The 2013 Civil Rules Package After the Public Comments: The Portland Finale

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Introduction
The 2013 Package

I. Introduction

On Friday, March 21, 2014, the Civil Rules Advisory Committee (the "Rules Committee") released reports from two relevant Subcommittees recommending changes in the "package" of proposed amendments to the discovery rules now before the Rules Committee.[2] Aside from some "tinkering" with Proposed Rule 26(b)(1) and abandonment of proposals to reduce presumptive limits on discovery devices, the most dramatic change is a complete revision to Proposed Rule 37(e).

A "text only" version of the revised proposals, reflecting the changes recommended in the March reports, is reproduced in Appendix A and B (Rule 37(e) only). Appendix C contains the original proposed form of Rule 37(e).

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[2] The Reports are to be found at 79-113 and 369-401, respectively, in the 2014 April (Portland) Rules Committee Meeting Agenda Book (the "AGENDA BOOK"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf. Citations use the page numbers in the Agenda Book and are referred as from the "2014 REPORTS."

The package was originally released for Public Comment in August, 2013,[3] and the recommendations reflect the results of three hearings (120 witnesses) and over 2300 written comments.

The Rules Committee will consider the final form of the Proposed Rules package at its meeting in Portland, Oregon on April 10-11, 2014. Unless republication for further Public Comment is deemed necessary, the next step in the process is a review by the Committee on Rules of Practice and Procedure (the "Standing Committee"), after which the proposals will be submitted to the Judicial Conference of the United States, preparatory to review by the Supreme Court. Thereafter, assuming adoption in some form, the earliest that the Proposed Rules (or any subset of them) could go into effect is December, 2015, assuming that Congress does not exercise its prerogative to nullify or modify them.

Summary of Proceedings to Date

The impetus for the proposals was the May, 2010 Conference on Civil Litigation held by the Committee at the Duke Law School to determine if it was necessary to "totally rethink the current approach taken by the civil rules."[4] As the then Chair of the Rules Committee subsequently put it, "[f]or years we [had] heard a steady chorus of complaints from parts of the bar about the increasing costs and delays in federal litigation."[5]

The Duke Conference generated a substantial body of scholarly papers and involved highly motivated dialogue stretching over two days.[6] Key "takeaways" were the need for better case management, application of the long-ignored principle of "proportionality" and cooperation among parties.[7] In addition, through the work of the E-Discovery Panel,[8] attention was drawn to the need for uniform national rules regarding preservation and spoliation.

The task of developing individual rule proposals was delegated to a Discovery Subcommittee chaired by the Hon. Paul Grimm and a "Duke" Subcommittee, chaired by the Hon. John Koeltl. While there was "basic agreement that the present rule structure

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[3] The original Proposed Rules and Committee Notes are to be found in the Request for Comments, dated August 15, 2013, which can be found at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf. That document includes, at pages 259-328, the Advisory Committee Report of May 8, 2013, as supplemented June, 2013 (hereinafter cited as the "2013 REPORT").

[4] Mary Kay Kane, Pretrial Procedural Reform and Jack Friedenthal, 78 GEO. WASH. L. REV. 30, 38 (2009).

[5] 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

[6] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 540-541 (2010).

[7] 2013 REPORT, at 260 ("[p]articipants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management").

[8] The Duke Conference E-Discovery Panel consisted of Hon. S. Scheindlin and J. Facciola as well as Mssrs. T. Allman, J. Barkett, D. Garrison, G. Joseph and D. Willoughby; *see* 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.

is basically sound," the Committee concluded there was room for "careful changes" to advance the identified goals.[9] Both Subcommittees vetted interim proposals at "mini-conferences" and the resulting proposals were merged into a single "package" for public comment.

Other projects stemming from Duke involved enhanced educational programs, various pilot projects, an ongoing appraisal of state court procedures and the development of protocols for categories of litigation.

Hearings and Public Comments

The Rules Committee conducted three Public Hearings in Washington, D.C, Phoenix and Dallas.[10] In addition, the Committee solicited and received written comments through mid-February, 2014. Over 2200 Comments were submitted, all of which are available on the "Regulations.gov" website, accessible via the U.S. Courts website.[11]

Lawyers for Civil Justice ("LCJ") and the American Association for Justice ("AAJ," formerly "ATLA") provided comprehensive advocacy on virtually all proposals. The AAJ urged rejection of rules "that add proportionality to the scope of discovery, impose reduced presumptive limits [and] make sanctions less likely in instances of spoliation" whereas LCJ supported limiting sanctions, adding proportionality to the scope of discovery, cost-allocation and reductions in presumptive numerical limits. LCJ did not support the amendments to Rule 1 and the AAJ did not mention them.

The bulk of the support came from individuals or representatives of corporate or affiliated advocacy entities.[12] However, aspects of the package were also supported by the Federal Magistrate Judges Association ("FMJA"); the Association of Corporate Counsel ("ACC"), the American College of Trial Lawyers ("ACTL"); ARMA, the Department of Justice ("DOJ"), the Sedona Conference® WG1 Steering Committee ("Sedona") and a cross-section of state, national and local Bar Associations.

The primary opposition was expressed by representatives of individual claimants, non-profits associated with their welfare and members of the academic community.[13] Most focused on the proposed changes to the scope of discovery in Rule 26(b)(1), the

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[9] 2014 REPORTS, at 80.

[10] The initial Public Hearing on the rules package was held by the Rules Committee in Washington, D.C. on November 7, 2013 followed by a second hearing on January 9, 2014 in Phoenix and a third and final hearing on February 7, 2014 at the Dallas (DFW) airport. Transcripts of the first two hearings (D.C. and Phoenix) are available at http://www.uscourts.gov (scroll to Rules and Policies).

[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] In addition to Comments filed by individual corporate entities, over 300 General Counsel and executives supported a joint Statement of Support. *See* Letter from Companies in Support, February 14, 2014.

[13] Joint Comments by Professors Hershkoff, et. al., February 5, 2014 (listing 6 signatures), at 3; *seconded by* Statement by Janet Alexander et. al, February 18, 2014 (listing 171 signatures).

lowering of presumptive limits in Rules 30, 31, 33 (and imposition of a new limit in Rule 36) and Proposed Rule 37(e).

Opposition also came from some of the entities listed above, some District and Magistrate Judges and Democratic members of the House and Senate.[14] Only a few dedicated law review articles have appeared.[15]

II. The Amended 2013 Proposals

We discuss the individual proposals, as amended by Subcommittee Reports of March, 2014, in chronological order based on the primary Rule involved.[16]

(1) Cooperation (Rule 1)

Rule 1 of the Federal Rules provides that the civil rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The rule does not include a "duty to cooperate," as proposals to that effect were rejected in former times.[17] Instead, other subdivisions of the Civil Rules require participation by counsel and parties in "good faith" in preparing discovery plans and attending case management conferences.[18]

The Proposal

The Committee has proposed to amend Rule 1 so that the rules will 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 Duke Subcommittee Report of March, 2014 does not propose any change in the text or the original Committee Note. The Proposed Committee Note thus states that

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[14] A Senate Subcommittee held a hearing on the topic on November 5, 2013. *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.

[15] 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); Elisabeth M. Stein, Proposed Changes to Discovery Rules Loom, 49- SEP TRIAL 48 (2013) and Jennifer Ecklund and Janelle L. Davis, Preservation of [ESI]: Proposed Changes to Federal Rule 37(e), 55 No. 4 DRI FOR DEF. 44 (2013); *see also* Philip J.Favro and Derek P. Pullan, New Utah Rule 26: A Blueprint for Proportionality Under the [FRCP], 2012 MICH. ST. L. REV. 933 (2012).

[16] The Rules Committee also proposes to abrogate Rule 84 and the related "Appendix of Forms" and make certain conforming amendments to Rule 4, 6 and 55. This Memorandum does not deal with that aspect of the Rules Package.

[17] Steven S. Gensler, Some Thoughts on the Lawyer's E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 547 (2009) (a 1978 proposal requiring cooperation was deleted "in light of objections that it was too broad").

[18] *See, e.g.*, FED. R. CIV. P. 16(f); FED. R. CIV. P. 37(f).

the 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. It also observes that "most lawyers and parties cooperate" and that "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

Cooperation was a "theme" that was heavily emphasized at the Duke Conference and "principles of cooperation have been drafted by concerned organizations."[19] Many Local Rules and other e-discovery initiatives invoke cooperation as an aspirational standard.[20] Local Rule 26.4 for the Southern and Eastern Districts of New York emphasize that cooperation of counsel must be "consistent with the interests of their clients."[21]

Prior to its October 8, 2012 Mini-Conference at Dallas, the Duke Subcommittee had considered modifying the text of Rule 1 to require parties to "cooperate to achieve these ends." The Rules Committee abandoned the effort because it might generate excessive collateral litigation and conflict with professional responsibilities of effective representation.[22]

Testimony and Comments

The Duke Subcommittee concluded after the Public Hearings that "[t]here is little opposition to the basic concept of cooperation."[23] It described the "doubts" that emerged in the hearings and comments as including concerns that "vague concept" of cooperation might "invite confusion and ill-founded attempts to seek sanctions for violating a duty to cooperate."[24]

The AAJ, for example, did not mention the proposal. The FMJA indicated support for the change in the Rule as did Sedona, given the consistency with the Sedona Cooperation Proclamation[25] and its effort to change the culture of discovery.[26] The N.Y. State Bar Association endorsed the proposal but suggested that the duty to cooperate should be articulated in the Rule, not the Committee Note.[27]

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[19] 2014 REPORTS, at 92-93.
[20] *See* [MODEL] STIPULATED ORDER, ¶ 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]).
[21] E.D.N.Y. & S.D.N.Y. L.R. 26.4. In its Comment, the Advisory Committee of the Eastern District supported placing the "explicit recognition" of the cooperation principle in the text of Rule 1. Comment, December 6, 2013, at 2.
[22] 2013 REPORT, at 270.
[23] 2014 REPORTS, at 93 (noting that the Rule could have been written to require that the parties to construe and administer the rules consistent with its goals) .
[24] *Id.*
[25] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[26] Sedona Conference® Comment, November 26, 2013, at 3.
[27] N.Y. State Bar Assn. Comment, 8.

Some witnesses argued for imposition of an "obligation to cooperate."[28] However, others opposed the extension of the obligation to "parties" without providing objective criteria on the proper balance between cooperative actions and the professional requirements of effective representation.[29]

The leaders of the IAALS/ACTL Task Force effort suggested that "attorneys" should be added to the rule so that the "responsibility falls equally on attorneys."[30] A former Reporter for the Committee, however, challenged the wisdom of placing the responsibility on the court "to punish parties and counsel for excessive zeal in contesting their cases."[31]

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

Measures to increase active case management of discovery by the judiciary were widely advocated at the Duke Conference as an alternative to rule changes.[32] A number of suggestions survived into the Rules Package and were made available for public comment but, "drew far fewer comments [in the public comment period] than the discovery proposals."[33]

The Duke Subcommittee Report of March, 2014 has recommended only one changes in the original proposals.

Timing (Shortening of Limits for Service)

The time limits in Rule 4(m) governing the service of process were originally proposed to be cut back to 60 days in contrast its current limit of 120. However, the Duke Subcommittee Report noted that "many comments offered reasons why 60 days [was] not enough time to serve process."[34]

Accordingly, the Duke Subcommittee now recommends that "the time to serve be reduced from 120 to 90 days, rather than the earlier proposal to reduce the time to 60

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[28] William P. Butterfield Comment, February 18, 2014, at 6 (proposing use of phased discovery as well as specification of discovery issues subject to early disclosure, discussion and resolution); *see also* Ariana J. Tadler Comment, February 18, 2014, at 7.
[29] LCJ Comment, August 30, 2013, at 20.
[30] IAALS/ACTL Joint Comment, January 28, 2014, at 15.
[31] Testimony of Paul D. Carrington, November 7, 2013.
[32] Milberg LLP and Hausfeld LLP, E-Discovery Today: The Fault Lies Not In Our Rules, 4 FED. CTS. L. REV. 131 (2011); Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 DUKE L. J. 669 (2010); Paul W. Grimm and Elizabeth J. Cabraser, The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burdens, or Can Significant Improvements Be Achieved Within The Existing Rules?, at 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").
[33] 2014 REPORTS, at 90.
[34] *Id*., 92.

days."[35] The Committee Note would now acknowledge that the shortening will increase the occasions for extensions for "good cause."[36]

Timing (Shortening of issuance of Scheduling Orders)

It is proposed, unless there is "good cause for delay," that a scheduling order required under Rule 16(b) must 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 present rule.

The Duke Subcommittee Report noted objections to the change, especially from the DOJ, but concluded it was warranted because "[i]t remains desirable to get the case started sooner, not later."[37] However, additional explanatory material was added to the Committee Note emphasizing the discretion to provide for extra time in order to establish meaningful collaboration necessary to have a meaningful conference.[38]

Discovery Requests Prior to Meet and Confer

It is also proposed to insert a new Rule 26(d)(2)("Early Rule 34 Requests") so as to allow delivery of discovery requests prior to the "meet and confer" required by Rule 26(f). The running of the response time to the request would 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." The Duke Subcommittee Report of March, 2014 noted concerns about the likelihood that the provision would be used, but made no changes because it "deserves to be adopted."[39]

Form of Scheduling Conference

Finally, Rule 16(b) would 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 - so as to facilitate "direct simultaneous communications." However, the Committee rejected suggestions to mandate a scheduling conference in all cases[40]

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[35] 2014 REPORTS, at 90, 92.
[36] *Id*., at 95.
[37] *Id*., at 91.
[38] *Id*., at 97.
[39] *Id*., at 88-89.
[40] 2013 REPORT, at 262.

The March, 2014 Duke Subcommittee Report noted that a court may base the order "on the parties' report under the Rule 26(f) without a conference,"[41] probably in response to a complaint from a District Judge against the often unnecessary expense of "[r]equiring lawyers to [come] down to Court for every Rule 16 Conference."[42] However, no change was made in the proposed Committee Note.

In addition, Rule 16(b)(3) would be amended to authorize inclusion of a requirement in scheduling orders that parties seek a conference with the court prior to moving for a discovery order. Whether or not to require such conferences would be left to the discretion of the judge in each case.[43]

Preservation Planning

Rules 26(f) and 16(b) are to be modified to require identification of open preservation issues involving ESI in discovery plans and their resolution in scheduling orders. This corrects a long-standing omission from the 2006 Amendments. Both rules are also to be modified to encourage increased use of FRE 502.

The original proposed Committee Notes stated that "parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed, and may be shaped by prefiling requests to preserve and responses to them."[44] However, the Duke Subcommittee proposes to drop the latter clause,[45] apparently in a general reluctance to deal with prelitigation preservation issues.[46]

No mention is made in either the Duke Subcommittee Report or the Discovery Committee Report of the considerable number of comments by Sedona supporters and others of the need for such an approach. The original proposal ignored the Sedona recommendation that Rule 26 should articulate the scope of the duty to preserve,[47] that "preservation" should be added to the Preamble and that protective orders should be available to a party "who is, or may be, subject to a request to preserve."[48]

The Discovery Subcommittee has also proposed revisions to the Rule 37(e) Committee Notes to include the assertion that "[p]reservation orders may become more common" because "Rules 16(b)(3)(B)(iii) and 26 (f)(3)(C) are amended to encourage discovery plans and orders that address preservation."[49]

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[41] 2014 REPORTS, at 91.
[42] Hon. Michael M. Baylson (E.D. Pa.), October 22, 210 (noting that one-half of his case load is employment discrimination or civil rights case which typically settle for less than $50K and in which members of the Bar are congenial and experienced in the type of discovery needed).
[43] Committee Note, Rule 16.
[44] 2013 REPORTS, at 287 (Rule 16(b)) and at 299 (Rule 26(f).
[45] 2014 REPORTS, at 97; but compare 105 (dropping the entire clause).
[46] The Discovery Committee has proposed to drop a "factor" dealing with prelitigation preservation demands and to insert the phrase "after commencement of litigation" as a qualification in another.
[47] *See generally* Sedona Comment, November 26, 2013, Attachment A.
[48] Comment, at 6.
[49] 2014 REPORTS, at 385.

(3) Proportionality/Scope of Discovery (Rule 26)

Rule 26(b)(1), defining the scope of discovery, provides that all discovery is subject to "the limitations imposed by Rule 26(b)(2)(C)." That provision includes a subsection [(iii)], generally described as the "proportionality" principle,[50] which limits discovery when the burden or expense of the proposed discovery "outweighs its likely benefit," considering the needs of the case and certain other factors.[51] The proportionality principle is also made applicable to pleadings and other documents filed by requesting and producing parties and their counsel under Rule 26(g).

The Duke Subcommittee concentrated on enhancing the use of proportionality because "excessive discovery occurs in a worrisome number of cases," particularly those that are "complex, involve high stakes, and generate contentious adversary behavior."[52] In its 2013 Report, the Committee cited surveys by the FJC,[53] the ABA Section of Litigation,[54] NELA[55] and LCJ.[56] The Committee also concluded that proportionality considerations are "not invoked often enough to dampen excessive discovery demands."[57]

However, the Subcommittee concluded that simply "adding a bare reference to 'proportional'" in the scope Rule would have been "too open-ended, too dependent on the eye of the beholders." Instead, it recommended that the factors already prescribed to limit discovery should be "relocated" to Rule 26 (b)(1).

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[50] *See, e.g.,* Apple v. Samsung, 2013 WL 4426512, at 3 (N.D. Cal. Aug. 14, 2013)(describing proportionality as "an all-to-often ignored discovery principle").
[51] 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").
[52] 2013 REPORT, at 265.
[53] FJC National, Case-Based Civil Rules Survey, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/FJC%20National%20Case-Based%20Civil%20Rules%20Survey.pdf.
[54] ABA Section of Litigation Survey, at 12 ("[s]urvey respondents also agree that litigation costs are not proportional to the value of a small case. Over 78% of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed practice attorneys agree, with a large proportion of each group strongly agreeing"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.
[55] NELA Survey, at 6 ("[t]there was a universal sentiment among NELA respondents that the discovery process is too costly"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf.
[56] Litigation Cost Survey of Major Companies, at 17 ("multi-national companies spend a greatly disproportionate percentage of their revenues in litigation expenses in the U.S. relative to foreign jurisdictions [of which of substantial portion] may be attributable to the discovery process"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.
[57] 2013 REPORT, at 265.

This recommendation was adopted by the full Committee along with several a number of other changes to the rule, discussed separately below.

During the Public Comment period, the Committee heard from a number of critics who challenged the underlying concepts and the specific methods of implementation. In its March 2014 Report, Duke Subcommittee noted that while it had "listened carefully" to the concerns expressed, none of the predicted outcomes were intended, and the basic structure of the original proposal was sound.[58] The Minutes of the Subcommittee meetings reflect consideration – and rejection – of a bifurcated statement of scope followed by one of limitations.[59]

Thus, the Subcommittee recommends that the "considerations that bear on proportionality [should be] moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and [included in the rule] with one addition."[60] The "amount in controversy" factor has been moved behind "the importance of the issues at stake in the action."[61] Moreover, addition of consideration of "the parties' relative access to relevant information" is recommended as a response to concerns that proportionality will undertake a disproportionate role, which gives a requesting party "something to push back with."[62]

The Revised Proposal

The Subcommittee now recommends that Rule 26(b)(2)(1) permit a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.* (new material in italics).[63]

The revised Committee Note incorporates an extensive recital of the historical evolution of the scope of discovery which also explains its relationship to proportionality.[64] It explains that the new direction to consider the relative access to

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[58] 2014 REPORTS, at 84.
[59] Notes, February 7, 2014 Subcommittee Meeting, 2014 REPORTS, at 125 (considering approach which would "separate" proportionality from scope by stating first that a party may obtain discovery that is relevant to claims or defenses, followed by a sentence to the effect that "a court must ensure that discovery is proportional to the needs of the case, considering the factors of proportionality); *see also* March 3, 2014 Subcommittee Meeting, 2014 REPORTS at 133 (would be "a step back from the present rules").
[60] Revised Committee Note, 2014 REPORTS, at 97.
[61] Notes, February 7, 2014 Subcommittee Meeting, 2014 REPORTS, at 122.
[62] Notes, March 3, 2014 Subcommittee Meeting, 2014 REPORTS, at 134 (rebutting argument that it is already reflected in the other factors and noting that there is little harm in reducing "ill-founded contentiousness" - if it is a "placebo, it is a good one"); *see also* Notes, February 7, 2014 Subcommittee Meeting, 2014 REPORTS, at 124.
[63] 2014 REPORTS, at 97- 98.
[64] *Id*., 99- 105.

relevant information deals with "information asymmetry" under which the burden of responding "lies heavier on the party who has more information, and properly so."[65]

Testimony and Comments

The changes to Rule 26(b)(1) drew wide support during public comments because of the largely unfettered scope of discovery which causes runaway costs in civil litigation.[66] As one witness at a hearing put it, "it is not a bad outcome" that the move may require parties requesting information to make some choices and prioritize.[67] It was argued that the change would help prevent excessive demands from being used to leverage settlements, especially in patent,[68] employment[69] and mass tort/product cases.[70] Sedona endorsed the proposal because it had "the potential to help cabin excessive discovery."[71]

The New York State Bar Association[72] and the DOJ stated support for the proposal while cautioning against placing improper emphasis on references to "the amount in controversy."[73]

Opponents of the change disagreed with the assertion in the Committee Report[74] that the rule was not invoked enough[75] and argued that there was no evidence that excessive discovery costs were a systemic problem.[76] One witness contended that the claims had never been empirically supported and suggested that the Committee should reject the amendments and collect more information.[77] Others noted that many of the "factors" driving excessive costs in complex cases are not sensitive to changes in the rules, and are unlikely to be reduced by them.[78]

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[65] *Id*., 102.
[66] DRI ("The Voice of the Defense Bar") Comment, January 14, 2014, at 3-6.
[67] Testimony by John H. Beisner, January 9, 2014.
[68] Intellectual Property Owners Assoc. Comment, February 14, 2014, at 2 ("[s]ome parties [in patent infringement matters] use the threat of this expense to extract settlements).
[69] Paul D. Weiner, Littler Mendelson, February 3, 2014, at 6 (noting "the requesting party has no incentive to limit its preservation or production demands").
[70] Michael J. Harrington, SVP and CG, Eli Lilly and Company, February 13, 2014, at 1 ("lawyers in mass tort and patent cases often by seeking overly broad discovery that can cost millions of dollars to produce").
[71] Sedona Comment, November 26, 2013, at 5.
[72] N.Y. State Bar Assn. Comment, October 2, 2013, 26 (the amendment would "signal strongly that the scope of discovery should be narrowed).
[73] Department of Justice Comment, January 28, 2014, at 4.
[74] 2013REPORT, at 265.
[75] Joint Comments by Professors February 5, 2014, at 5 ("vague complaints . . . hardly establish that judges are balancing improperly or are unaware of the need to do so").
[76] Joint Comments by Professors, February 5, 2014, at 3 ("the data [in the FJC Study] fail to demonstrate that disproportionality is a systemic problems") and at 9 (there is no "empirical justification for a more restrictive approach").
[77] Prof. Danya Shocair Reda, February 18, 2014 (submitting copy of article, The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions, 90 OR. L. REV. 1085 (2012));
[78] Joint Comments by Professors, February 5, 2014, at 3- 5(noting use of large law firms that bill by the hour at high rates, etc.).

A number of Comments predicted that the costs of the change would deter the filing of suits by individual claimants.[79] It was also argued that the proposed change unfairly "shifts the burden" associated with demonstrating a lack of proportionality[80] and would empower producing parties to make unilateral decisions not to produce based on proportionality.[81]

The Subcommittee Response

The 2014 Report forcefully rejected many of the criticisms as not intended by the Subcommittee and made a number of changes in the Committee Note to address them. For example, the "change does not place on the party seeking discovery the burden of addressing all proportionality considerations" nor does the change "permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."[82] As the Note puts it, "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."[83]

Relationship to Preservation

The Duke Subcommittee did not address the DOJ request that it clarify that "the scope of discovery a party anticipates [when executing preservation obligations[84]] should be consistent with the scope of rule 26(b)(1)."[85]

The omission of any discussion of the scope change on preservation is reminiscent of the issue as to whether the addition of presumptive limits based on accessibility of ESI under Rule 26(b)(2)(B) justified a reduced duty to preserve such sources.[86] The Committee Note ultimately stated that a party was not "relieved" of its common-law or statutory duties to preserve evidence" by Rule 26(b)(2)(B).[87]

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[79] It has been observed that proportionality limitations could also benefit individuals. *See* Jonathan M. Redgrave Comment, February 14, 2014, at 5, n.11 (citing possible use against excessive demands for preservation of material on "home computers, tablets, smart phones, video gaming consoles, cloud-based messaging, sharing and storage, social media and even home appliances").

[80] AAJ Comment, December 19, 2013, at 11.

[81] *See, e.g.,*. Peter Welch, Member, U.S. Congress, Comment, January 15, 2014, at 1 (if a party decides that the opposing party's discovery request is not 'proportional' to the needs of the case, it could simply refuse to provide the discovery").

[82] 2014 REPORTS, at 101.

[83] *Id*.

[84] Rule 37(e)(3)(C)(as revised in the 2014 Report) lists proportionality of preservation efforts as a factor for a court to assess (retroactively) in considering conduct, but the Committee Note ducks the issue of whether, when planning preservation, the amended scope of discovery is relevant or determinative.

[85] DOJ Comment, January 28, 2014, at 18 ("[w]e are concerned that . . some will claim a disconnect between the scope of information covered by [Rule 37(e)] and the scope of information that is otherwise available in discovery").

[86] *See* Thomas Y. Allman, *supra*, The "Two-Tiered" Approach to E-discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?. 14 RICH. J.L. & TECH. 7, at *47 (2008)).

[87] *Id*., at *47, n. 120 (quoting Fed. R. Civ. P. 37, Committee Note (2006).

Other Changes: Deletion of "Subject Matter"

Under Proposed Rule 26(b)(1), the authority to order subject matter discovery for good cause would be deleted.[88] The 2013 Report explained that discovery should be limited to material relevant to "claims or defenses" and if discovery shows support for new claims or defenses, the pleadings may be amended when appropriate.[89]

However, the Duke Subcommittee reports addresses criticism of the original Committee Note assertion that "[p]roportional discovery relevant to any party's claim or defense suffices" by a proposed qualification that this is true "given a proper understanding of what is relevant to a claim or defense."[90]

Other Changes: Deletion of "Reasonably Calculated" Language

The Committee proposes 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." Instead, the rule would include the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[91]

The 2013 Report explained that "many cases continue to cite [the deleted language] as though it defines the scope of discovery," which sets "a broad standard for appropriate discovery."[92] Critics argued that this assertion was "based on nothing more than anecdotal impressions" and predicted the change will "almost certainly" be perceived as "narrowing the definition of relevance and mandating a more restrictive approach to discovery."[93]

The 2014 Report affirms the proposal as written and explains that the change is "designed to curtail reliance on the "reasonably calculated" phrase to expand discovery beyond the permitted scope."[94] It cited as evidence of the need for changes the comments during the hearings affirming the phrase as a "bedrock definition of the scope of discovery."[95]

Other Changes: Deletion of Examples of Discoverable Information

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[88] Rule 26(b)(1)("[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action").
[89] 2013 REPORT, at 266.
[90] 2014 REPORTS, at 103 (with lengthy illustration of confusion caused by use of the "subject matter" language)
[91] 2014 REPORTS, at 98.
[92] 2013 REPORT, at 266.
[93] Joint Comments by Professors, February 5, 2014, at 8- 9.
[94] 2014 REPORTS, at 86.
[95] *See, e.g.,* Hon. J. Leon Holmes (E.D. Ark) Comment, October 22, 2013, at 1(the current scope of discovery *is* defined in terms of whether the discovery is reasonably calculated to lead to discovery of admissible evidence).

The Committee proposes to strike the listed examples of the types of relevant evidence that are discoverable, such as 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."

The Committee Note explained that these examples were "so deeply entrenched in practice that it is no longer necessary to clutter the text" with them. The Duke Subcommittee Report concedes that concerns exist that the omission might be misunderstood as authorizing negative inferences.[96] Thus, it recommends that the Committee Note states that "discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."[97]

Related Suggestions

Supporters of the use of Technology-Assisted Review ("TAR") have suggested amending the Proposed Committee Note to "encourage" parties in "appropriate cases" to consider use of "advanced analytical software applications and other technologies' that they can "screen for relevant and privileged documents in ways that are at least as accurate as manual review, at for less cost."[98]

However, a supporter of "predictive analytics and computer assisted review ("CAR"), however, noted that while "technology is crucial in solving the problem of data growth," it is only one arrow in a quiver of resources, and "[m]uch more emphasis should be placed on educating parties on how to act reasonably and how good is good enough."[99]

(4) Presumptive Limits (Rules 30, 31, 33, 34 and 36)

The Civil Rules currently impose presumptive numerical limits on the number and duration of oral depositions in Rule 30 as well as the number of depositions that may be conducted by written questions under Rule 31. In addition, a party is limited in the number of interrogatories which it may serve under Rule 33. A court may, by order, alter the limits.[100]

The Rules Committee initially proposed to further lower these presumptive limits as an indirect form of proportionality in order to "decrease the cost of civil litigation,

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[96] 2014 REPORTS, at 85.
[97] 2014 REPORTS, at 103 (citing the need for discovery about "another party's information systems and other information resources" in order to frame "intelligent requests for [ESI]").
[98] Maura Grossman, Gordon V. Cormack and John K. Rabiej (and 24 others), October 17, 2013 (arguing that the addition would not require that TAR be used in any given case but is needed to "raise awareness" and show that the Rules Committee finds nothing inherently wrong with its use).
[99] Patrick Oot Comment, February 15, 2014, at 7-8 (arguing that it is unfair to demand a "close-to-perfect standard of performance in discovery").
[100] FED. R. CIV. P. 26(b)(2)(A).

making it more accessible for average citizens."[101] It cited research by the FJC to the effect that most cases would not be affected by such a change.[102] A proposal to limit requests for production in Rule 34 (although not under Rule 45)[103] was dropped prior to the April, 2013 Rules meeting.[104]

The specific changes 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: A party may serve no more than 25 requests to admit, including all discrete subparts (except as to requests to admit the genuineness of any described document).

However, after what the 2014 Report of the Duke Subcommittee called "fierce resistance," it concluded that "it is better not to press ahead with these proposals." While some of the "more extreme expressions of concern may be overblown, . . . the body of comments suggests reasonable grounds for caution."[105]

Testimony and Comments

Members of the defense bar largely supported lower presumptive[106] and noted that in their experience parties readily work out disagreements on the topic or, if not, then courts generally grant the requests for additional discovery. Counsel for requesting parties opposed the reductions because of the detrimental impact on securing needed evidence, especially in asymmetric cases.[107] According to Professor Burbank, adoption would be "another means of pricing the poor and middle class out of court."[108] A number contended that there is no evidence that the lower limits are needed.[109]

The IAALS reported that at a Forum it conducted in which both counsel for plaintiffs and counsel for defendants participated, "[t]here was no support among the

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[101] 2013 REPORT, at 267.
[102] *Id*.
[103] Report to Standing Committee, December 5, 2012, at Agenda Book, January, 2013, at 230-231.
[104] Subcommittee Meeting, Feb. 1, 2013, AGENDA BOOK, April, 3013, at 107 ("[t]he Subcommittee unanimously agreed to drop the draft provisions that would implement a presumptive limit on the number of Rule 34 requests).
[105] 2014 REPORTS, at 90.
[106] LCJ Comment, August 30, 2013, at 21-22 (suggesting that the relevant Committee Notes for each lowered limit should state that the purpose of the presumptive limitation at issue was to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices).
[107] Ariana J. Tadler Comment, February 18, 2014, at 2-3 (listing numerous reasons for opposition including the fact that the proposals appeared "relatively late in the development process").
[108] Professor Stephen B. Burbank Comment, February 10, 2014, at 18 (parties in high-stakes, complex case [will] usually stipulate out of the limits" meaning that the potential substantial transaction costs will "disproportionately fall on individual plaintiffs suing or being sued").
[109] AAJ Business Torts Section Comment, December 232, 2013, at 3.

participants for decreasing the numerical limits on depositions" or reducing the hours of depositions.[110] The FMJA opposed the reduction in the number of depositions but did support changing the presumptive time limit for oral depositions to six hours and placing presumptive limits on requests for admission.[111]

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

The presumption in Federal Courts is that each party bears the costs of selection, review and production of discoverable information, including attorney's fees associated with the effort. Advocates for producing parties have long pushed for a modified "requester pays" approach and the 2006 Amendments provided for optional cost-shifting in connection with Rule 26(b)(2)(B), relating to production of ESI from sources which are identified as not reasonably accessible.[112]

The Committee proposes to amend Rule 26(c)(1) to acknowledge that a protective order issued for good cause to protect against undue burden or expense may include, as a term in such order, the "allocation of expenses."

The 2013 Report initially asserted that the power is already "implicit" in Rule 26(c) and is being exercised with "increasing frequency."[113] The 2014 Report, however, addes that "recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice."[114] That Note states that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[115]

The 2014 Report also observes that the Discovery Subcommittee "plans" to explore the question whether it may be desirable to develop more detailed provisions to guide the determination whether a requesting party should pay the costs of responding."[116]

Testimony and Comments

The DOJ supported the change because "expressing the authority in the Rule will clarify any uncertainty" as to the authority of the courts.[117] LCJ supported the proposal

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[110] IAALS Forum Summary Comment, undated, at 7 (noting consensus that existing limits on interrogatories do not present problems).
[111] *Id*.
[112] Rule 26(b)(2)(B)("[t]he court may specify conditions for the discovery [of ESI orders to be produced for good cause from inaccessible sources]"); *see also* Committee Note ("[t]he conditions may take also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are no reasonably accessible").
[113] Boeynaems v. LA Fitness Int'l 2012 WL 3536306, at *8 (Aug. 16, 2012)(ordering cost shifting because plaintiffs had "already amassed, mostly at Defendant's expense, a very large set of documents").
[114] 2014 REPORTS, at 87.
[115] 2014 REPORTS, at 104.
[116] 2014 REPORTS, at 87.
[117] DOJ Comment, January 28, 2014, at 5.

as an important first step toward a "requester pays" approach.[118] A number of corporate witnesses offered data about excessive costs of preservation, collection, processing and production as compared to the meager results[119] as measured by the resulting trial exhibits.[120]

Opponents dismissed the summaries of costly preservation and production as merely anecdotal.[121] Some contended that "advances in ESI search and review technology" are "substantially lowering discovery costs."[122] A District Judge opposed the change because it "may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without."[123]

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

Rule 34(a) currently permits a party to request production of discoverable information or to permit its inspection or copying. Under Rule 34(b)(2)(B), however, a party in receipt of such a request need only state whether inspection will be permitted or provide an "objection." Similarly, Rule 37(a)(2) merely authorizes motions to compel inspections, not production.

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. Under current practice involving production, a "common lament" that Rule 34 responses often begin with a "laundry list" of objections, but that the production of volumes of materials subject to the objections can leave uncertainty whether anything has been withhold.[124]

The Committee proposes three amendments to Rule 34 to better facilitate the process of requesting and producing discoverable information.

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

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[118] LCJ Comment, August 30, 2013, 18.
[119] At the 2011 Mini-Conference on Preservation/Spoliation, Microsoft famously provided statistics on the volumes of information it had preserved, collected, processed and produced – and the limited impact that expensive effort had on trial exhibits. An updated summary was supplied to the Rules Committee at the Phoenix Hearing. Similar statistics were offered by others, including Professor William Hubbard (U. of Chicago Law School), who offered the results of his survey of preservation costs and potential impacts of the Proposed Rule Package, especially Rule 37(e).
[120] Bayer Corporation Comment, October 25, 2013, at 2.
[121] AAJ Comment, December 19, 2003, at 28.
[122] AAJ Class Action Litigation Group Comment, December 23, 2013 (citing Nicholas M. Pace and Laura Zakaras, Where The Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, RAND Corporation (2012), available at http://www.rand.org/pubs/monographs/MG1208.
[123] Hon. Shira A Scheindlin Comment, January 13, 2014, at 7.
[124] 2013 REPORT, at 269.

Second, Rule 34 (b)(2)(B) would be changed to require a party to indicate whether it "will produce copies of documents or [ESI] instead of permitting inspection."[125] [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.[126]]

Third, Rule 34(b)(2)(C) would require a party to state "whether any responsive materials are being withheld on the basis of [an] objection."[127]

One concern identified in the 2014 Report is that a party which limits the scope of the search for ESI and "cannot state whether responsive documents are being 'withheld.'"[128] The original proposed Committee Note stated that an objection that articulates the limits that have controlled the search "qualifies as a statement that the materials have been 'withheld.'" The Note cites as an example "a statement that the search was limited to materials crated during a defined period, or maintained by identified sources." That language has been slightly modified.

Testimony and Comments

A number of Comments challenged the assumption that describing material as having been "withheld" is workable. An in-house counsel testifying at the Washington hearing pointed out that the requirement will "undoubtedly be followed a request to identify each and every document withheld," thus encouraging ancillary litigation over the adequacy of the disclosure.[129]

The New York State Bar Association expressed concern that the requirement could be read to unfairly require a complete review of all potentially relevant materials prior to objecting to requests beyond permissible scope or because of undue burden.[130] It was also pointed out that it is difficult to state what is being "withheld" when a broad request makes it difficult to know exactly what is being sought.

Concerns were also expressed about ESI that are not identified by search terms, since they are not being "withheld."[131] One Comment cautioned that the new requirement might have the unintended consequence of eliminating the "efficient practice

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[125] The Proposed Rule would also require that if production is chosen, it must be completed no later than the time indicated for inspection or a later reasonable time stated in the response.
[126] The Proposed Committee Notes explain that these changes merely "reflect[s] the common practice of producing copies of documents or [ESI] rather than simply permitting inspection."
[127] Rule 34(b)(2)(B) & (C).
[128] 2014 REPORTS, at 88.
[129] Testimony of Gina Littrell, VP Employment Litigation, FedEx, Transcript (Washington), at 14-22. (suggesting that the issue can be best worked out at the Rule 26(f) conference with an earlier exchange of discovery requests). *See also* Proposed Rule 26(d)(2)("Early Rule 34 Requests") permitting requests to be delivered prior to the Rule 26(f) conference.
[130] N.Y. State Bar Assn. Comment, 39-40, esp. n. 16 (suggesting additional clarification in the Committee Note to make it clear that this was not the intent of the Amendment).
[131] Norton Rose Fulbright Comment, January 15, 2014, at 9-11 (suggesting alternative language focusing on disclosing what information the party will either produce or for which it will allow inspection).

of including general objections applicable to all of a counter party's requests."[132] Another suggested that the "sufficiency" of the identification should be measured against the "degree of specificity of the description of materials sought in the request."[133]

(7) Sanctions/Curative Measures (Rule 37(e))

Rule 37(e)[134] was adopted in 2006 to prevent the imposition of sanctions for ESI losses due to "routine, good faith" operation of information systems, but has had limited impact on the root cause of concern, a lack of uniformity among the Circuits.[135] Failures to preserve backup tapes[136] or to interrupt auto-deletion of e-mail,[137] for example, are routinely sanctioned in some Circuits, while not in others.[138]

The primary difference is that some Circuits require a showing of highly culpable conduct, given that only such a showing justifies an inference that the party knowingly sought to destroy harmful evidence.[139] In other Circuits, however, negligent conduct is sufficient.[140] Under that view, "the party responsible for loss of evidence, not the innocent party, should [always] be responsible for the consequences that follow."[141] One of the side-effects of this variation has been a growth in "over-preservation" by entities seeking to avoid the risk due to unpredictability.[142]

At the Duke Litigation Review Conference in 2010, the E-Discovery Panel recommended that a preservation rule be adopted with provisions for "sanctions for non-compliance resulting in prejudice" based on the "state of mind of the offender."[143]

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[132] Jeffrey S. Jacobson Comment, December 11, 2013, 3 ("[i]t should not be necessary for a responding party to repeat the same objections to each enumerated request or subpart").
[133] Scott A. Kane Comment, February 12, 2014, at 5.
[134] Rule 37(e)(2006), formerly Rule 37(f), provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."
[135] REPORT, at 274 ("[s]ome say it has provided almost no relief from growing preservation burdens").
[136] Little Hocking Water v. E.I. DuPont, 2013 WL 1196606 (S.D. Ohio. March 25, 2013)(Zubulake requires that "*all* back-up tapes storing documents of 'key players' must be preserved)(emphasis in original).
[137] Apple v. Samsung Electronics, 888 F. Supp.2d 976 (N.D. Cal. Aug. 21, 2012).
[138] Denim North America v. Swift Textiles, 816 F. Supp.2d 1308, 1328 (M.D. Ga. Oct 4, 2011)(rejecting use of the "Zubulake rule" because opinions of the Southern District, "no matter how erudite, are no more binding on this Court than this Court's opinions are binding on [that court]").
[139] Bracey v. Grondin, 712 F.3d 1012, 1020-1021 (7th Cir. March 15, 2013)("destruction for the purpose of hiding adverse information" is required in the Seventh Circuit).
[140] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2dCir. 2002).
[141] Hon. James C. Francis IV Comment, January 10, 2014, at 5.
[142] HP Comment, January 7, 2014, at 2 (over-preservation results from a "nebulous set of requirements that vary from jurisdiction to jurisdiction").
[143] Elements of a Preservation Rule (2010), Duke Conference E-Discovery Panel; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Elements%20of%20a%20Preservation%20Rule.pdf.

Reported decisions since Duke involving spoliation allegations have continued to increase,[144] reflecting a routine focus on the topic in civil litigation.[145]

Currently, according to testimony at a Mini-Conference (and confirmed during the Public Comment period) producing parties routinely engage in the practice of "remarkably broad" litigation holds.[146] The RAND study, for example, noted that the absence of "clear, unambiguous" legal authority was thwarting thoughtful efforts, leading to "overpreservation at considerable cost."[147]

The Rules Committee ultimately adopted for public comment a proposed replacement for Rule 37(e) – applicable to all forms of discoverable information – which would displace inherent sanctioning power and provide limits on the imposition of sanctions under certain conditions.

The Original Committee Proposal

The initial proposal would have authorized sanctions for failures to preserve *only* if they caused substantial prejudice in the litigation and were the result of "willful or bad faith" conduct ["(B)(i)"] *or* if they involved failures to preserve which 'irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation ["(B)(ii)"].

Subsection (B)(i) was intended to reject cases which authorized sanctions based upon a finding of negligence or gross negligence.[148] The particular sanction was not governed by the Rule. However, the Committee Note stated an "expectation that the court would employ the least severe sanction needed to repair the prejudice resulting from loss of the information."[149]

However, whether or not sanctions were authorized, Subsection (1)(A) acknowledged that a court could order "additional discovery" as well as "curative measures" such as "order[ing] the party to pay the reasonable expenses, including

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[144] The Author's ongoing request of the ALLFEDS database of WESTLAW for reported decisions involving "spoliation w/20 sanctions" returns an average of one or more such opinions each day.
[145] Reported spoliation decisions do not, of course, capture all instances when such motions are threatened or anticipated. *See also* Dan H. Willoughby, Jr. et. al., Sanctions for e-Discovery Violations: By The Numbers, 60 DUKE L. J. 89 (2010).
[146] Bruce Kuhlik, EVP and GC, Merck & Co. Comment, February 11, 2014, at 9 ("[b]y way of example, Merck's broadest current hold covers the electronic data of over 4000 individuals, all for a single litigation); *see also* William H.J. Hubbard, Ass't Prof. of Law, University of Chicago, Comment, February 18, 2014 (submitting Preservation Costs Survey Final Report & Summary of Findings (updated)(previously distributed at Phoenix hearing).
[147] Nicholas M. Pace, Laura Zakaras, Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery, RAND Institute for Civil Justice (2012), at xx-xxi (concluding that "steps must be taken soon to address litigant concerns about complying with preservation duties"); copy at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.
[148] *Id.* (the Rule "rejects decisions that have authorized the imposition of sanctions - as opposed to measures authorized by Rule 37(e)(1)(A) - for negligence or gross negligence").
[149] Committee Note, Subdivision (e)(1)(B)(i).

attorney's fees" upon a showing of a failure to preserve. No showing of prejudice or culpable conduct would have been required for such measures to be available.

The Committee Note suggested turning first to these measures to see if the loss could be remediated before deciding if sanctions should also be imposed.[150] Many of the listed "curative measures" were, in fact, indistinguishable from sanctions.[151]

Testimony and Comments

The Proposed Rule drew conditional support for the concept of confining the most serious sanctions to a narrower set of situations[152] and establishing a uniform national standard for spoliation sanctions.[153] In particular, supporters cited the rejection of *Residential Funding Corp. v. DeGeorge Fin. Corp*.[154] as bringing provide "much-needed" predictability[155] which would allow companies to formulate a "single strategy" geared towards complying with a "national standard." Some corporate representatives stated that they would be able to significantly reduce over-preservation provided that certain clarifications were made.[156]

However, supporters expressed concerns about some of the details. The use of "willfulness" as a threshold culpability standard for (B)(i) sanctions was questioned, given that some courts define "willful" as merely intentional conduct.[157] Sedona suggested clarification by adding that the party must have acted "with specific intent to deprive the opposing party of material evidence relevant to the claims and/or defenses involved in the matter.[158]

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[150] Committee Note, Subdivision (e)(1)(B)(i)("sanctions [are] inappropriate" even if sufficient culpability exists if curative measures "can sufficiently reduce the prejudice"); *see also* Note, at (B)(ii)(referencing the possibility that "curative measures . . . can reduce the adverse impact").

[151] *Compare* Mali v. Federal Insur. Co., 720 F.3d 387, 392 -93 (2nd Cir. June 13, 2013)(distinguishing adverse inference instructions issued as "a sanction" from a "fundamentally different" type of instruction that "simply explains to the jury" that is not a punishment but "simply an explanation to the jury of its fact-findings powers"); *accord* Herrman v. Rain Link, 2013 WL 4028759, at *6 (D. Kan. Aug. 7, 2013)(the judge [could]find that admission of some evidence concerning spoliation of evidence might be helpful for determining the probative value of the documents [which may be placed in evidence]").

[152] John Beisner Comment, January 2, 2014, at 5 ("sanctions for spoliation should be imposed only when a party has intentionally destroyed evidence that it knows it had an obligation to retain").

[153] FMJA Comment, February 2014, at 15-16 (a "balanced approach requiring courts initially to look to possible remedies and weighing culpability in imposing sanctions").

[154] 306 F.3d 99 (2dCir. 2002). *See* 2013 REPORT, at unnumbered page 272 of 354.

[155] Pfizer Comment, November 5, 2013, at 2.

[156] EDI Panel Transcript, at 13 (quoting Jon Palmer of Microsoft as stating that "I would no longer put entire organizations under a hold when I know that there are three or four key players within the organization that are going to have all of the relevant material"); copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1680.

[157] Sekisui v. Hart, 945 F. Supp.2d 494, 504 (S.D. N.Y. Aug. 15, 2013)(intentional destruction of relevant information after a duty to preserve has attached is "willful").

[158] Sedona Comment, November 26, 2013, at 13 & n.15.

Others questioned the wisdom of Subsection (B)(ii) which allowed sanctions without a showing of culpability based solely on the degree of prejudice involved.[159] A number of Comments suggested that (B)(ii) should be dropped because of the ease with which it could be used to evade the culpability requirements in (B)(i). A variant of this approach would be to make the rule applicable only to ESI. A less radical suggestion advanced by LCJ and others was to keep the (B)(ii) exception in the rule, but confine its scope to "tangible property."[160]

In addition, Sedona and others expressed concerns about treating curative measures as if they were separate from sanctions, given the lack of meaningful distinctions between the two categories.[161] Sedona had[162] suggested listing all forms of sanctions, but making the harshest forms available only if the "failure to preserve was intentional," with "remedial or case management orders" available to effectuate discovery or trial preparation.

A related suggestion was that the list of "factors" listed in Rule 37(e)(2) should be rewritten to focus on "bad faith" and include considerations relating to the availability of alternative sources and the materiality of the lost information.[163] This also would involve extensive revisions to the Proposed Committee Note.[164]

Opponents of a new Rule 37(e) argued that limiting sanctions to instances involving "willful" or "bad faith" conduct would "exempt [defendants] from having to preserve critical discovery and allow them to escape accountability when they have improperly destroyed such discovery."[165] The argument was that this would unfairly restrict a trial court's ability to deal with misconduct.[166]

Magistrate Judge Francis[167] suggested dropping the provisions dealing with sanctions, consistent comments by some who argued that using "bad faith" sets the bar too high because it will "encourage sloppiness and disregard for the duty to preserve."[168] He suggested, instead, authorizing curative measures needed to "to cure any prejudice to the innocent" party[169] and retaining the list of factors.[170] Others, including Judge

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[159] The Committee Note gave as an example those cases "in which the alleged injury-causing instrumentality has been lost, such as *Silvestri v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001).
[160] *See e.g.,* LCJ Supplementary Comment, February 3, 2014, at 6 (the court may impose any sanction listed in Rule 37(b)(2)(A) or give an adverse inference-inference jury instruction, but only if the court finds that the failure "(ii) *in the case of tangible things,* irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation").
[161] Sedona Comment, November 26, 2013, at 8.
[162] Sedona Comment, November 26, 2013, with Attachment A.
[163] Jonathan M. Redgrave Comment, February 14, 2014, at 11-13.
[164] *Id*., at 19-21.
[165] AAJ Comment, 19, 2013, at 19 -20 ("defendants already make every effort to obfuscate critical documents that they are required to provide during discovery").
[166] The Legal Aid Society, October 30, 2013, at 10.
[167] James C. Francis IV Comment, January 10, 2014, at 6.
[168] Hon. Shira A. Scheindlin, January 13, 2014, at 9-10.
[169] [Francis] Proposed Rule 37(e)(1)("Curative Measures"). Subsection (2) included a list of factors "to be considered in fashioning a remedy" identical to the present Committee list in Proposed Rule 37(e)(2).

Scheindlin, endorsed the Francis[171] proposal "as a baseline for Committee discussion and work, with a new public comment period to follow in the future."[172] However, others questioned whether "curative measures" should be made available without a showing of prejudice requiring remediation since "there must be something that is being cured."[173]

Subcommittee Recommendation after Public Comments

The Discovery Subcommittee met shortly after the Third Public Hearing (February 7, 2014) and decided to recommend that the Rules Committee reject the pending proposal and adopt a revised Rule 37(e).[174]

The Subcommittee concluded that the original proposal was "too restrictive" of trial court discretion[175] and – in addition – that it was time to abandon efforts to eliminate "over-preservation."[176] Instead, the Subcommittee adopted the emphasis on "curative measures" advocated by Judge Francis in his Comment,[177] but coupled it with a "bullet" aimed at the Residential Funding line of cases[178] which would "take some very severe measures of[f] the table."[179]

It confined its recommendations to failures to preserve ESI, refusing to cover both "ESI" and "documents," while emphasizing the "heartache" caused by rulemaking involving "tangible" property.

The Revised Proposal

Thus, (revised) Proposed Rule 37(e) would authorize the imposition, in Subsections (1) and (2), of "measures" to "cure" the loss of ESI caused by failures to

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[170] *Cf.*, Jonathan Redgrave Comment, February 14, 2014 at 13 (pointing to the "governance and regulatory considerations" and the "ethical and moral reasons" that drive clients and counsel).
[171] Hon. Shira A. Scheindlin Comment, January 13, 2014, at 10 ("I agree with his proposal and with all of his comments").
[172] Ariana J. Tadler Comment, February 18, 2014, at 6-7.
[173] John K. Rabiej, Director, Duke Law Center for Judicial Studies, September 11, 2013 (noting that "it seems a bit odd not to refer to a prejudice standard for a curative measure").
[174] The Discovery Subcommittee Report and the Notes of the Subcommittee meetings are included in the Agenda Book for the 2014 April (Portland) Rules Committee Meeting (the "AGENDA BOOK"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf. The Report contains introductory material and the revised text of Rule 37(e) [also reproduced in Appendix B] and the proposed Committee Note. Citations to all three use the page numbers in the Agenda Book and are collectively referred to as the "2014 REPORT." The Subcommittee Notes are referred to only by their location in the AGENDA BOOK. The original proposal is reproduced in Appendix C.
[175] 2014 REPORT, at 371.
[176] Notes, February 20, 2014 Meeting, AGENDA BOOK, at 419 ("that does not seem to be something we can affect very much"); *accord*, at 424 ("the tradeoff in lost judicial latitude is too costly").
[177] Notes, February 8, 2014 Meeting, AGENDA BOOK, at 410 ("[his view is that] we should keep focused on the reality that the party that lost the evidence is more at 'fault' than the one who is deprived of the evidence").
[178] Notes, February 28, 2014 Meeting, AGENDA BOOK, at 431; *see also* Notes, February 25, 2014, at 425 (a "rifle shot" approach).
[179] Notes, March 4, 2014 Meeting, AGENDA BOOK, at 438.

preserve without requiring any showing of culpable intent. The distinction in (1) and (2) is between measures designed to cure "losses" and those designed to cure "prejudice." The relationship between the two, if any, is not apparent on the face of the rule.

In Subsection (3), however, three measures are listed as to which "the party [must have] acted with the intent to deprive another party of the information's use in the litigation," which is a definition of "bad faith" consistent with the definition used in the *Rimkus* decisions.[180] The three measures are (A) findings by a court that lost information is presumed to be "unfavorable;" (B) instructions that a jury "may or must" make similar presumptions, or (C) entry of judgments of dismissals or default.

Although downplayed in the revised Committee Notes, the Subcommittee apparently intends that the factors listed in Subsection (4) should help guide a court in analyzing preservation efforts. Subsection (4) tentatively adopts essentially the same factors as listed in the original proposed Rule 37(e)(2)[181] to provide guidance "in applying Rule 37(e)." Two additional factors - one relating to culpability and one relating to prejudice – were included but dropped at the last minute.[182] The Subcommittee has recommended, however, that the full Committee consider whether to carry the factors forward in the text, consign them to the Note – or delete them.[183]

A threshold issue is whether republication for further comment is needed. A rule "should be republished" *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."[184] The Subcommittee apparently believes that its changes are well within the "ambit of what can be done without any need to republish."[185]

Existing Rule 37(e)

The Subcommittee concluded that "[t]here is no further use for present Rule 37(e)" since it incorrectly assumes that the decisions restricting Rule 37(e) to pre-trigger contexts are correct,[186] thus justifying ignoring suggestions to incorporate its standards in the new rule, which focuses on post-trigger conduct. The DOJ and Sedona Comments - and the experience in states such as Connecticut - suggest otherwise..

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[180] *Id.* *See* Rimkus Consulting v. Cammarata, 688 F. Supp.2d 598, 618 (S.D. Tex. Feb. 19, 2010)(severe sanctions are justified by actions "to prevent [the evidence's] use in litigation").

[181] The factor referring to demands for preservation was dropped because it received negative commentary during the public comment period.

[182] Since the Subcommittee has not published its drafts, it is difficult to assess the value of the language originally added and then deleted. The Notes reflect concern as to the role of culpability in "deciding on (e)(1) curative measures for the loss of information [because] the choice could become punitive." Notes, March 12, 2014 Meeting, AGENDA BOOK, at 447 - 48.

[183] 2014 Report, at 373 & 380-381.

[184] Procedures Governing the Rulemaking Process, § 440.20.50 (b)(Advisory Committee Review; Republication (2011).

[185] Notes, February 8, 2014 Meeting, AGENDA BOOK at 14 (citing the fact that the five questions raised for public comment identified "many" of the issues).

[186] Notes, February 25, 2014 Meeting, AGENDA BOOK, at 425 ("[t]hat rule ceases to apply once a duty to preserve arises").

Residential Funding/Uniformity

The Subcommittee apparently believes the need for national uniformity which was at the heart of the Duke Conference E-Discovery Panel recommendations can be satisfied by enactment of Subsection (3). It was asserted, for example, that making "the most severe measures" available under Subsection (3) for "the most culpable conduct" would "overrule Residential Funding."[187]

However, if Subsection (3) does, in fact, bar "reliance on inherent power to adopt measures it does not authorize,"[188] the Seventh, Eighth, Tenth, Eleventh and Federal Circuits could no longer require, in those Circuits, a showing of bad faith for measures under Subsections (1) and (2) which have the impact of sanctions. In short, a new form of dis-uniformity would be created under which culpability standards would be lowered to the level of the Second Circuit.

Subsection (1) compounds this problem by abolishing the need for any culpability showing as a precondition to harsh curative measures imposed without a showing of prejudice provided they are imposed only to mitigate "losses."[189] Under these conditions, even reasonable and good-faith preservation conduct would be sanctionable if relevant ESI were nonetheless lost after a duty to preserve attached, whether or not prejudice resulted. [190]

This also creates additional and fertile grounds of dis-uniformity, is inconsistent with emerging case law[191] and defeats whatever positive impact the Rule might otherwise have on reducing the lack of uniformity at the heart of over-preservation.

Without the protections offered by the appropriate (or enhanced) protections of existing Rule 37(e), such a result would be manifestly unfair as well. [192]

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[187] Notes, February 20, 2014 Meeting, AGENDA BOOK, at 424.

[188] 2014 Report, at 382; Notes, February 28, 2014 Meeting, AGENDA BOOK, at 434 ("[o]ur rule should supplant inherent authority").

[189] Notes, February 20, 2014 Meeting, AGENDA BOOK, at 420 ("Unless we act with care, the rule could say that extremely important 'curative measures' could be authorized without any showing of either culpability above negligence or prejudice to another party").

[190] Should a court decide to avoid the impact of existing rules by labelling sanctions as intended "merely" intended to "cure," not punish, it would invite disputes and place courts in the uncomfortable position of justifying and explaining their motives, thus risking respect for the court and the processes involved. At the least, unnecessary collateral litigation would ensue over the authority of Circuits to maintain their existing rules. Rulemaking ought not to place courts in that position.

[191] *See, e.g.,* 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).

[192] The Author had suggested expanding Rule 37(b) and (c) to authorize spoliation sanctions while modifying Rule 37(e) to limit such sanctions to "intentional actions designed to avoid known preservation obligations." Thomas Y. Allman, Change in the FRCP: A Fourth Way, September 4, 2011.

The Overly-Complex Committee Note

The Committee Note proposed for the revised Proposal totals nine single-spaced pages of repetitious and complex material. It is far from ideal and is unlikely to advance the intended purposes of the Committee.

It describes the Proposed Rules as a "graduated series of measures a court may employ" which "forecloses reliance on inherent authority or state law."[193] However, a Subcommittee member has more accurately noted that the structure of the proposed rule leaves a "squishy line" between measures employed as "curative and those forbidden absent a finding of specified intent."[194]

The Committee Note also reflects deep confusion about the appropriate role of courts and juries in regard to "inferences" and "presumptions" that can, should or must be drawn from the failure to preserve ESI across a spectrum of alternative fact patters. It is not at all clear from the discussion that any real limitation would exist from the language of Subsection (3).

The addition of the "missing evidence" instruction – which it saw as not requiring any showing of culpable intent – is probably worthy of a treatise discussion, but only complicates an already confusing matter.[195]

(8) Preservation Guidance

Under the revised proposal for Rule 37(e), a predicate showing to its applicability remains that a "a party failed to preserve [electronically stored information] that should have been preserved in the anticipation or conduct of litigation."[196]

The reference is to a "preservation obligation [that is] recognized by many court decisions" and not to "a new duty to preserve."[197] The Subcommittee continues to be comfortable with leaving the task of determining when a party has "failed to preserve [ESI] that should have been preserved" to the vagaries of the case law in the various Circuits, despite the fact that strict liability is applied in some Circuits and not in

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[193] Committee Note, 2014 REPORT, at 385- 866 (arguing that the subsections are "sequential steps, but even then they may overlap" and citing examples of "going straight to measures to cure prejudice" if lost information cannot be recovered).
[194] Notes, March 4, 2014 Meeting, AGENDA BOOK, at 438.
[195] Notes, February 25, 2014 Meeting, AGENDA BOOK, at 428.
[196] 2014 REPORTS, at 383.
[197] 2014 REPORTS, at 385.

others.[198] Some have argued that a finding that a party "should have" preserved discoverable information implies a finding of some degree of fault.[199]

Similarly, it is not clear that a finding of a failure to preserve can exist without also finding that the loss is of some consequence, e.g., some showing of prejudice, or, "something to be cured."

Role of Factors

The revised Proposal for Rule 37(e) reflects ambiguity over the role of the factors it has adopted (with some changes) from the original Rule 37(e)(2).

The "original" Committee Note, for example, stated that it contained "many" of the factors that "should be considered in determining when a duty to preserve arose and what information should have been preserved." While ostensibly provided only for court use,[200] these factors were also intended to "provide general guidance for parties contemplating their preservation obligations.[201] That formulation has been dropped from the proposed revised Committee Note.

The current list makes no reference whatsoever to the planning for preservation, only the retrospective evaluation by courts of the conduct.[202]

However, even in their diminished role as guides for courts, the risk remains that courts will (understandably) extrapolate backwards and imply that the listed factors represent standards to be applied. Hewlett-Packard Company ("HP"), for example, suggested that the original factors might become "a rigid, formulaic test with various standards of conduct mandated across jurisdiction."[203]

Rule 37(e)(4)(A) [Trigger]

The first factor, as revised, now states that courts should pay attention to the "extent to which the party was on notice that litigation was likely and that the information would be relevant" and the Committee Note – both original and as revised – states that a "variety of events" may alert a party to the "prospect of litigation." The Subcommittee

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[198] Notes, February 25, 2014 Meeting, AGENDA BOOK, at 428 ("some SDNY judges have moved close to a strict liability attitude in which failure to retain, without more, establishes negligence [and] is the source of much over-preservation").
[199] *See* Henry Kelston, Milberg, February 16, 2014, at 5 (the formulation "could easily be misinterpreted as requiring some level of fault," citing to Champions World v. US Soccer, 276 F.R.D. 577, 583 (N.D. Ill. 2011).
[200] Committee Note, Subdivision (e)(2)("[t]hese factors guide the *court* when asked to adopt [sanctions or curative measures] . . . . and the *court's* focus should be on the reasonableness of the parties conduct")(emphasis added).
[201] REPORT, at 275.
[202] Committee Note, Subdivision (e)(4), AGENDA BOOK, at 391.
[203] HP Comment, January 7, 2014, at 3.

also deleted the previous references to the "ill-advised" presumption that a party receiving a preservation demand was required to go to court to get protection.[204]

Both the original and the revised Committee Note are ambiguous, however, about what actually triggers a duty to preserve for planning purposes. Google had observed that the factor did not provide "an objective threshold for preservation based on when a party can reasonably anticipate [that] litigation is certain."[205] The Subcommittee ignored the comments suggesting that "[c]larity" could be enhanced by designating the onset or commencement of litigation as the point at which the party should begin to preserve potentially discoverable information.[206]

Rule 37(e)(4)(B) [Reasonableness]

The second factors suggests that a court should consider "the reasonableness of the party's efforts to preserve the information." The amended proposal does not articulate the scope of the duty to preserve nor describe the impact of the amended scope of discovery in Rule 26(b)(1).

Moreover, the Subcommittee changed its mind about listing culpability and prejudice as factors in Subsection (e)(4).[207]

Rule 37(e)(4)(C) [Proportionality]

The third factor identifies "proportionality of the preservation efforts" as a matter for consideration in assessing conduct. The original Committee Note argued that a party "should make its own determination" about preservation while simultaneously advising that only *requesting* parties need keep "proportionality principles in mind," having deleted a reference to the role of proportionality in "calibrating a reasonable preservation regime."[208]

Those references were dropped in the March, 2014 Report and replaced by language completely different in tone. Instead of emphasizing the limiting nature of the factor on the duty to preserve, the Committee Note now emphasizes it as expanding the duty to preserve. It states that "proportionality may require more extensive preservation efforts when other potential or pending litigation involves the same information," giving a pharma-based example of multiple injuries from the same product.[209]

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[204] *See* Don Bivens (and 22 others)("individual members of the Leadership of the [ABA] Section of Litigation") Comment, February 3, 2014, at 4-5.
[205] Google Comment, February 11, 2014, at 4.
[206] QVC Comment (by Vincent LaMonaca), February 7, 2014.
[207] Notes, March 12, 2014 Meeting, AGENDA BOOK, at 447-48 (dropping factors (E) and (F) as not needed because it might imply that the "curative measures" could "become punitive.").
[208] Rules Committee Report to the Standing Committee, May 8, 2013, at 59 (showing deletion of phrase stating that "Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime" from Committee Note).
[209] 2014 REPORTS, at 391.

Neither the original nor the amended Committee Notes mention that "proportionality-based" presumptive limitations have been included in local Rules, Guidelines, Model Orders and other initiatives.[210] The Seventh Circuit E-discovery Pilot Program[211] and the District of Delaware Default Standards,[212] for example, identify specific categories of ESI which need not be preserved, absent notice and discussion, given that they are typically not subject to discovery.

Rule 37(e)(4)(D) [Seeking Court Guidance]

The fourth factor emphasizes that parties should "not forgo available opportunities to obletain prompt resolution" of any differences as illustrated by the changes in Rule 26(f) and 16(b) which facilitate guidance available if agreement among the parties cannot be reached.

Evaluations/Suggestions

As noted, the Subcommittee has recommended that the full Committee decide at Portland if the (now) four factors should remain in the Rule, or be eliminated or relegated to the Committee Notes. Judge Francis made the point that the factors are "beneficial" because, among other things, they made clear "that a party's preservation efforts are expected to be proportional and reasonable, not perfect."[213]

LCJ and others have suggested, however, that the list of factors in Proposed Rule 37(e)(2) should be dropped from the Proposed Rule,[214] or, at the most, confined to Committee Notes.[215] The concern is that the interpretive risks presented by the ambiguous factors outweigh the positive benefits.

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[210] Thomas Y. Allman, Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-discovery) Road, 19 RICH. J. L. & TECH. 8, ¶49 (2013)("[i]t would be preferable . . .to adopt these presumptive limitations as a national rule").
[211] [Proposed] Standing Order, SEVENTH CIRCUIT E-DISCOVERY PILOT (listing six categories of ESI whose possible preservation or production must be raised "at the meet and confer or as soon thereafter as practicable"), copy at http://www.discoverypilot.com/ .
[212] D. DEL. Default Standard for Discovery, at ¶ 1(c)(ii)(referring to App. A)(listing thirteen categories of ESI which need not be preserved), copy at http://www.ded.uscourts.gov/court-info/local-rules-and-orders.
[213] James C. Francis IV Comment, January 10, 2014, at 6.
[214] Don Bivens (and 22 others)("individual members of the Leadership of the [ABA] Section of Litigation"), February 3, 2014, at 4-5.
[215] LCJ Comment, August 30, at 13 ("the factors should be mentioned, if at all, in the Committee Note, given the limited role they are intended to play").

APPENDIX A

Rules Text (new material in bold italics)

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~~ ***~~60~~ 90*** days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) ***or to service of a notice under Rule 71.1(d)(3)(A).***

Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

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

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

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

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

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

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

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and proportional to the needs of the case, [~~considering the amount in controversy, the importance of the issues at stake in the action,~~] considering the importance of the issues at stake in the action, the amount in controversy, [the parties relative access to relevant information,] the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be 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).~~

Note: Matter added and deleted by March, 2014 Subcommittee report shown in brackets.[216]

(2) *Limitations on Frequency and Extent.*

[~~(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, and interrogatories~~***~~, and requests for admissions,~~*** ~~or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.~~]

Note: Matter deleted by March, 2014 Subcommittee report shown in brackets.[217]

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[216] See 2014 Reports, at 97-98.
[217] See 2014 Reports, at 98.

(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.

(1) *Timing*. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except**:**

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~***;*** or

(B) when authorized by these rules, ***including Rule 26(d)(2),*** by stipulation, or by court order.

(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 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.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *

(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):

[~~(A) if the parties have not stipulated to the deposition and:~~

~~(i) the deposition would result in more than 10~~ ***5*** ~~depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;~~]

Note: Matter deleted by March, 2014 Subcommittee report shown in brackets.[218]

(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~~ ***6***] 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.

Note: Matter deleted by March, 2014 Subcommittee report shown in brackets.[219]

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):

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[218] See 2014 Reports, at 105.
[219] *Id*.

[(~~A) if the parties have not stipulated to the deposition and:~~
~~(i) the deposition would result in more than 10 **5** defendants, or by the third-party defendants~~;]

Note: Matter deleted by March, 2014 Subcommittee report shown in brackets.[220]

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

(1) *Number.* [~~Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than 25 **15** interrogatories, including all discrete subparts.~~] Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)***(1) and*** (2).

Note: Matter deleted by March, 2014 Subcommittee report shown in brackets.[221]

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 an objection to the request~~ ***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 stated in the request or a later reasonable time stated in the response.***

(C) *Objections*. ***An objection must state whether any responsive materials are being withheld on the basis of that***

[220] See 2014 Reports, at 105.
[221] *Id*.

objection. An objection to part of a request must specify the part and permit inspection of the rest. . * * *

Rule 36 Requests for Admission

(a) SCOPE AND PROCEDURE.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described document.

[(2) ~~Number. Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts. The court may grant leave to serve additional requests to the extent consistent with Rule 26(b)(1) and (2).~~]

Note: Matter deleted by March, 2014 Subcommittee report shown in brackets.[222]

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.

[222] See the general explanation at 2014 Reports, 89.

APPENDIX B

REVISED (Post-Public Comment) RECOMMENDATION OF DISCOVERY SUBCOMMITTEE

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.

If a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, the court may:

(1) Order measures no greater than necessary to cure the loss of information, including permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees.

(2) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.

(3) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(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.

[**(4)** In applying Rule 37(e), the court should consider all relevant factors, including:

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

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

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

(D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.]

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.

* * * * *