

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
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SHIRA A. SCHEINDLIN
UNITED STATES DISTRICT JUDGE

January 13, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building
One Columbus Circle, Room 7 - 240
Washington, D.C. 20544

Re: Comments on Proposed Rules

Dear Committee Members:

Thank you for the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure. As background to these comments I note the following: I have served as a United States District Judge for nineteen years, and previously served as a United States Magistrate Judge for almost five years. I am also a former member of the Advisory Committee on Civil Rules having served from 1999 through 2006. I attended the Duke Conference in 2010, participating in a panel that addressed a potential rule on preservation, and subsequently attended two mini-conferences in Dallas sponsored by the Advisory Committee, again focusing on the issue of preservation. Finally, I have authored a number of opinions in the area of electronic discovery, co-authored the first casebook on that subject, and frequently write and lecture on that topic.

Many of the new proposals have great merit and I support them fully. I will only comment on those rules that I believe should not be adopted – or at least not as currently drafted.

1. Proposed Rule 26(b)(1): Scope in General

The Committee has made several significant changes to Rule 26(b)(1), the rule that governs the permitted scope of discovery in civil actions. The biggest change is to define the scope of discovery in a new way. In the current rule scope is defined as that which is relevant to a claim or defense and, upon a showing of good cause, relevant to the subject matter of the action. The proposal would re-define scope to include two elements: relevant to a claim or defense *and* proportional to the needs of the case. The proposal eliminates the ability to reach subject matter upon a showing of good cause.

There is no question that this proposal is intended to narrow the scope of permissible discovery. The first change, eliminating even the possibility of expanding the scope of discovery to the subject matter of the action, is unnecessary. In the seven years since the adoption of the 2006 amendments which established the two-tier scope standard, I have not heard any disputes regarding the scope of permissible discovery. I suspect that the parties have had no trouble reaching a general and amicable agreement as to what information is relevant and what is not. The sole purpose of eliminating the second tier is to send a signal that the permissible scope of discovery is being narrowed – although there is no evidence that the current definition of scope is causing any problems.¹ Indeed, the Committee provided no explanation for its decision to drop the second tier other than that the first tier is “sufficient.” Respectfully, this is not a sufficient explanation to warrant a change that contracts the scope of discovery.

The second change adds a proportionality assessment to the definition of scope. This change raises several concerns. *First*, the rule invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional to the needs of the case. This could become a common practice, requiring requesting parties to routinely move to compel the production of the withheld materials. This, in turn, will increase costs and engender delay. The courts could experience a rise in motion practice as requesting parties are forced to make motions based on the

¹ Some experts in e-discovery have expressed concern that restricting discovery to that which is relevant to a claim or defense might preclude discovery of significant metadata accompanying electronic records that is necessary to permit the use of technology assisted review.

routine assertion of a proportionality objection. Courts are overburdened with motion practice as it is – given the rise in motions to dismiss arising from the decisions in *Twombly* and *Iqbal*. This new proportionality motion may take a busy court months to decide – not to mention that it takes parties anywhere from six to ten weeks (in my experience) to brief any motion. And motions are expensive. I suspect that any motion of substance costs \$25,000 at today’s hourly rates.

Second, the proposed rule does not specify which party bears the burden of proof. It appears to me that if a producing party makes a “proportionality” objection, the burden of proof will be on the requesting party to show that the requested information is proportional to the needs of the case. This is burdensome and unfair at the outset of a case, and this burden is more likely to fall on plaintiffs than on defendants. As just noted, all motion practice is expensive and all motions result in delay. If the burden of proof falls on plaintiffs, given that they typically (albeit not always) have less resources than defendants, this is a significant new expense to be considered when bringing a case in federal court. I understand from comments by Committee members at the first public hearing on the proposed rules that some believe that the burden of proof will fall on the producing (or objecting) party rather than on the requesting party, finding support for this conclusion in Rule 26(g)(3). If this is indeed the case – a proposition that seems dubious to me – then it would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party.

Third, the rule specifies that proportionality should be assessed by considering “the amount in controversy, the importance of the issues at stake in the action, 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.” Addressing five factors in every motion will be burdensome and may not be particularly informative to the court in making an assessment of proportionality. The requesting party will say the case is worth one million dollars, and the producing party will say it is worth ten thousand dollars. How will a court fairly decide the true amount in controversy at the very outset of the case? The producing party will say the burden or expense of the proposed discovery is great – it will cost us millions of dollars to retrieve the requested information – and the requesting party will say the producing party is exaggerating and the search and review can be done for far less if the requesting party uses less expensive and more efficient means to conduct the search. What a nightmare for the court! Does a

court then appoint an expert to determine the true burden or expense of responding to the request? Does the court investigate the sources on which records reside and perhaps arbitrarily decide the number of custodians whose records must be collected, retrieved, and reviewed? And then the court must balance the alleged burden and expense against the potential benefit. How, exactly, can a court assess the benefit of materials that have not been identified – except in the most general way – at the very outset of the case? The proposal is not realistic. Indeed, in an article repeatedly cited by the United States Supreme Court in its landmark *Twombly* opinion,² Judge Frank Easterbrook noted that “[t]he portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow.”³

The current definition of scope has been working well. Most studies show that in the vast majority of cases the lawyers and parties believe that the amount of discovery requested and taken is just about right.⁴ Requiring this new

² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (citing the Easterbrook article twice in the majority opinion and once in the dissent).

³ Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638-39 (1989) (further noting that “[j]udicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. . . . We [referring to judges] cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice *we lack essential information*. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole . . . from a request that was not justified at the time?)(emphasis added). *See also* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 899-900 (2009) (“Judges face information and other constraints that impair their ability to manage optimally, especially in the highly strategic environment of litigation.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603-04 (2001) (arguing that proportionality limits are impractical because the trial court is not in a good position to assess whether the desired information is worth the cost).

⁴ Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (Oct. 2009), at 27, available at

assessment at the very *outset* of the case may result in the unintended consequence of increasing cost and delay instead of reducing it. Both the parties and the court have had the proportionality tool available for years. It was not often raised, but when it was, it was raised at a time in the case when both the parties and the court had developed significant information about the case that allowed the court to deal intelligently with the objection. A proportionality assessment at the outset of a case may be useful in a mega case, but given that the rules are trans-substantive, it is unfortunate to impose this new requirement in every case and with respect to every discovery request.

The third change in the proposed rule eliminates the following language in the current rule: “parties may obtain discovery . . . 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.” This language, in substance, has governed the use of all discovery devices for forty-four years – since 1970 – and depositions in particular before that. The language is useful because it encourages the early identification of sources of information and of persons with knowledge of the location of discoverable information. Such discovery is particularly important when dealing with voluminous electronic records. When language is eliminated lawyers tend to argue that the act has a meaning and is not without consequence. I am concerned that some lawyers will argue that the rule no longer contemplates that such information is within the scope of permissible discovery. I see no harm in leaving the language in the rule and, once again, the Committee provides no explanation justifying its deletion.

The fourth and final change eliminates the long-standing language that follows: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” There is no empirical evidence that this language has caused any real problems – it appears, however, that the Committee instinctively believes (or speculates) that courts have used this language to expand the definition of relevance. But this ignores the words in the current rule. The language now is qualified by the word *relevant*. All it says is that *relevant information* (*i.e.* relevant to a claim or defense) need not be admissible at trial if it is likely to lead to the

[http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

discovery of admissible evidence. It does *not* expand the scope of relevance or create an exception that swallows the rule. The Committee proposes the following language to replace the current rule: “Information within this scope of discovery [*i.e.* relevant and proportional] need not be admissible in evidence to be discoverable.” The change will be seen as another signal to the court that the scope of discovery is to be narrowed. The meaning is the same – admissibility is not the test of relevance. But the deletion of the phrase “likely to lead to the discovery of admissible evidence” is unnecessary and leads to the conclusion that the Committee meant to narrow the scope of discovery by this change, thereby adding an arrow to the quiver of objecting producing parties.

In sum, there is no basis for this change in the rule defining the scope of discovery. The rule was amended just seven years ago. It is too soon and too often to once again revise this rule and to further contract the scope of discovery. This change appears to be weighted in favor of defendants (generally the producing party) and against plaintiffs (generally the requesting parties) and does not have the appearance of fairness and neutrality. I view it as a continued and systematic effort to respond to a big business complaint that the American system of litigation is somehow bad for American business and reduces our competitive position in the world of international commerce. The Committee should not respond to this interest group in formulating rules governing all civil cases in the federal courts.

2. Rule 26(c)(1)(B): Protective Orders - in General

This is a small but important change. For years, the Committee has been urged to write a cost-shifting rule. The pressure to do so has been repeatedly resisted. But cost-shifting has crept into the rules and the more often it does, the more likely we are to see a change in the American system of litigation, where each party bears its own costs, absent a sanction for wrongful conduct. In 2006, a change was made in Rule 26(b)(2)(B) permitting a party to obtain discovery of information that is “reasonably accessible” but also permitting a party to obtain discovery of information that is “not reasonably accessible” if it can show “good cause” to reach the second tier of information, and if such discovery satisfies the proportionality rule of 26(b)(2)(c). The rule then states “the court may specify conditions for the [second tier] of discovery.” The Advisory Committee Notes explain that one such condition is cost-shifting. In other words, if a court permits a requesting party to obtain information that is not reasonably accessible, it can also require that party to pay for such discovery. Now, the Committee proposes that in

issuing an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, the court may “specify[] terms, including time and place *or the allocation of expenses*, for the disclosure or discovery.” This is another effort to shift the costs of discovery to the requesting party. In combination, these two rules may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without. That has not been our system of civil justice – and I hope it does not become the default position.

3. Rule 30: Depositions by Oral Examination

Two changes to Rule 30 are proposed as follows: the presumptive number of depositions is reduced from 10 to 5, and the presumptive time limit remains one day which is now defined as 6 hours instead of 7 hours. Neither of these changes is wise or necessary. In my experience, lawyers work well together to determine the number of depositions needed in a case. It is very rare that I hear a dispute on this issue. Parties in large cases routinely agree to more than 10 depositions per side; in smaller cases the parties take no more depositions than are necessary – usually less than 10 per side. The arbitrary reduction from 10 to 5 is just another signal that the Committee believes discovery must somehow be narrowed or curtailed based on the unsubstantiated premise that the system is subject to abuse. In fact, as I noted earlier, a 2009 survey by the Federal Judicial Center revealed that most lawyers believe that the amount of discovery in their case was just about right.⁵ An ancillary concern is that the cost of resolving objections to the number of depositions will fall disproportionately on parties in smaller cases. In large cases the parties will inevitably agree to more than five depositions per side. But in smaller cases, if an objection is made, the parties will spend money raising the dispute with the court – which must then be resolved – both of which increase cost and delay. The proposal to reduce the presumptive time limit on depositions by one hour is even worse. This will again lead to unnecessary disputes that must be decided by a telephone call to chambers. The 6 hours will be measured with a chess-clock approach to every rest break, meal break, or colloquy. Lawyers will try to “run the clock” to protect a witness. The 7-hour rule was generally viewed as a full day. There is no need to make this change. It cannot be viewed as an improvement, but only as an invitation to mischief and gamesmanship.

⁵ See *supra* n. 4.

4. Rule 33: Interrogatories to Parties

The proposed rule would reduce the presumptive number of interrogatories from 25 to 15. I oppose this change for the same reasons I oppose the changes to Rule 30 governing depositions. There is no empirical evidence that 25 interrogatories has caused any problems or that it is resulting in undue cost or delay. It is a change only for the purpose of signaling a narrowing of the scope of discovery and will lead, once again, to an increase in both cost and delay based on the transactional cost of resolving a dispute regarding the appropriate number of interrogatories. As with the deposition limits, these disputes are more likely to be raised in smaller cases than in the larger cases where the parties will stipulate to more than 15 interrogatories. There is simply no proof that this change is necessary.

5. Rule 37(e): Failure to Preserve Discoverable Information

The proposed rule was designed to address the perceived problem of over-preservation but in the end does no such thing. The Committee sought input regarding the possibility of drafting a rule addressing preservation but in the end determined that they could not propose such a rule. Instead, they decided to address the preservation problem through the retrospective lens of whether a sanction should be imposed for the loss of information. The second purpose of the proposed rule was to create a national standard for the imposition of sanctions for the loss of information. At the moment, the Circuits are in disarray as to what state of mind on the part of the spoliating party warrants any particular sanction. The second goal is laudable. I agree that a single national standard for the federal courts is advisable although I note that this standard will not bring national uniformity as the fifty state courts may adopt diverse standards that may differ from that adopted in the rules governing the federal courts.

The proposed rule makes a distinction between curative measures and sanctions – although it fails to clearly draw the line between the two. Curative measures may be ordered without regard to the spoliating party's state of mind. Rule 37(e)(1)(A) provides that such measures may be imposed "if a party fails to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation" and can include additional discovery, any expenses incurred by the failure to preserve including attorneys' fees and "curative measures," which is not a defined term. Rule 37(e)(1)(B) then provides that a

court may impose any sanction listed in Rule 37(b)(2)(A) (adverse inference, preclusion, striking pleadings, staying proceedings until violation is remedied, dismissing the action, entering a default judgment, or issuing a contempt citation), only if the court finds that the loss of evidence “caused substantial prejudice” *and* was done “willful[ly]” *or* “in bad faith” or “irreparably deprived a party of any meaningful opportunity” to present a claim or defend against it. The Advisory Committee Notes make clear that the second alternative should rarely be used. The Note also advises that this rule is meant to eliminate a court’s ability to use its inherent authority to impose a sanction. I oppose the proposed Rule 37(e) for the following reasons.

First, the extent of permissible curative measures is unclear. In *Mali v. Federal Insurance Co.*⁶ the Second Circuit held that an instruction to the jury that it had the power to find that if a party had control over information but failed to preserve it, then the jury could infer that the lost information was unfavorable to that party. The Court clarified that this was not a sanction and therefore neither the court nor the jury was required to make the preliminary finding that the lost material was relevant or that the alleged spoliating party acted with a culpable state of mind. The holding in *Mali* sounds very much like a “curative measure” under the proposed new rule – in that there is no need to determine culpable state of mind and the result would be to “cure” the damage caused by the loss of information. But how many judges would think this jury instruction is a curative measure?

Second, in order to impose a sanction listed in Rule 37, the court must find that the spoliating party’s action caused “substantial prejudice” and was “willful” or in “bad faith.” This language is fraught with problems. Substantial prejudice is an open ended concept that will be interpreted differently by each judge facing the question. It is a subjective determination. Worse yet, “willful” must mean something other than “bad faith” given that the latter term is preceded by “or.” What, then, does “willful” mean? My research shows that it varies depending on the context in which it is used. Is it merely any intentional act or does it require some level of malevolence (*i.e.* wrongful intent)? I would not like to see this problem cured by eliminating “willful” and leaving only “bad faith.” That sets the bar too high. If only bad faith conduct can be sanctioned then why should any party be careful about preservation and make a real effort to preserve

⁶ 720 F.3d 387 (2d Cir. 2013).

relevant non-privileged information. Such a rule would encourage sloppiness and disregard for the duty to preserve. If the Committee wishes to keep the focus on state of mind then I would urge that the language include “gross negligence” “reckless” or “bad faith” rather than “willful” or “bad faith.”

Third, I am very concerned about the burden of proof. Once again, it appears that the burden of proof is placed on the innocent party to show “substantial prejudice” or that it has been “irreparably deprived of any meaningful opportunity” to present a claim or defend against one. The innocent party may well be required to prove that the spoliating party acted with a culpable state of mind but it is unreasonable to ask that party to prove prejudice or its inability to prove its case when it cannot know the value of the information that it does not have. The better approach – and one which has been successfully used for some time – would presume that the loss of information would cause substantial prejudice (or has irreparably damaged the innocent party) *if* the culpable conduct was done with a sufficiently egregious state of mind. This presumption can then be rebutted by the spoliating party if it can show that despite the loss of information the innocent party has not been harmed. This is a fair approach and ought to be retained.

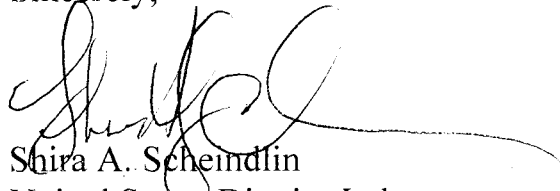
Fourth, in determining whether a failure to preserve was willful or in bad faith the proposed rule directs the court to consider five factors. But a review of these factors reveals that they have little or nothing to do with willfulness or bad faith. Rather, they are factors that assess the reasonableness of the conduct. This creates a disconnect. If the standard for the imposition of sanctions included negligence or gross negligence the factors would make sense. But given the high bar of “willful” or “bad faith” the factors are not helpful.

In sum, the proposed Rule 37(e) will only create new problems instead of curing old ones. Magistrate Judge James C. Francis has submitted an alternative rule proposal.⁷ I agree with his proposal and with all of his comments concerning the proposed rule circulated for public comment.

⁷ The Hon. James C. Francis IV, *Comment on Proposed Changes to Rule 37(e) of the Federal Rules of Civil Procedure* (Jan. 10, 2014).

I thank the Committee for the opportunity to comment on the proposed amendments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Shira A. Scheindlin', with a long horizontal flourish extending to the right.

Shira A. Scheindlin
United States District Judge