempt to authorize sanctions for a failure to comply with a "duty to cooperate" into the Federal Rules.[22] Similarly, the Duke Subcommittee and the full Committee have resisted advocacy[23] to incorporate a duty in Rules 1, 16, 26 or 26(g).[24]

Nonetheless, the problem of the Committee Note centers on whether the referenced "cooperation" means something more than a willing to take opportunities to discuss defensible positions in good faith[25] – in short, whether it mandates compromise.[26] While the Notes have long asserted that lawyers have a responsibility, as officers of the court, to help further the goals of the rule, that has been understood to operate in an aspirational sense[27] much like local rules and guidelines to that effect.[28] To take it to a new, more elevated level necessarily risks clashes with the ethical obligations of counsel in ways not yet predictable.

(2) Cost Shifting

It is proposed to amend Rule 26(c)(1)(B) to acknowledge that a protective order issued for good cause to protect a party from undue burden and expense may specify terms, "including time and place or the allocation of expenses, for the disclosure or discovery[;]."

The June 2014 Committee Report explained that the amendment would "ensure" that courts and parties will consider cost allocation as an alternative to "denying requested discovery or ordering it" despite the risk of "imposing undue burdens and expense.[29] LCJ supported the adoption of the Proposed Rule 26(c) as a "small step towards our larger vision of reform."[30]

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[22] 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 Rule 26(f) and 37(e) authorizing sanctions for failure to have cooperated in framing an appropriate discovery plan).

[23] Minutes, Rules Committee Mtg., November 15-16, 2010, at lines 1148-1149 ("Judge Grimm has suggested changes that would codify the importance of cooperation").

[24] The Duke Conference Subcommittee noted that while there "is no substantive requirement to cooperate in the Rule" it "could be incorporated in Rules 16, 26(b), (f), and (g) and emphasized by amending Rule 1." Conference Subcommittee Agenda, March 2011, at 3-4; Agenda Book for April 2011 Meeting.

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

[26] *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).

[27] Committee Note, Rule 1 (1993)("[a]s officers of the court, attorneys share this responsibility [under Rule 1] with the judge to whom the case is assigned).

[28] *Cf*., 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").

[29] June 2014 RULES REPORT, B-10.

[30] Comment, Reducing the Costs and Burdens of Modern Discovery, August 30, 2013, at 19-20 (arguing that it will place requesting parties on notice that the "may be required to bear the costs of responding to their requests, and thus encourage more careful deliberation regarding the true needs of the case"); copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_advisory_committee_on_civil_rules_8.30.13.pdf.

The Committee Note explains that "[a]uthority to enter such orders is included in the present rule, that courts already exercise this authority" and that "[e]xplicit recognition will forestall the temptation some parties may feel to contest this authority."[31] It also states that "[r]ecognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice" and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[32]

This latter comment, made after criticism during the public comment period,[33] was protested by LCJ because it seemed to "pre-judge" any future study of the work on "requester-pays" proposals.[34] The Subcommittee Chair rejected that observation and noted that work on cost-shifting will continue and will be thorough."[35] A Subcommittee Report had mentioned plans to "explore the question" of whether provisions should be developed to guide "whether a requesting party should pay the costs of responding."[36]

Observation

LCJ has long advocated consideration of a "requester pays" rule. At the Duke Conference, it suggested amending Rules 26 and 45 to make reasonable costs of preserving, collecting, reviewing and producing electronic and paper documents the responsibility of requesting parties – and revising Rule 54(d) to make them taxable costs as well.[37] It also noted the infrequent use of the cost allocation provisions of Rule 26(b)(2)(B), which had been adopted in 2006.[38]

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[31] Committee Note, at B-45. This may have been a reaction to *Zubulake* I and III and its progeny which imply that courts lack authority to do so if the information sought not inaccessible.
[32] Committee Note, at B-45. The language first appears in the Amended Committee Note as reproduced in the May 2014 RULES REPORT, at 26.
[33] *See* AAJ Comments, December 19, 2013, at 18; copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372.
[34] LCJ Comment, At the Finish Line, April 4, 2014, at 7 (the statement that courts and parties should continue to assume that a responding party ordinarily bears the costs of responding contradicts the rule text and "appears to predestine" the future consideration of additional rules); copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_for_april_2014_rules_committee_meeting.pdf.
[35] Minutes, April 10-11, 2014 Rules Committee Meeting, at lines 234-238.
[36] Duke Subcommittee Report (undated, but circa March 2014), at 9; copy in April 2014 Rules Committee Agenda Book.
[37] Comment, Reshaping the Rules of Civil Procedure for the 21st Century, May 2, 2010, at 55-60 (arguing that a requester-pays rule would encourage cooperation); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf.; *see also* Comment, Supplementing the White Paper, June 8, 2010, at 12-13 ("we propose an amendment to Rule 26 that would require that each party pay the costs of the discovery it seeks"), copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_supplementing_white_paper_060810.pdf.
[38] Comment, Reshaping the Rules, *supra*, at 57.

Throughout the drafting process, as costs remained an issue,[39] LCJ stressed the value of a "requester pays" rule in addressing cost concerns.[40] Thus, in a major filing,[41] it summarized scholarship by Professors Redish, Allen and Elliott which demonstrate how the present system provides an incentive to litigants to make overbroad discovery requests which damage the integrity of the judicial system.

The advantage of a requester pay regime is that it encourages each party to tailor its discovery requests by placing the cost-benefit decision on the requesting party. From a drafting point of view, a rule can be tailored for individual cases where access to justice is threatened by "an exception for fee-shifting cases" or for instances where information is "not symmetrically available."[42]

The Duke Subcommittee briefly considered an alternative draft amendment which would have required a requesting party to "bear part or all of the expanses reasonably incurred in responding [to a discovery request].[43] It subsequently noted that "[t]he subcommittee is not enthusiastic about cost-shifting, and does not propose adoption of new rules" and that only a modest emphasis on making it a more "prominent feature of Rule 26(c) should go forward."[44]

Admittedly, dealing with "requester-pays" will involve facing the inconvenient fact that costs and expenses of discovery have turned out to be far greater than was assumed at the time the basic default rule was developed.[45]

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[39] Submissions identifying dissatisfaction with costs and the extent of civil discovery were made by the ACTL, the ABA Section of Litigation and NELA in contrast to the FJC study of "closed cases." Report of Duke Subcommittee (circa March 2014), at 82-83; copy in April 2014 Agenda Book for Rules Committee Meeting.

[40] LCJ Comment, Now is the Time, March 15, 2012, at 16 (arguing that parties settle in or to avoid expensive and protracted discovery); LCJ Comment, the Need for Meaningful Rule Amendments, June 5, 2012, at 12-14 (arguing for requester pays rule would address the unfairness and economic perversity of the existing system); LCJ Comment, The Need for a Meaningful Package of Amendments, October 30, 2012, at 6-7 and n. 8 & 9 (citations & referring to letter from House Chairman Franks of March, 2012 suggesting that Rules Committee consider shifting the cost-benefit decision to the requesting party); copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_a_meaningful_package_of_amendments_103012.pdf.

[41] LCJ Comment, The Un-American Rule, April 1, 2013; copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_the_un-american_rule__040113.pdf.

[42] Duke Conference Miniconference Notes, October 8, 2012, at 32 ("[d]rafting a balanced rule presents 'a huge number of challenges. But it is well worth the effort'"). The Notes are located at 309 of 542 in the Agenda Book for the November, 2012 meeting of the Rules Committee, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf.

[43] Initial Rules Sketches, at 29, Addendum to Agenda Materials for Rules Committee Meeting, March 22-23, 2012, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

[44] Initial Rules Sketches, at 37, as modified after Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.

[45] Initial Rules Sketches, at 24-24 ("[n]one of these sketches" address the concern that discovery rules were adopted without "the slightest inkling of the expenses that would become involved as the practice evolved"); copy in June 2012 Standing Committee Agenda Book.

(3) Proportionality

It is proposed to amend Rule 26(b)(1) so as to 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 proposal reflects the decision to "transfer the calculus of (iii) to become part of the Rule 26(b)(1) definition of the scope of discovery," as reached after the Mini-Conference held by the Subcommittee.[46] This was regarded as an "elegant solution" whihch reduced the open-endedness of the word "proportional."[47] The Committee had been concerned that since "proportionality" did not appear in the rules, its use by itself could generate uncertainty and "corresponding contention."[48]

The final text reflects several changes made after the Public Comment period. The "amount in controversy" factor was moved to a secondary position 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 to provide "explicit focus" on the need to deal with "information asymmetry."[49] The Committee explained that, as modified, the revised provision would be a significant improvement.[50]

In addition, the balance of the remaining text in Rule 26(b)(1) would be deleted. This includes the list of examples[51] along with authority to order "subject matter" discovery for good cause.[52] Also deleted would be the statement that "[r]elevant information need not be admissible at trial if [it] appears reasonably calculated to lead to admissible evidence," because it has been used, incorrectly, to define the scope of discovery.[53] It would be replaced by the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."

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[46] *See* Amended Initial Sketch (undated), at 20; as modified after the October 8, 2012 Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.
[47] Minutes, Subcommittee Conference Call, October 22, 2012, at 6, copy at https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf.
[48] Minutes, March 22-23, 2012 Rules Committee Meeting, at lines 1041-1044.
[49] Committee Note, at B-41 ("the burden of responding to discovery lies heavier on the party who has more information, and properly so").
[50] May 2014 RULES REPORT, 5 ("a significant improvement to the rules governing discovery"). The June Report did not repeat the observation in the May Report that "if" the expressions of concern reflect "widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation." (*Id.* 8).
[51] Rule 26(b)(1)("including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identify and location of persons who know of any discoverable information").
[52] Committee Note, at B-43 (the language is rarely invoked and "[p]roportional discovery" suffices).
[53] *Id.*, at B-44.

Rule 26(b)(2)(C)(iii) would be modified to confirm the availability of protective orders[54] when a court determines that "the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)." (new matter underlined).

The Committee Note was also amended to provide that "[c]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.[55] Judge Campbell has described this to the Standing Committee as "addressing possible proportionality concerns that might arise in ESI-intensive cases."[56]

Public Comments

The Proposal to incorporate proportionality factors into Rule 26(b)(1) was widely opposed by the plaintiffs' bar as a restriction on discovery. The American Association of Justice ("AAJ"), formerly "ATLA,"[57] argued that the change would "fundamentally tilt the scales of justice in favor of well-resourced defendants" because a producing party could "simply refuse reasonable discovery requests" and force requesting parties to have to "*prove* that the requests are not unduly burdensome or expensive."[58] (emphasis in original).

Prof. Arthur Miller criticized the proposal as erecting "stop signs" to discovery without an empirical evidence of a need to restrict discovery. He described the inclusion of proportionality in the 1983 rules ("on his watch") as based on merely "impressionistic" evidence of discovery abuse.[59] He also noted that the original placement intentionally treated proportionality as a "safety valve." Other comments predicted a massive increase in assertions of disproportionality[60] and in motions to compel, which would unfairly increase costs would likely to deter filings in federal courts.[61]

It was also argued that the movement of proportionality for consideration early in the case was "putting the cart before the horse" since a proportionality analysis is best accomplished by a court only after the issues are developed and there is more information available.[62]

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[54] McPherson v. Canon Business Solutions 2014 WL 654573, at *3 (D. N.J. Feb. 20, 2014)(best understood as "a motion to limit discovery").
[55] *Id*., at B-42.
[56] Draft Minutes, May 29-30 Standing Committee Meeting, 4; copy at November 2014 Rules Committee Agenda Book, at 20 of 588.
[57] AAJ Comment, December 19, 2013.
[58] *Id*., at 11.
[59] 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).
[60] Professor Miller is quoted as predicting a "tidal wave of defense motions to prevent discovery on the ground that one or more of the five proposed proportionality criteria is absent." *Id.*
[61] Hon. Shira A. Scheindlin Comment, January 13, 2014, at 3.
[62] Testimony by Larry Coben, January 9, 2014.

To supporters, however, the proposal was a "modest" adjustment[63] which addressed the largely overlooked role of proportionality in limiting the amount of discovery that is permissible. Proportionality has been in the Rule since 1983 and requesting parties are already obligated, by Rule 26(g), to certify that requests meet those criteria.[64] The Sedona Conference®[65] and the Department of Justice[66] endorsed the proposal, with the latter suggesting that language to be added to the Committee Note to clarify that the movement of the factors is not intended to change the scope of discovery.[67]

LCJ and others also argued that it would also be appropriate to require that the discovery sought be "material."[68]

Observations

It is overly simplistic to assert that a shift in the burden of proof will occur under the proposal or that the scope of discovery will be changed. The proposed Committee Note emphasizes that the relocation of the factors into the "scope" rule will not limit proportional discovery nor change the burden of proof involved.[69] The change is "not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."[70]

Under current practice, a producing party may assert limitations based on proportionality by registering an objection under Rule 34(b)(2) or by seeking a protective order under Rule 26(c). If a motion to compel is filed, and a facial showing of proportionality is made by the requesting party, the producing party must demonstrate the basis for the assertion of disproportionality or be compelled to produce the information.[71]

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[63] Caig 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)(the proposal will not "materially change obligations already imposed upon litigants, their counsel, and the court").

[64] Rule 26(g)(1)(B)(iii)(attorney signing discovery filings impliedly certifies that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action").

[65] Sedona Conference® Comment, November 26, 2013, at 5.

[66] And in Proposed Rule 37(e)(2).

[67] Department of Justice Comment, January 28, 2014, at 3 ("The transfer of the text describing the factors from Rule 26(b)(2)(C) to Rule 26(b)(1) is not intended to modify the scope of permissible discovery").

[68] LCJ Comment, Reducing the Costs and Burdens of Modern Discovery, August 30, 2013, at 18-19 (suggesting addition of a materiality requirement to the introductory clause so that a party would be able to "obtain discovery regarding any non-privileged matter that is relevant and material to any party's claim or defense")(new matter underlined).

[69] Committee Note, at B-39 ("the change does not place on the party seeking discovery the burden of addressing all proportionality considerations").

[70] *Id*. ("[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discover disputes").

[71] *See, e.g.,* Nkemakolam v. St. John's Military School, 2013 WL 5551696 (D. Kan. Dec. 3, 2013) at *2 ("[t]he party requesting discovery bears the low burden of showing the request to be relevant on its face, but once facial relevance is established, the burden shifts to the party resisting discovery"). A similar process is spelled out in Rule 26 when inaccessibility of ESI is at issue. *See* Rule 26(b)(2)(B)("On motion

However, this is not a "one-sided" burden but a discussion to which both parties contribute. A requesting party will address the benefits of the information sought, the responding party will address the burden and expense of complying and both will address the importance of the discovery to the issues.[72] As a Committee Member noted during the Phoenix hearing, only if the factors are in "equipoise" will the burden of proof issue even arise.

Incorporation of proportionality into scope is an idea whose time has come. At the Phoenix hearing, a Utah State trial Judge described similar Utah rule changes as part of a "cultural shift" to "proportional discovery."[73] Minnesota[74] and Utah have amended their Civil Rules to give added prominence to proportionality in determining the scope of discovery, with Utah adhering closely to proposal now before the Supreme Court.[75]

The flexibility of the Rules Committee in the withdrawal of the proposals to lower the presumptive limits for discovery under Rules 30, 31, 33 and 36[76] shows that the Rules committee was responsive to stated concerns. The proposals encountered "fierce resistance"[77] on grounds that present limits worked well and might have the effect of limiting discovery unnecessarily.[78]

The Committee was told that the hope remains that parties will discuss reasonable discovery plans at the Rules 26(f) Conference and with the court, which can "shape discovery to the reasonable needs of the case."[79]

The Report to the Standing Committee states that it will be possible to "promote the goals of proportionality and effective case management through other proposed rule changes."[80]

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to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonable accessible because of undue burden or cost").

[72] Testimony by John H. Beisner, January 9, 2014.

[73] Testimony by Hon. Derek Pullan, January 9, 2014.

[74] Minn. Rule 26.02(B)(Scope and Limits)(eff. July 1, 2013)("Discovery . . . must comport with the factors of proportionality").

[75] 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"); *see* Philip J. Favro and The Hon. Derek P. Pullan, New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure, 2012 MICH. ST. L. REV. 933 (2012).

[76] *See* June 2014 RULES REPORT, *supra*, at B-4. The specific changes would have included: Rule 30: From 10 oral depositions to 5, with a deposition limited to one day of 6 hours, down from 7 hours; Rule 31: From 10 written depositions to 5; Rule 33: From 25 interrogatories to 15; and Rule 36 (new): No more than 25 requests to admit, including all discrete subparts (except as to requests to admit the genuineness of any described document).

[77] 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").

[78] A detailed Report of May, 2014 by a plaintiffs' advocacy group 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.

[79] Minutes, April 10-11, 2014, lines 311-315.

[80] June 2014 RULES REPORT, B-4.

(4) Preservation/Spoliation of ESI

It is proposed to replace current Rule 37(e) with a new Rule 37(e) entitled "Failure to Preserve Electronically Stored Information" which provides:

> 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.[81]

This text differs markedly from the initial proposal released for public comment in August, 2013.[82] That proposal authorized curative measures for failures to preserve[83] and sanctions or an adverse inference if 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.[84] It also listed five "factors"[85] to be used in "assessing a party's conduct."

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[81] The text and Committee Note adopted by the Judicial Conference are at pages 36-47 of the June 2014 RULES REPORT, which was Rules Appendix B (starting with B-1) of the Standing Committee Report to the Judicial Conference for its September, 2014 meeting; copy at http://www.law.georgetown.edu/cle/materials/eDiscovery/2014/thusmorndocs/JudicialConfSep2014_Campbell_.pdf.

[82] The May 2014 RULES REPORT included the original text and Committee Note at pages 53-59; which are pages 324 through 330 of the Agenda Book for the May Standing Committee Meeting; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf.

[83] Rule 37(e)(1)(A)(including permission to "permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure").

[84] Rule 37(e)(1)(B).

[85] Rule 37(e)(2)(notice of litigation; reasonableness of efforts to preserve; requests to preserve and "good faith" consultation about it; proportionality to the litigation and whether the party "timely sought" court guidance)

The proposal encountered a mixed reception at three Public Hearings and in written comments.[86] Critics attacked ambiguities, an alleged disrespect of court discretion and the exception based on "irreparable deprivation." However, some endorsed the approach to "curative" measures and argued it could form the basis of a revised rule.[87]

The Discovery Subcommittee met after the close of the public comment period and issued revised recommendations in March, 2014.[88] Those recommendations, with some substantial last minute changes, were adopted at the April 11, 2014 Meeting of the Rules Committee[89] and, subsequently, with minor stylistic changes, approved by the Standing Committee and the Judicial Conference.

Summary of Key Elements

First, the Rule applies only to losses of ESI, not to losses of other forms of "discoverable information," as did the initial proposal. The purpose of "cutting back" was to avoid complications inherent in the "irreparable deprivation" exception to the proposed rule based on *Silvestri v. GM*.[90] LCJ and others urged that the exception be stricken to avoid the temptation for litigants to "fit their claims of negligent spoliation of key evidence (electronic or physical) into the garb of the 'irreparably deprived' language."[91]

Second, the Rule is inapplicable unless the ESI is "lost" because of a failure to take "reasonable steps,"[92] since Rule 37(e) is not "a strict liability rule that would automatically impose serious sanctions if information is lost."[93] As the Committee Note puts it, "[b]ecause the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve."[94]

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[86] The testimony and comments were summarized at pages 331 through 411, *supra*, of the May Standing Committee Agenda book.

[87] Letter Comment, January 10, 2014, Hon. James C. Francis IV, at 5-6 (proposing that Rule 37(e) authorize remedies "no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith").

[88] The Discovery Subcommittee Report begins at page 369 of the April 2014 Rules Committee Meeting Agenda Book, with the revised text, restricted to ESI only, at 383-384 together with a proposed Committee Note; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[89] The May 2014 RULES REPORT, *supra*, the (third and final) version of Rule 37(e) and the new Committee Note at pages 47-52; which is are pages 318 through 323 of the Agenda Book for the May Standing Committee Meeting.

[90] 271 F.3d 583, 593 (4th Cir. 2001)(allowing sanctions without required showing of culpability); *see* June 2014 COMMITTEE REPORT, B-16.

[91] LCJ Comment, Reducing the Costs and Burdens of Modern Discovery, August 30, 2013, at 7.

[92] As expressed by the Subcommittee Chair, "the revised proposal . . . is limited to circumstances in which a party failed to take reasonable steps to preserve, thus embracing a form of 'culpability.'" Minutes, Rules Committee Meeting, April 10-11, 2014, lines, 631-633.

[93] Minutes, Standing Committee Meeting, May 29-30, 2014 at 6; copy available in November 2014 Rules Committee Agenda Book, at 22 of 588.

[94] Committee Note, B-61.

Absent that showing, there is no entitlement to *any* relief under the rule - thus providing a *de facto* safe harbor.

The rule is intended to fully displace the use of inherent power in dealing with losses of ESI that should have been preserved.[95]

Third, when applicable - that is to say when ESI is lost because of a failure to take reasonable steps which cannot be replaced by additional discovery - a court has broad discretion to fashion curative remedies to remedy prejudice, but may not impose certain case-dispositive measures[96] without finding an "intent to deprive" another of the ESI, thus resolving the debilitating split in the Federal Circuits[97] over the culpability required.[98]

LCJ and others had criticized the initial proposal to require a showing of "willful or in bad faith" conduct because of the ease with which cases like *Sekisui American v. Hart*[99] found willful intent in merely intentional conduct which lacked any intent to deprive.[100]

Observations

The Committee Note lists examples of "serious measures" which may be "appropriate"[101] under Subdivision (e)(1) as including the presentment of evidence of failures to preserve to the jury along "with all the other evidence in making its decision."[102] This risks a slippery slope by placing a "thumb on the scale."[103] Recent unfortunate experience in the *Actos* litigation suggests that great care will be required.[104]

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[95] Committee Note, B-58 ("It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used").

[96] Subdivision (e)(2)(presumptions or instructions to jury or dismissal or default judgments).

[97] *Compare* Residential Funding Corp. v. DeGeorge, 306 F.3d 99 (2d Cir. Sept. 26, 2002)(adverse inferences may be imposed if evidence was destroyed "*negligently*") (emphasis in original) *with* Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997)("[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case").

[98] June 2014 RULES REPORT, B-14 ("[r]esolving the circuit split with a more uniform approach to lost ESI, [will] thereby reducing a primary incentive for over-preservation").

[99] 945 F. Supp.2d 494 (S.D. N.Y. Aug. 15, 2013)

[100] LCJ Comment, *supra*, at 8 (noting that Sekisui also used willfulness as a sufficient predicate to permit the jury to infer that the missing evidence is unfavorable to the party).

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

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

[103] Gorelick et al., Destruction of Evidence §. 2.4 (2014)("DSTEVID s 2.4)("Even if the judge gives a very narrow instruction regarding the effect to be given t the spoliation inference, a jury might consider such conduct so outrageous as to justify a verdict against the spoliator").

[104] A jury recently awarded $9B in punitive damages after a court allowed it "to hear all evidence and argument establishing and bearing on the good or bad faith of [the spoliating party's] conduct." In re Actos (Pioglitazone) Products Liability Litigation, 2014 WL 2872299 at *38 (W.D. La. Jan. 30, 2014)(filed June 23, 2014). *See also* In re Actos, 2014 WL 4364832, at *45-46 (W.D. La. Sept. 2, 2014)(refusing post-trial relief because "even if there were evidence [that the jury found that spoliation was the basis for a punitive damage award] [t]he jury was free to make its own inferences").

Some have expressed concerns that proof of "intent to deprive" might be satisfied by merely reckless or willful conduct.[105] This would be inconsistent, however, with the Committee intent to require conduct "akin to bad faith, but [which is] defined even more precisely."[106] The language chosen invokes the "historical rationale for adverse inferences" under which conduct must be shown to have been for the purpose of hiding adverse information, not merely intentional conduct.[107]

There are few principled distinctions between losses confined to ESI and those involving ESI and hard copy documents or losses of tangible things which contain ESI. It remains to be seen how courts will apply varying standards in those contexts when the losses result from the same duty to preserve. In *Pettit v. Smith*, for example, the court (Chair of the Rules Committee) noted that a digital video file "does not concern ESI in the sense addressed" in the pending replacement rule for Rule 37(e).[108]

Preservation Standards

The proposed Replacement for Rule 37(e) does not provide detailed preservation guidelines for parties seeking to comply,[109] which was a core LCJ recommendation at the time of the Duke Conference. LCJ proposed adoption of a new Rule 26(h), which would have limited preservation obligations to matters what would enable a party to prove or disprove a claim or defense and which "comport[ed]" with proportionality. It would have specified limits on certain types of ESI and a new Rule 37(e) would have barred sanctions in the absence of proof of "willful destruction" designed to prevent its use in the litigation.[110]

Instead, the Committee proceeded with a "sanctions only"[111] approach which authorized sanctions and included a list of factors to "reassure and give direction to [those] making preservation decisions" through their "backwards shadow."[112] After the

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

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

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

[108] 2014 WL 4425779, at n. 6 (D. Ariz. Sept. 9, 2014)("which is concerned more with the operation of modern ESI systems and the ease with which information can be added to and lost by such systems").

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

[110] Comment, Reshaping the Rules of Civil Procedure for the 21st Century, May 2, 2010, at 36-38; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf.

[111] The proposal is at 22-23 of the "Preservation/Sanctions Issue" memo furnished with the June cover latter to participants in the Mini-Conference on the subject; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Preservation.pdf.

[112] *Id*., at 25. The text and list of factors originated with the Discovery Subcommittee Meeting of February 20, 2011, where it was attached as an Appendix (authorizing sanctions or appropriate jury instructions only if the failure "was willful, in bad faith, or caused irreparable prejudice in the litigation and listing eight factors for consideration"). 2011 Agenda Book, Rules Committee Meeting of April 2011, at 229.

public comment period, the Committee dropped the list of factors[113] and substituted the "reasonable steps" approach. The Chair of the Discovery Subcommittee has stated that the change was "meant to encourage reasonable preservation behavior," tempered by proportionality concerns.[114]

This implies that courts should utilize the formulation of the *Rimkus* case.[115] In that case, the court held that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards")(emphasis in original).[116]

However, this begs the question of whether it possible to agree on the preservation standards. And, more to the point, who will set them? The challenge for in-house counsel and their outside colleagues is to guide development of a consensus on a range of conduct involving "reasonable steps." It surely will not involve a *per se* preservation standards approach. A "reasonable steps" analysis should examine the reasonability and proportionality of the preservation efforts actually undertaken.[117]

However, the timing may be a matter of some urgency, as there are others who are prepared to set the standards in absence of such activity and have a track record to prove their ability to do so.[118]

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[113] Comment, Reducing the Costs and Burdens of Modern Discovery, August 30, 2013, at 9-16 (explaining in detail why the value of the factors – which refer to reasonability and proportionality - are outweighed by their incomplete and potentially misleading character); copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_advisory_committee_on_civil_rules_8.30.13.pdf.

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

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

[116] *Id.*, 613.

[117] Automated Solutions v. Paragon Data Systems, 756 F.3d 504, 516-517 (6th Cir. June 25, 2014)(refusing to apply a *per se* test pursuant to Pension Committee in light of the criticism of its approach by the Second Circuit in Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. 2012)).

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

APPENDIX

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 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; * * *

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

(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.