

# Applying the 2015 Civil Rules Amendments

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This Memorandum provides an overview of the experience of the first eight months under the amendments to the Federal Rules of Civil Procedure which became effective on December 1, 2015.

The “package” of amendments transmitted to Congress on April 29, 2016 became effective after inaction by that body.<sup>2</sup> They apply to all subsequently filed lawsuits as well as to pending cases unless a court determines that it is impracticable or unjust to do so. Some courts have overlooked the amended rules, but, by and large, courts are routinely applying them.<sup>3</sup>

## Background

The amendments resulted from a multi-year effort by the Civil Rules Advisory Committee (the “Rules Committee”) which began with a Conference on Civil Litigation held by the Committee at the Duke Law School (the “Duke Conference”) over two days in May 2010. The initial decision to hold the Conference reflected a desire to seek answers to issues such as whether “whether discovery really is out of control.”<sup>4</sup>

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<sup>2</sup> The complete “package” of materials as transmitted to Congress can be found at <http://www.uscourts.gov/file/document/congress-materials>. The text and Committee Notes, as well as explanatory comments by the Committee are available in the June 2014 RULES REPORT, one of the components of the package, which is available at 305 F.R.D. 457, 512 (2015). The Committee Notes to Rule 4(m) and to Rule 84, however, were amended at the request of the Supreme Court after the referenced Report was issued. The minor changes are noted where relevant.

<sup>3</sup> See, e.g., *Benefield v. MStreet Entertainment*, 2016 WL 374568 (M.D. Tenn., Feb. 1, 2016)(imposing adverse inference for loss of text messages with finding “intent to deprive” or mentioning Rule 37(e)).

<sup>4</sup> Minutes, Rules Committee Meeting, November 17-18, 2008, at 17-18.

Key “takeaways” from the Duke Conference were that there was no need for wholesale revisions to the discovery rules, but improved case management, a more focused application of the long-ignored principle of “proportionality” and enhanced cooperation among parties in discovery should be encouraged. In addition, an E-Discovery Panel “reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.”<sup>5</sup>

The task of developing rule proposals was divided between an *ad hoc* “Duke” Subcommittee, chaired by the Hon. John Koeltl and the Discovery Subcommittee, chaired by the Hon. Paul Grimm, which focused solely on preservation and spoliation. Both subcommittees vetted alternative draft rule proposals at “mini-conferences.” In addition, a subcommittee worked independently make develop recommendations about treatment of the Appendix of Forms, including Rule 84.<sup>6</sup>

## The Initial Proposals

An initial “package” of proposed amendments reflecting these efforts was released for public comment in August 2013.<sup>7</sup> The response to the initial proposals was robust, with 120 witnesses testifying at three public hearings as well as 2356 written comments, all of which remain available on line.<sup>8</sup>

The most contentious topics were proposed amendments to Rule 26(b)(1) and Rule 37(e). The competing submissions by Lawyers for Civil Justice (“LCJ”)<sup>9</sup> and the American Association for Justice (“AAJ,” formerly “ATLA”)<sup>10</sup> were also typical of many individual comments. The AAJ urged rejection of the addition of proportionality factors to Rule 26(b)(1) and reducing presumptive limits on discovery devices. LCJ, in contrast, supported amending Rule 37(e), although with caveats about the details, and supported changes relating to proportionality.

In addition to individuals, academics and policy advocacy groups, the Federal Magistrate Judges Association (“FMJA”), the Association of Corporate Counsel (“ACC”), the Department of Justice (“DOJ”), the Sedona Conference® WG1 Steering Committee

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<sup>5</sup> John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 544 (2010).

<sup>6</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 512 at 513. Similarly, the proposed amendment to Rule 55 was “developed independently of the Duke Conference initiatives.”

<sup>7</sup> The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules (hereinafter “2013 PROPOSAL,” remains available at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>.

<sup>8</sup> Hearing Transcripts are available at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees>. The written comments are archived at <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>.

<sup>9</sup> LCJ Comments, August 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267>, as supplemented. LCJ represents a coalition of defense trial lawyer organizations, law firms and corporations.

<sup>10</sup> AAJ Comments, December 19, 2013, available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372>.

("Sedona") and a cross-section of state bar associations also provided thoughtful comments.

## The Final Rules Package

After review of the public comments, the Committee affirmed its decision to move proportionality factors into Rule 26(b)(1), albeit with adjustments responding to many of the concerns raised. In addition, the proportionality-motivated proposals to further limit discovery devices were withdrawn.<sup>11</sup> In contrast, the initial proposal for a comprehensive Rule 37(e) to replace the existing rule was abandoned and a new proposal focused only on the loss of ESI was substituted without further public hearings.

Final versions of the proposed amendments were adopted by the Rules Committee at its April, 2014 meeting in Portland, Oregon.<sup>12</sup> The Standing Committee subsequently approved the revised proposals<sup>13</sup> as did the Judicial Conference, which then forwarded them to the Supreme Court with recommendations for adoption.

The Supreme Court adopted the amendments and forwarded them to Congress on April 29, 2015.<sup>14</sup> Congress took no action prior to the effective date of December 1, 2015, whereupon the rules became effective.

## The Amendments

As noted earlier, the Duke Subcommittee and the Discovery Subcommittee were generally responsible for developing the bulk of the 2015 Amendments. While developed separately, the abrogation of Rule 84 and the Appendix of Forms and the changes to Rule 55 are discussed in this Memorandum given that they became effective at the same time.

### Cooperation (Rule 1)

Rule 1 speaks of the need to achieve the "just, speedy, and inexpensive determination of every action and proceeding." Many participants at the 2010 Duke Conference emphasized the need for enhanced cooperation in achieving the goals of Rule 1, a theme echoed by the Sedona Conference® Cooperation Proclamation.<sup>15</sup>

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<sup>11</sup> The Committee dropped proposals to further reduce the presumptive limits on Rules 30, 31 and 33 and withdrew the proposal to place new limits on use of Requests to Admit.

<sup>12</sup> See Minutes, April 2014 Rules Committee Meeting (hereinafter April 2014 Minutes), available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014>.

<sup>13</sup> 305 F.R.D. 457, at 503-508 (Standing Committee recommendations to the Judicial Conference)

<sup>14</sup> Order, Supreme Court, April 29, 2015 (amending Rules and the Appendix of Forms to take effect on December 1, 2015 and authorizing Chief Justice transmittal to Congress. 305 F.R.D. 457, 460 (2015).

<sup>15</sup> The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).

The Subcommittee initially considered mandating that parties “should cooperate” to achieve the goals of Rule 1.<sup>16</sup> However, this was deemed to be “too vague, and thus fraught with the mischief of satellite litigation.”<sup>17</sup> As finally approved, instead, the Rule 1 is to be “construed, ~~and administered~~ and employed by the court and the parties to secure” its goals. The Committee Note explains that “the parties share the responsibility to employ the rules” in that matter.

The June 2014 Committee Report submitted to the Supreme Court (and Congress) asserts that “the change to Rule 1 will encourage parties to cooperate in achieving the just, speedy, and inexpensive resolution of every action.”<sup>18</sup>

## Counsel Cooperation

The Committee Note observes that “most lawyers and parties cooperate to achieve those ends” and that “[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.” After the public comment period, the Note was enlarged to state that “[t]his amendment does not create a new or independent source of sanctions” and “neither does it abridge the scope of any other of these rules.”<sup>19</sup>

The reference to sanctions was prompted by concerns about striking the proper balance between promoting cooperative actions while acknowledging the professional requirements of effective representation.<sup>20</sup> Rule 37(f) and 16(f) authorize sanctions against a party or its attorney that does not participate in good faith in developing a discovery plan or in the scheduling conference.

## Impact

Only a handful of decisions have, as yet, alluded to the change in Rule 1. One court ordered the parties to engage in “cooperative dialogue in an effort to come to an agreement regarding proportional discovery.”<sup>21</sup> In *Rosalind Searcy v. Esurance*, the court noted the need for parties to “work cooperatively and to employ common sense practicality so that cases can be resolved fairly and expeditiously.”<sup>22</sup>

While not a source of sanctions, an uncooperative party which acted “contrary to” the amended rule, found itself saddled with a “quick peek” plan for review of allegedly

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<sup>16</sup> Duke Subcommittee Conference Call Notes, 9, October 22, 2012), available at [https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel\\_4-Background\\_Paper\\_2\\_1.pdf](https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf).

<sup>17</sup> *Id.*

<sup>18</sup> June 2014 RULES REPORT, available *supra* at n. 16, II (D), hereinafter “June 2014 RULES REPORT.”

<sup>19</sup> Committee Note.

<sup>20</sup> See Report to Standing Committee, May 2, 2014, at 16 (the civil rules provide procedural requirements while rules of professional responsibility add requirements of their use; complicating these provisions by a “vague concept of ‘cooperation’ may invite confusion and ill-founded attempts to seek sanctions).

<sup>21</sup> *Siriano v. Goodman*, 2015 WL 8259548, at \*7 (S.D. Ohio Dec. 9, 2015).

<sup>22</sup> 2016 WL 4149964, at \*2 (D. Nev. Aug. 1, 2016)(citing Rules 1 and 26(b)).

privileged documents in order to achieve “cooperative and proportional discovery.”<sup>23</sup> However, the amended Rule does not “give the requesting party, or the Court, the power to force cooperation.”<sup>24</sup>

## Case Management (Rules 4(m), 16, 26, 34, and 55)

Recommendations for possible improvements in case management formed an essential element of the Duke Subcommittee focus.

### Waiver of Service of Process (Rule 4(d))

In connection with the assessment of the efficacy of supplying forms with the Civil Rules, as discussed *infra* in Section 7 (“Forms”), it was decided that two of the now abrogated forms have been incorporated into Rule 4 by appending them to the Rule.

The, the amended text of the Rule 4(d) requires that a notice be accompanied by “a the waiver form appended to this Rule 4” and that the party also inform the defendant, using ~~text prescribed in Form 5~~ the form appended to this Rule 4, of the consequences.<sup>25</sup>

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

The time limits in Rule 4(m) governing the service of process have been reduced from 120 to 90 days. The intent is to “reduce delay at the beginning of litigation.” There was some opposition to the change on the grounds that in some cases, the longer period is needed or useful. Other technical objections were made.

In its final form, the rule does not apply to service in a foreign country “or to service of a notice under Rule 71.1(d)(3)(A).” Moreover, at the request of the Supreme Court after its review prior to transmittal to Congress, the Note was amended to also state that shortening the presumptive time limit for service “will increase the frequency of occasions to extend the time for ~~good cause.~~”

### Default Judgment

The interplay between Rules 54(b), 55(c) and 60(b) have been clarified by inserting the word “final” in front of the reference to default judgment in Rule 55(c). As was the case in regard to the abrogation of Rule 84, discussed *infra*, this amendment was “developed independently of the duke Conference initiatives.”<sup>26</sup>

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<sup>23</sup> *Sommerville v. Moran*, 2016 WL 233627, at \*5 (S.D. Ind. Jan. 20, 2016)(encouraging parties to carefully study Committee Note to amended Rule 1).

<sup>24</sup> *Hyles v. New York City*, 2016 WL 4077114, at \*2 (S.D. N.Y. Aug. 1, 2016)(“operation principles, do not give the power to a court to force the responding party to use TAR).

<sup>25</sup> The Committee determined that “Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.” September 2014 Report of the Standing Committee to the Judicial Conference, 305 F.R.D. 457,491 at 506.

<sup>26</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 512 at 513.

## Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2) (“Early Rule 34 Requests”)) allows (as an option) a party to deliver its document requests prior to the “meet and confer” required by Rule 26(f). Prior to the amendment, this was not possible. The time to respond under Rule 34(b)(2)(A) “if the request was delivered under 26(d)(2)” is amended to be “within 30 days after the parties’ first Rule 26(f) conference.”

The sequence of discovery specified under Rule 26(d)(3) applies unless “the parties stipulate or” the court orders otherwise.

The Committee Note explains that this “relaxation of the discovery moratorium” before the Rule 26(f) conference change is “designed to facilitate focused discussion” during the Conference since it “may produce changes in the requests. A related change in Rule 26(d)(3) relates to case-specific stipulations regarding “sequences of discovery.”

This proposal was not uniformly supported during the public comment period. The comments submitted by the Federal Magistrate Judges Association (“FMJA”) warned that the procedure could “devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage” and impede the progress of the case by leading to more disputes at the Rule 26(f) conference. The Department of Justice (“DOJ”) expressed similar concerns.<sup>27</sup>

It has been pointed out that certain types of cases, such as employment discrimination cases, may be better suited to use of the device, given the similarity to types of documents at issue.<sup>28</sup>

## Scheduling Conference

Rule 16(b)(1) now merely refers to consultations “at a scheduling conference.” It no longer refers to conducting scheduling conferences by “~~telephone, mail, or other means.~~” The Committee Note observes that the conference may be held “in person, by telephone, or by more sophisticated electronic means” and “is more effective if the court and parties engage in direct simultaneous communication.”

## Scheduling Orders: Timing

Rule 16(b)(2) now requires a court to issue the scheduling order no later than 90 days after any defendant has been served or 60 days after any appearance of a defendant,

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<sup>27</sup> Amil N. Castle, *Avoid Being the Early Worm: Early Service of Rule 34 Document Requests Under the Proposed Amended Federal Rules of Civil Procedure*, 71 J. MO. B. 200, 2012 (2015)(summarizing comments)

<sup>28</sup> *Id.*, (“[j]ust because federal practitioners will not be able to serve early document requests does not mean they always should”).

down from 120 and 90 days, respectively, in the absence of “good cause for delay.” The Committee Note explains that in some cases, parties may need “extra time” to establish “meaningful collaboration” to secure the information needed to participate in a useful way. In practice, the process often extends over multiple hearings.

### Scheduling Orders: Pre-motion Conferences

Rule 16(b)(3)(B)(v) (“Contents of the Order”) now permits a court to “direct that before moving for an order relating to discovery the movant must request a conference with the court.”

Many courts have moved to a system of pre-motion conferences to resolve discovery disputes, and the intent of the amendment is to encourage its use. The Committee Note explains that “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion.”<sup>29</sup> A former Magistrate Judge regards this as possibly “the great[est] cost-saver” in the 2015 Amendments.<sup>30</sup>

### Scheduling Orders: Preservation

Rule 26(f)(3)(C), has been amended to require that parties state their views on “disclosure, ~~or~~ discovery, or preservation” of electronically stored information (ESI) in the discovery plan submitted prior to meeting with the Court. Rule 16(b)(3)(B)(iii) has also been amended to permit a scheduling order to provide for “disclosure, ~~or~~ discovery, or preservation” of ESI.

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

### FRE 502 Orders

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

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<sup>29</sup> See also Steven S. Gensler and Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 861 (2013).

<sup>30</sup> Ronald J. Hedges, *The Other December 1 Amendments to the Federal Rules of Civil Procedure*, ABA *Litigation, Pretrial Practice & Discovery* (2016), available at <http://apps.americanbar.org/litigation/committees/pretrial/articles/spring2016-0516-other-december-1-amendments-federal-rules-civil-procedure.html>.

## Discovery Scope (Rule 26(b))

Rule 26(b)(1), which defines the scope of discovery for all forms of information, has been revised to emphasize the role of the proportionality. The scope of discovery in Rule 26(b) has been subject to proportionality limitations since 1983.<sup>31</sup> However, after exploring alternatives at a Mini-Conference,<sup>32</sup> the Committee decided to add the phrase “proportional” to Rule 26(b)(1) and to move the proportionality factors there as well in support.<sup>33</sup> The 2015 Amendments also made conforming changes to Rules 30, 31 and 33 to “reflect the recognition of proportionality in Rule 26(b)(1).”<sup>34</sup>

As amended, it provides:

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 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.

Rule 26(b)(2)(C)(iii) was amended to provide that courts must limit the frequency or extent of discovery when “[iii] ~~the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1).~~” Subsections (i) and (ii) of Rule 26(b)(2)(C) continue to limit discovery which is unreasonably cumulative or duplicative or which can be obtained from other less burdensome sources.

The same limits apply to the scope of discovery in subpoenas to third parties, and a court has standing to issue protective orders under Rule 26(c) to enforce them.<sup>35</sup>

In addition, if production of ESI is involved, a lack of accessibility under Rule 26(b)(2)(B) may be invoked as an objection, which will ultimately be resolved under the proportionality principle, as tempered by a showing of “good cause.”<sup>36</sup>

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<sup>31</sup> See 97 F.R.D. 165, 215 (1983)(Rule 26(b)(1)(iii). The Committee Note described this as intended to limit “disproportionate” discovery of matters which were “otherwise proper subjects of inquiry.”

<sup>32</sup> See Amended Initial Sketch (undated), at 20; as modified after the October 8, 2012 Mini-Conference, copy at [https://ralphlosey.files.wordpress.com/2012/12/rules\\_addendumsketchesafterdallas12.pdf](https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf).

<sup>33</sup> Minutes, Subcommittee Conference Call, October 22, 2012, at 5- 6 (“adding the [listed] factors to explain what ‘proportional’ means relieves the risk of uncertain meaning”), available at [https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel\\_4-Background\\_Paper\\_2\\_1.pdf](https://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper_2_1.pdf).

<sup>34</sup> Committee Note.

<sup>35</sup> *Noble Roman’s Inc. v. Hattenhauer*, 314 F.R.D. 304, 309 (S.D. Ind. March 24, 2016)(“[a court] can issue a protective order against a subpoena as a means of enforcing the scope of discovery in rule 26(b)”).

<sup>36</sup> *Nelson v. American Family Mutual Insurance*, 2016 WL 3919973, \*6 (D. Minn July 18, 2016)(noting that party that withholds ESI based on Rule 26(b)(2)(B) must show its basis for doing so and the court may nonetheless order discovery if ‘good cause’ shown,” considering proportionality concerns).



The Committee Note explains that the changes to Rule 26(b)(1) “reinforce” Rule 26(g) obligations by requiring “parties to consider these [proportionality] factors in making discovery requests, responses, or objections.”

The Committee acted because it had concluded that an increased emphasis was needed to achieve the goals of Rule 1,<sup>37</sup> despite an FJC survey<sup>38</sup> which suggested that for most cases discovery was proportional to the needs of the case.

## Deletions

Substantial deletions were also made from the existing Rule 26(b)(1).<sup>39</sup> It no longer contains examples, which remain discoverable since “deeply entrenched” in practice. The authority to order “subject matter” discovery for good cause was deleted because it was “rarely invoked” and because discovery that is relevant to the parties claims or defenses may also support amendment of pleadings to add a new claim or defense that affects the scope of discovery.

Also deleted is the statement that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,” which had been improperly used to describe the scope of discovery.<sup>40</sup>

## Scope of Discovery

The proposed changes to Rule 26(b)(1) unleashed a firestorm of opposition, fueled in part by a statement in the Draft Note that the scope of discovery was to be “changed.”<sup>41</sup> Many argued that there was no empirical evidence that a change was needed and that it was unfair to do so.

In response to what it felt were “quite unintended” interpretations of its proposal,<sup>42</sup> the text and the Committee Note were revised so as to drop the reference to a “change” in scope in favor of a statement that the amendment “restores” the proportionality considerations to their original place in Rule 26(b)(1). The listed order of the relocated factors was rearranged so that the position of the “amount in controversy” factor was

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<sup>37</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 512 at 517 (“civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality”).

<sup>38</sup> Emery G. Lee III and Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 765, 773-774 (2010) (“[discovery] costs are generally proportionate” to client stakes in the litigation).

<sup>39</sup> The red-lined version of the final version, showing deletions, is found at 305 F.R.D. 457, at 541-542. The related portion of the Committee note is at 553-555.

<sup>40</sup> As recently as August, 2016, some courts are apparently unaware of the deletion of this language, although cited without any obvious impact on ultimate decision. *See Fastvdo LLC v. AT&T Mobility*, 2016 WL 4542747, at \*2 (S.D. Cal. Aug. 31, 2016).

<sup>41</sup> *See, e.g.*, Draft Committee Note, 2013 PROPOSAL, *supra*, at 296 (“[t]he scope of discovery is changed . . . to limit the scope of discovery to what is proportional to the needs of the case”).

<sup>42</sup> April 2014 Rules Committee Minutes at 4-5 (lines 176-177) (quoting Chair of Duke Subcommittee).

secondary and a new factor dealing with information asymmetry was added. In addition, the Committee Note was rewritten and expanded.

Despite the changes, some continue to argue that the scope has been narrowed.<sup>43</sup> Under this view, courts have been “encouraged” to “put their thumbs on the scale” to achieve that result.<sup>44</sup> A more balanced view, however, is that the amendment is intended to restore the scope of discovery to what it was always intended to be, but was lacking when courts and parties ignored proportionality considerations.<sup>45</sup> According to this view, corporate defendants are “mistaken” in their “belief that these changes dictate severe limitations on discovery.”<sup>46</sup>

## Burden of Proof

According to the Committee Note, the rule does not assign a particular burden of proof to a party to demonstrate the presence or lack of proportionality. The AAJ,<sup>47</sup> for example, had argued that it would shift the burden to “*prove* that the requests are not unduly burdensome or expensive,” since a producing party could simply refuse reasonable discovery requests by objecting.<sup>48</sup>

Each party is expected to provide information uniquely in their possession to the court, which then is expected to reach a “case-specific determination of the appropriate scope of discovery.” In *Carr v State Farm Mutual*, the court noted that the party seeking discovery “may well need” to “make its own showing of many or all of the proportionality factors.”<sup>49</sup>

## Relevance

It seems clear that the definition of discovery relevance is unchanged after the amendments. In *State v. Fayda*, the court quoted from *Oppenheimer Fund v. Sanders* to make the point that relevancy is “still” construed “broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on” any party’s claim or defense.<sup>50</sup> The use of the quoted language from a 1978 Supreme Court has been

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<sup>43</sup> Berman, *Reinventing Discovery under the New Federal Rules*, LITIGATION, Vol. 42, No. 3, Spring 2016, (the amendments “change discovery in a big way, largely by narrowing its scope”).

<sup>44</sup> XTO Energy v. ATD, LLC, 2016 WL 1730171, at \*19 (D. N.M. April 1, 2016).

<sup>45</sup> Arcelormittal Indiana Harbor v. Amex Nooter, 2016 WL 4077154 (N.D. Ind. July 8, 2016) (“the purpose of the amendment to Rule 26(b)(1) was to narrow the scope of discovery because the language “reasonably calculated to lead to the discovery of admissible evidence” had been incorrectly used by some to define the scope of discovery as more broad than intended”).

<sup>46</sup> Altom M. Maglio, *Adapting to Amended Federal Discovery Rule*, 51- JUL TRIAL 36, 37 (2015).

<sup>47</sup> AAJ Comment, *supra*, December 19, 2013.

<sup>48</sup> *Id.*, at 11 (emphasis in original).

<sup>49</sup> 2015 WL 8010920, at \*9 (N.D. Tex. Dec. 7, 2015).

<sup>50</sup> *State Farm v. Fayda*, 2015 WL 7871037 at \*2 (S.D. N.Y. Dec. 3, 2015), quoting from *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) .

criticized as “inconsistent” with the amendment of Rule 26(b)(1),<sup>51</sup> albeit, in the Authors view, without diminishing the accuracy of the observation.

It is clear, however that the elimination of the phrase “reasonably calculated” from the text of Rule 26(b)(1) means that, as the former Chair of the Rules Committee recently put it, “the test going forward is whether “evidence is ‘relevant to any party’s claim or defense,’ not whether it is “reasonably calculated to lead to admissible evidence.”<sup>52</sup> A surprising number of courts continue to erroneously cite that language despite its deletion.<sup>53</sup>

## Proportionality

Relevance is necessarily tempered by proportionality considerations.<sup>54</sup> Discovery must be *both* relevant to any party’s claim or defense “and proportional to the needs of the case, considering” the re-arranged and slightly modified list of the proportionality factors previously listed in Rule 26(b)(2)(C)(iii).

The primary focus is on the balance of benefit against burden in deciding if otherwise relevant information is proportional to the needs of the individual case.<sup>55</sup> In *Henry v. Morgan’s Hotel Group* the court described the rule as intended to “encourage judges to be more aggressive in identifying and discouraging discovery overuse” before ordering production of relevant information.<sup>56</sup>

The Committee Note emphasizes that the amended rule “does not change the existing responsibilities of the court and the parties to consider proportionality”<sup>57</sup> and does not “place on the party seeking discovery the burden of addressing all proportionality concerns.” Further, a party may not “refuse discovery simply by making a boilerplate objection that it is not proportional.

In *Siriano v. Goodman Manufacturing*, a court carefully explained that requests for relevant information were not disproportionate because information about product defects and warranty claims were uniquely available to the defendant; distributor information was

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<sup>51</sup> John M. Barkett, *The First 100 Days (or so) of the 2015 Civil Rules Amendments*, 44, copy at <http://www.frcpamendments2015.org/uploads/5/8/6/3/58636421/barkettfirst100days.pdf>.

<sup>52</sup> In re: Bard IVC Filters Products Liability Litigation, 2016 WL 4943393, at \*2 (D. Ariz. Sept. 16, 2016)(noting that under the Rules Enabling Act, prior rules have “no further force of effect”).

<sup>53</sup> *Id.*, at n. 1 (listing numerous examples from August, 2016)

<sup>54</sup> *Cf.* Wright and Miller, 8 FED. PRAC. & PROC. CIV. § 2008 (3<sup>rd</sup> Ed.)(2016)(using quote from Oppenheimer to explain “the concept of relevancy”).

<sup>55</sup> High Point Sarl v. Sprint Nextel Corp., 2011 WL 4036424, at \*15 (D. Kan. Sept. 12, 2011)(the court will “balance the burden on the interrogated party against the benefit to the discovering party of having the information” and the discovery will be allowed unless the hardship is “unreasonable.”)

<sup>56</sup> *Henry v. Morgan’s Hotel Group*, *supra*, 2016 WL 303114, at \*3 (S.D. N. Y. Jan.25, 2016); *see also* Tatsha Robertson v. People Magazine, 2015 WL 9077111, at \*2 (S.D. N.Y. Dec. 16, 2015 (“the 2015 amendment does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly”).

<sup>57</sup> The revised Note also states that if faced with a dispute “the parties’ responsibilities would remain as they have been since 1983.” *Id.*

best accessed from the party, not assembled piecemeal, and in weighing advantages against cost, the proper test was of “undue” burden, not mere expense.<sup>58</sup>

Many disputes under the amended rule have been resolved without the degree of attention to proportionality factors shown in *Siriano*. It is therefore difficult to determine whether the relocation of the proportionality factors (and the addition of a new one) has impacted the scope of discovery in general. Courts rarely make a comparison of their current rulings with what would have occurred under a prior rule. Nonetheless, some courts have gone out of their way to assure litigants that in deciding the motion before it, “the same result would follow regardless of which version of Rule 26 was applied.”<sup>59</sup>

In *Goes Int’l v. Dodu*, the court noted that it should not be an excessive burden for an entity to produce revenue data, and thus the discovery was proportional, even for an entity located in China.<sup>60</sup> In *O’Connor v. Uber*, the “overbreadth” of the requested discovery” failed to meet “Rule 26(b)’s proportionality test.”<sup>61</sup>

Courts continue to limit discovery when parties already have enough information to meet their needs in the case.<sup>62</sup> In *Pertile v. GM*, for example, a court in a roll-over case refused to require GM to produce complex modeling software which, although relevant, was not proportional to the needs of the case given the failure to demonstrate that other discovery was not adequate.<sup>63</sup>

Courts have not, however, been reluctant to reject unwarranted claims of disproportionality. In *Federal Mortgage Assn. v. SFR Investments*, a District court affirmed a Magistrate Court’s order compelling limited discovery by describing objections that the discovery was “disproportionate to the needs of the case” as simply “hyperbole.”

However, when a case has public policy implications, the “amount in controversy” factor may have a lesser weight in the court’s analysis.<sup>64</sup> In *Lucille Schultz v. Sentinel Insur. Co.*, for example, a court rejected objections based on the costs of compliance despite the small amount in controversy, citing other proportionality factors.<sup>65</sup> The Committee Note confirms that “many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.”

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<sup>58</sup> 2015 WL 825948 (S.D. Ohio Dec. 9, 2015)(the court noted that the parties had an obligation to cooperate as much as possible under Rule 1 in dialogue regarding proportional discovery and that it would, in the spirit of active case management, hold a discovery conference to discussed phased discovery).

<sup>59</sup> *Cottonham v. Allen*, 2016 WL 4035331, at n. 2 (M.D. La. July 25, 2016).

<sup>60</sup> 2016 WL 427369 (N.D. Cal. Feb. 4, 2016).

<sup>61</sup> 2016 WL 107461, at \*4 (N.D. Cal. Jan. 11, 2016).

<sup>62</sup> *Turner v. Chrysler*, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016).

<sup>63</sup> *Pertile v. GM*, 2016 WL 1059450, at \*4 (D. Colo. March 17, 2016).

<sup>64</sup> *Laporte and Redgrave*, *supra*, at 61.

<sup>65</sup> 2016 WL 3149686, at \*7 (D. S.D. June 3, 2016)(rejecting the argument that proportionality in the new amendments involved considerations not formerly present).

Moreover, the relative *wealth* of the parties is not significant. In *Salazar v. McDonald's*, the court held that the comparative financial resources available to handle discovery costs was irrelevant.<sup>66</sup> The Committee Note provides that “consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party.”<sup>67</sup>

As noted, the Committee added a new “factor” to rule 26(b)(1) after public comments thus requiring that courts consider “the parties’ relative access to relevant information.” The Committee Note explains that the “burden of responding to discovery lies heavier on the party who has more information, and properly so.” *Doe v. Trustees of Boston College* emphasized that a party with superior access needs to show “stronger burden and expense” to avoid production.<sup>68</sup>

### Third Parties

Proportionality considerations apply when discovery is sought from third parties. Courts are usually reluctant to allow parties to raise them if based on the burden suffered by non-parties absent a showing of special interest. In *CDK v. Tulley Automotive Group*, a party lacked a basis under the amended rule to object since the burden of production would not be faced by it.<sup>69</sup> In *Henry v. Morgan’s Hotel Group*, *supra*, third-party subpoenas were nonetheless quashed at the request of the plaintiff because of the possible harm they might cause to the ability to find future employment.<sup>70</sup>

In *Noble Roman’s v. Hattenhauer*,<sup>71</sup> the court issued a protective order against a subpoena under Rule 26(c) to ensure that it was proportional to the needs of case, although the party objecting was not the producing party. The court held that the subpoena “fail[ed] the proportionality test” and constituted an example of “discovery run amok” which was too far afield from the contested issues in the case.

### Computer Assisted Review (“CAR”)

The Committee Note endorses use of “computer-based methods of searching” as a form of proportionality designed to reduce the burden or expense of producing ESI and suggests that courts and parties should consider use of “reliable means” of searching ESI by electronically enabled means. In *Dynamo Holdings v. CIR*, a court approved use of predictive coding use and subsequently relied upon it to refuse additional discovery.<sup>72</sup>

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<sup>66</sup> 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).

<sup>67</sup> Committee Note.

<sup>68</sup> *Doe v. Trustees of Boston College*, 2015 WL 9048225 (D. Mass., Dec. 16, 2015).

<sup>69</sup> 2016 WL 1718100, at \*9 (D. N.J. April 29, 2016)(citing *Green v. Cosby*, 2016 WL 1086716, at \*7 (E.D. Pa. Mar.21, 2016).

<sup>70</sup> *Henry v. Morgan’s Hotel Group*, 2016 WL 303114, at \*3 (S.D. N.Y. Jan. 25, 2016); *but compare* *Jennifer Saller v. QVC*, *supra*, 2016 U.S. Dist. LEXIS 82895 (June 24, 2016)(“Henry is distinguishable on the facts”).

<sup>71</sup> 314 F.R.D. 304, (S.D. Ind. March 24, 2016).

<sup>72</sup> 2016 WL 4204067 (T.C. July 13, 2016).

In *Hyles v. New York City*, the court rejected an attempt by a requesting party to compel the use of TAR over objection. It held that courts are not empowered by the 2015 Amendments to force use of TAR.<sup>73</sup> Commentators agree that it is “generally not appropriate for the judge” to order a party to “purchase or use” a specific technology or method, but suggest that a judge “may” consider whether a party has been unreasonable in choosing a particular method or technology.<sup>74</sup>

## Case Management

“Whether proportionality moves from rule text to reality depends in large part of judges.”<sup>75</sup> As noted in *Robertson v. People Magazine*, the rule “serves to exhort judges to exercise their preexisting control over discovery more exactly.”<sup>76</sup> In doing so, the amendment to Rule 1 makes it clear that parties - and their counsel<sup>77</sup> - are expected to engage in cooperative and proportional efforts to achieve cost effective management.<sup>78</sup>

The 2015 Amendments “include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case.”<sup>79</sup> Early “delivery” of potential requests for production prior to the Rule 26(f) conference, for example, as authorized by Rule 26(d), should facilitate early and meaningful discussions about the requests, including proportionality.<sup>80</sup>

Phased discovery is a useful option. In *Siriano v. Goodman Manufacturing*,<sup>81</sup> a court scheduled a discovery conference to consider the benefits from the use of phased discovery, while encouraging “further cooperative dialogue in an effort to come to an agreement regarding proportional discovery.” In *Wide Voice v. Sprint*, the court “sequenced” discovery to prioritize on one of the five claims in the case.<sup>82</sup>

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<sup>73</sup> 2016 WL 4077114 (S.D. N.Y. Aug. 1, 2016).

<sup>74</sup> Duke Guidelines, at 9.

<sup>75</sup> Lee H. Rosenthal and Steven S. Gensler, *Achieving Proportionality in Practice*, 99 JUDICATURE, 43, 44 (2015) (noting that judges must make it clear to parties that they must work toward proportionality and be themselves willing and available to work with parties, including resolving discovery disputes quickly and efficiently)(Rosenthal and Gensler).

<sup>76</sup> 2015 WL 9077111, at \*2 (S.D. N.Y. Dec. 16, 2015)

<sup>77</sup> Ronald J. Hedges, *The ‘Other’ December 1 Amendments, supra*, Section of Litigation, Pretrial Practice & Procedure (Spring 2016)(while Rule 1 is not intended to be source of sanctions it should be cited by attorneys to call on their adversaries to cooperate in regard to discovery demands).

<sup>78</sup> Committee Note (“[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure”).

<sup>79</sup> Rosenthal and Gensler, at 44 (2015).

<sup>80</sup> Rule 26(d) permits a request under Rule 34 to be delivered more than 21 days after the summons and complaint are served but is considered to be served at the first Rule 26(f) conference. Rule 34(b)(2)(A) is modified to reflect that the time to respond is 30 days after that conference is that delivery option is taken.

<sup>81</sup> 2015 WL 8259548, at \*7 (S.D. Ohio Dec. 9, 2015)

<sup>82</sup> 2016 WL 155031 (D. Nev. Jan. 12, 2016)(“[a]t this stage in litigation, sequenced discovery will benefit both parties”).

The Duke Center for Judicial Studies led an effort to develop a list of *Guidelines and Principles* “aimed at provid[ing] greater guidance on what the amendments are intended to mean and how to apply them effectively.”<sup>83</sup> In conjunction with the ABA, the Duke Center sponsored an ongoing “Roadshow”<sup>84</sup> held in courthouses in various cities across the country.<sup>85</sup> Judges and practitioners have also contributed articles on the practical use of proportionality under the amended rule.<sup>86</sup>

## Search

Courts have applied proportionality considerations to assess the degree of search efforts required for compliance with production requests. In *Wagoner v. Lewis Gale Medical Center*,<sup>87</sup> the court refused to bar a costly search which resulted from the party’s “choice” to use a system that automatically deleted information after three days.

In *Wilmington Trust v. AEP Generating*, however, the court refused to order an additional search because a moving party failed to provide “evidence or persuasive argument” why ordering such a search would “materially add to [an] existing collection of relevant documents.”<sup>88</sup> Similarly, in *AVM Techs v. Intel*, the court refused to order Intel to undertake a further search of databases where the moving party had not demonstrated that production to date was inadequate.<sup>89</sup>

## State Developments

A number of states have acted to enhance use of proportionality in rulemaking prior to and after the 2015 Amendments. These states include Colorado (2015),<sup>90</sup> Iowa (2015), Illinois (2014),<sup>91</sup> Minnesota (2013),<sup>92</sup> New Hampshire (2013) and Utah (2011).<sup>93</sup> Arizona is about to do so as well.<sup>94</sup>

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<sup>83</sup> *Guidelines and Practices*, Duke Center for Judicial Studies (2015), available at 99 JUDICATURE 47 (hereinafter “Duke Guidelines”).

<sup>84</sup> See ABA Rules Amendments Roadshow, available at <http://www.frcpamendments2015.org/national-coordinators.html>.

<sup>85</sup> Andrew J. Kennedy, *supra*, ABA LITIGATION NEWS (Oct. 14, 2015) (describing the 13-city roadshow).

<sup>86</sup> Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality* (hereinafter “Shaffer, *Applying Proportionality*”), 16 SEDONA CONF. J. 55 (2015), at 21 (a “facially objectionable” standard applies when requests are “overly broad or seek information that does not appear relevant”); Hon. Eliz. D. Laporte and Jonathan Redgrave, *A Practical Guide to Achieving Proportionality Under the New Federal Rule of Civil Procedure* 26, 9 FED. CTS. L. REV. 19 (2015); Ariana J. Tadler, Practical Law Resource ID w-001-0015 (Nov. 15, 2015) (WESTLAW Practical Law subsection of “Secondary Sources”).

<sup>87</sup> 2016 U.S. LEXIS 91323] (W.D. Va. July 14, 2016).

<sup>88</sup> 2016 WL 860693, at \*2 (S.D. Ohio March 7, 2016) (noting a failure to identify gaps in production or difficulty in proving element of claims without additional documents).

<sup>89</sup> 2016 U.S. Dist. LEXIS 58378 (D.Del. May 3, 2016).

<sup>90</sup> COLO. R.C.P. 1, 16(b)(6) and 26(b)(1).

<sup>91</sup> ILL. R. S. CT. 201(c)(3), see also Committee Note (2014) (emphasizing that certain categories of ESI are not normally discoverable as a result).

<sup>92</sup> MINN. Civil Rules 1, 26.02(b) (2013).

<sup>93</sup> UTAH R. C.P. 26(b), 37(a). (2011).

<sup>94</sup> See, e.g., Proposed Rule 16(a)(3), Rules of Civil Procedure for the Superior Courts of Arizona (May, 2016).

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

The initial package released in 2013 included amendments which would have lowered the presumptive limits on the use of discovery devices in Rules 30, 31 and 33 while imposing a new limit on use of Rule 36 in order to “decrease the cost of civil litigation, making it more accessible for average citizens.” The proposal was advocated as consistent with considerations identified at the Duke Conference.

The proposed changes would have included the following:

- Rule 30: From 10 oral depositions to 5, with a deposition limited to one day of 6 hours, down from 7 hours;
- Rule 31: From 10 written depositions to 5;
- Rule 33: From 25 interrogatories to 15; and
- Rule 36 (new): No more than 25 requests to admit.

A proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.<sup>95</sup>

However, the proposals encountered “ferce resistance”<sup>96</sup> on grounds that the present limits worked well and that new ones might have the effect of unnecessarily limiting discovery. Concerns were also expressed that courts might view the presumptive numbers as hard ceilings. If so, any failure to agree on reasonable limits could result in motion practice.<sup>97</sup>

After review, the Duke Subcommittee recommended<sup>98</sup> and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools. The Chair of the Duke Subcommittee noted that “[s]uch widespread and forceful opposition deserves respect.”<sup>99</sup>

The Committee expressed the hope that most parties “will continue to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially, and if need be, as the case unfolds.”<sup>100</sup> It expected to “promote the goals of proportionality and effective case management through other proposed rule changes” without raising the concerns spawned by the new presumptive limits.<sup>101</sup>

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<sup>95</sup> 2013 PROPOSAL, *supra*, at 267-268, 300-304, 305 & 310-311 [of 354].

<sup>96</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 515 (“[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect”).

<sup>97</sup> April 2014 Minutes, *supra*, at 7 (lines 307-310).

<sup>98</sup> The Duke Subcommittee Report is in the April 2014 Rules Committee Meeting Agenda Book, copy at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>.

<sup>99</sup> April 2014 Minutes, at lines 466-467.

<sup>100</sup> *Id.* (at lines 467-470).

<sup>101</sup> June 2014 RULES REPORT, 305 F.R.D. 457, 515.



## Cost Allocation (Rule 26(c))

The costs of collection and reviewing information for production are said to constitute the largest component of discovery costs.<sup>102</sup> Not surprisingly, producing party advocates have long advocated that the civil rules should require that the “requester pays” the reasonable costs of such efforts, a position renewed at the Duke Conference.<sup>103</sup>

While a draft embodying cost-shifting<sup>104</sup> of response costs was developed for discussion, the Subcommittee declined to recommend its adoption. Instead, Rule 26(c)(1)(B) has been amended to provide that a protective order may specify terms, “including time and place or the allocation of expenses, for the disclosure or discovery.” The Committee described this as making cost-shifting a more “prominent feature of Rule 26(c).”<sup>105</sup>

The Committee Note explains that the “[a]uthority to enter such orders [shifting costs] is included in the present rule,” and the inclusion will forestall the temptation some parties may feel to contest this authority. There is Supreme Court support for that statement.<sup>106</sup>

After objections that the change would give “undue weight” to use of cost-shifting<sup>107</sup> the Note was further amended to provide that the change “does not mean that cost-shifting should become a common practice.” The Note affirms that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”

Some concerns were expressed that this addition to the Committee Note prejudged any continuing study of “requester pays” proposals. The Chair of the Subcommittee denied that this was the case.<sup>108</sup> However, at the November 2015 meeting of the Rules Committee, it was stated that “the time has not yet arrived” to work on the questions since

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<sup>102</sup> RAND Institute for Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 1, 16 (2012)(at least 73% of costs in surveyed instances), copy at [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

<sup>103</sup> LCJ Comment, Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century, May 2, 2010, at 55-60 (recommending changes to Rules 26, 45 and Rule 54(d)).

<sup>104</sup> Duke Conference Subcommittee Rules Sketches, at 17-19, Agenda Materials for Rules Committee Meeting, March 22-23, 2012 (requiring a requesting party to “bear part or all of the expenses reasonably incurred in responding [to a discovery request]”); available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012> (beginning at 375 of 644).

<sup>105</sup> Initial Rules Sketches, at 37, as modified after Mini-Conference.

<sup>106</sup> *Oppenheimer Fund v. Sanders*, 437 U.S. 340,358 (1978).

<sup>107</sup> AAJ Comments, *supra*, December 19, 2013, at 17-18 (noting that “AAJ does not object to the Committee’s proposed change to Rule 26(c)(1)(B) per se” but suggesting amended Committee Note); *cf.* LCJ Comment, *supra*, August 30, 2013, at 19-20 (endorsing proposal as “a small step towards our larger vision of reform”).

<sup>108</sup> April 2014 Minutes, *supra* n. 63, at 6 (lines 234-238).

the “refocused emphasis on the scope of discovery” in Rule 26(b)(1) may reduce the need for more general cost-bearing rules<sup>109</sup> if proportional discovery becomes the norm.

### **Production Requests/Objections (Rule 34, 37)**

Rule 34 and 37 have been amended to facilitate requests for and production of discoverable information and to clarify aspects of current discovery practices. Rule 37(a)(3)(B)(iv) is changed to authorize motions to compel for *both* failures to permitting inspection and failures to produce. This reflects “the common practice” of producing copies of documents and ESI “rather than simply permitting inspection.”<sup>110</sup>

Thus, Rule 37(a)(3)(B) now provides that a party may move for an order to compel an answer, designation, production or inspection 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.

As noted earlier, Rule 26(b)(2)(d)(“Timing and Sequence of Discovery”) now includes a new subsection (2)(“Early Rule Requests”) regarding the permissible *timing* of the delivery of Rule 34 Requests. The request is considered to have been served as of the first Rule 26(f) Conference.

In addition:

Rule 34(b)(2)(B) now requires that an objection to a discovery request must state “an objection with specificity the grounds for objecting to the request, including the reasons.” The Committee Note explains that “if the objection [such as over-breadth] recognizes that some part of the request is appropriate, the objection should state the scope that is not [objectionable].” An acceptable example is an objection that states that the party will limit its search to information created within a given period of time or to specified sources.<sup>111</sup>

An amendment to Rule 34(b)(2)(C) requires that objection lodged to a discovery request must state “whether any responsive materials are being withheld on the basis of that objection.”<sup>112</sup> This is intended to end the confusion when a producing party states several objections but still produces some information.

This proposal garnered enthusiastic support as “long overdue.”<sup>113</sup>

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<sup>109</sup> Discovery Subcommittee Report: *Requester Pays*, available at 2015 November Rules Committee Agenda, at 327-329 of 578.

<sup>110</sup> Committee Note (“[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling ‘production, or inspection’”).

<sup>111</sup> Committee Note.

<sup>112</sup> The new language continues to be followed by the requirement that “[a]n objection to part of a request must specify the part and permit inspection of the rest.”

<sup>113</sup> Comments of the LACBA Antitrust and Unfair Business Practices Section, January 10, 2104, at 5 (suggesting that if production has not been made at the time of the objection, the party should amend the response at time of production to report if documents have been withheld on that basis).

The Committee Note states that a producing party “does not need to provide a detailed description or log of all documents withheld,” but should alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.<sup>114</sup>

The Committee Note also includes the statement that “an objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been withheld.”<sup>115</sup> According to the Chair of the Subcommittee, parties should discuss the response and if they cannot resolve the issue, seek a court order.<sup>116</sup>

In *Rowan v. Sunflower Electric Power*,<sup>117</sup> the court relied on statements as to how a party had searched for responsive material as sufficient to show compliance and noted that “if [the requesting party] wants to know whether [other material not within that search exists] [it] can make that inquiry in future discovery.”<sup>118</sup> The Court explained that the statements as to the limits that had controlled its search “are sufficient to put [the party] on notice that [the other party] has withheld documents in connection with its objections,” thus satisfying the requirements of the rule.

Rule 34(b)(2)(B) has also been amended to permit a “responding party [to] state that it will produce copies of documents or of [ESI] instead of permitting inspection.” This belatedly updates the rule to conform to “common practice” of producing copies of documents or ESI “rather than simply permitting inspection.”<sup>119</sup> The Response must state that copies will be produced.

Rule 34(b)(2)(B) requires that if production (as opposed to inspection) is elected, it must be completed no later than the time specified “in the request or another reasonable time specified in the response.”

If the production is made in stages, the response should specify the beginning and end dates of the production.

### **Forms (Rules 4(d), 84, Appendix of Forms)**

Prior to the 2015 Amendments, Rule 84 provided that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” Both Rule 84 and the Appendix of Forms themselves have been abrogated,

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<sup>114</sup> Committee Note.

<sup>115</sup> *Id.*

<sup>116</sup> April 2014 Minutes, at 10 (lines 423-427).

<sup>117</sup> 2016 WL 3743102 (D. Kan. July 13, 2016).

<sup>118</sup> *Id.* at \*5-6.

<sup>119</sup> Committee Note (“the response to the request must state that copies will be produced”).

although certain of the forms formerly found in the Appendix have been integrated into Rule 4(d), which now incorporates the forms “appended to this Rule 4.”<sup>120</sup>

The phrase “[Abrogated (Apr. , 2015, eff. Dec. 1, 2015).]” now replaces the text and of former Rule 84 and replaces the separate list of “Appendix of Forms.”

## Background and Impact

In response to the relative lack of use of the forms, the Rules Committee appointed a Rule 84 Subcommittee to consider the current use of forms and make recommendations. The Subcommittee, chaired by Gene Pratter of the Eastern District of Pennsylvania, canvassed judges, law firms, and others and found that virtually none of them used the forms. In particular, it was concluded that “the increased complexity of most modern cases [has] resulted in a detailed level of pleading that is far beyond that illustrated in the forms.”<sup>121</sup>

Ultimately, the Subcommittee recommended and the full Committee concluded that it was time “to get out of the forms business.” It noted that “many of the forms are out of date,” are little used and amending the forms is “cumbersome” since it requires the same process as amending the rules themselves.<sup>122</sup>

As explained in the final form of the Committee Note, “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.” The initial reference to using the Administrative Office as an alternative source for forms was expanded to include the websites of many district courts and local law libraries at the suggestion of the Supreme Court.<sup>123</sup>

The Committee rejected concerns that abrogation was inappropriate because the forms had become such an “integral” part of the rules they illustrated that abrogating the form also abrogated the Rule. It decided that the publication process and the opportunity to comment on the proposal “fully satisfies the Rules Enabling Act requirements.”<sup>124</sup>

The Chief Justice, in his year-end Report, described a process whereby “a group of experienced judges” have been assembled to “replace these outdated forms with modern versions that reflect current practice and procedure.”<sup>125</sup> The revised forms are available

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<sup>120</sup> The text of amended Rule 4(d)(Waiving Service) and the forms transferred (“appended”) to it are located out of numerical order adjacent to the [abrogated] Appendix of Forms in the June 2014 RULES REPORT. See 305 F.R.D. 457, at 582. They are not reproduced in the Appendix to this Memorandum.

<sup>121</sup> June 2014 RULES REPORT (Abrogation of Rule 84), 305 F.R.D. 457, 530-531 (2015).

<sup>122</sup> June 2014 RULES REPORT (Abrogation of Rule 84), 305 F.R.D. 457, 530-531 (2015).

<sup>123</sup> Memorandum, April 2, 2015, *supra*.

<sup>124</sup> September 2014 Report, Standing Committee to the Chief Justice and the Judicial Conference, 305 F.R.D. 457, 491 at 506.

<sup>125</sup> Chief Justice Roberts, 2015 Year End Report, 8-9 (December 31, 2015), available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>

on the federal judiciary website.<sup>126</sup> Some have criticized this as empowering private groups, not bound by the Rules Enabling Act, to enact what are equivalent to rules “largely behind closed doors and without public input.”<sup>127</sup>

At the Supreme Court’s suggestion,<sup>128</sup> the Committee Note was also amended to observe that the “abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”<sup>129</sup> During public comments, some contended that the abrogation would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards.

The Committee rejected that view and stated that if it decided to take action in about pleading standards, it would do so by amendment to the rules.<sup>130</sup> In *Richtek Technology v. uPi Semiconductor*, the court noted that Federal Circuit authority holding that the pleading standard for patent infringement in former Form 18 was sufficient (as opposed to the standard in *Twombly* and *Iqbal*) no longer applies.<sup>131</sup>

### **Failure to Preserve ESI/Sanctions (Rule 37(e))**

Until 2006, Rule 37 of the Civil Rules did not deal with the sanctions that may be imposed in the event of a failure to preserve (“spoliation”). The initial version of Rule 37(e), adopted at that time, merely limited certain sanctions for losses of ESI issued “under these rules”.<sup>132</sup> It was largely irrelevant to the planning and management of the duty.<sup>133</sup>

The E-Discovery Panel at the 2010 Duke Litigation Conference, on which the Author participated, recommended “spelling out” the elements of duty to preserve as well as the consequences that flowed from its violation. The Committee, however, ultimately adopted a “sanctions only” approach to satisfy Rules Enabling Act concerns that procedural rules must “regulate how rights are enforced in litigation,” not create them.<sup>134</sup>

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<sup>126</sup> Pro Se Forms, available at <http://www.uscourts.gov/forms/pro-se-forms>.

<sup>127</sup> See ACS Blog, A New Year, New Civil Forms, and a New Civil Rulemaking Process, available at <https://www.acslaw.org/acsblog/a-new-year-new-civil-forms-and-a-new-civil-rulemaking-process>.

<sup>128</sup> Memorandum, April 2, 2015, Judicial Conference to Supreme Court, copy available at <http://www.uscourts.gov/file/document/congress-materials>.

<sup>129</sup> *Id.*

<sup>130</sup> June 2014 RULES REPORT (Abrogation of Rule 84), 305 F.R.D. 457, 531 (2015)(noting that only a few comments argued the forms assist pro se litigants and new lawyers and only one stated that the writer had ever used the form).

<sup>131</sup> 2016 WL 1718135, at \*2 (N.D. Cal. April 29, 2016).

<sup>132</sup> Cf. *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 72 (S.D. N.Y. 1991)(acts of spoliation prior to issuance of discovery orders violate Rule 37(b) because the inability to comply is “self-inflicted”).

<sup>133</sup> John H. Beisner, *Discovery A Better Way: the Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 590 (2010)(the rule was “too vague to provide clear guidance as to a party’s preservation obligations”).

<sup>134</sup> A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2032 & n. 137 (2011)(synthesizing Supreme Court requirements).

Amended Rule 37(e), as fine-tuned and approved at the April 2014 meeting of the full Committee,<sup>135</sup> applies only to losses of ESI and provides:

Failure to ~~Produce~~ Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.<sup>136</sup>

The rule is said to “foreclose[s] reliance on inherent authority or state law to determine when certain measures should be used.”<sup>137</sup> The Rule does not, however, entirely displace use of inherent authority if, in the exercise of “informed discretion,” a court concludes that a rule is not up to the task.<sup>138</sup> The rule is silent as to whether it displaces the use of remedies under other subsections of Rule 37.<sup>139</sup>

Rule 37(e) consists of two distinct segments. The threshold requirements which must exist are described first, followed by the measures available to address prejudice – and the circumstance when harsh measures are available.

### Threshold Requirements

The rule is applicable only when the “lost” ESI is relevant. Mere loss or destruction of ESI is not, in and of itself, a breach of the Rule without that showing as well as the other threshold requirements.

Rule 37(e) takes the onset and nature of the duty to preserve as established by the common law as its starting point; it does not create a new duty. However, before a court

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<sup>135</sup> See *Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package*, BNA EDiscovery Resource Center, April 14, 2014 (“Rule 37(e) Revised Again”)(also reproducing revised text as presented to and approved by the Committee at its Meeting), available at <http://www.bna.com/advisory-committee-makes-n17179889550/>.

<sup>136</sup> A redlined version of Rule 37(e) is found at 305 F.R.D. 457, 567-568 (2015).

<sup>137</sup> Committee Note.

<sup>138</sup> *Chambers v. NASCO*, 501 U.S. 32, 49-50 (1991). *CAT3 v. Black Lineage*, 2016 WL 154116, at \*10 (S.D. NY. Jan. 12, 2016)(“[i]f the plaintiff were correct that Rule 37(e) is inapplicable here, relief would nonetheless be warranted under the Court’s inherent power”). In *GN Netcom v. Plantronics*, 2016 WL 3792833 (D. Del. July 12, 2016), the court awarded a “punitive monetary sanction” in the amount of \$3M payable to the moving party in addition to an award of costs and fees as well as an adverse inference under Rule 37(e)(2).

<sup>139</sup> See, e.g., *Matthew Enterprise v. Chrysler Group*, 2016 WL 2957133, at n. 47 (N.D. Cal. May 23, 2016)(refusing to preclude evidence under Rule 37(b) because the issue as to the emails is “spoliation and not compliance with the courts order on a motion to compel).

is empowered to conclude that a breach of that duty has empowered it to impose any of the measures under subsections (e)(1) or (e)(2), it must first determine that

- ESI which “should have been preserve” has been “lost;”
- *after* a duty to preserve attached;
- because a party failed to take “reasonable steps” to preserve; and

In *Konica Minolta Business Solutions v. Lowery Corp.*, the court described these as “predicate elements” that must be met “before turning to the [measures available under] sub-elements of (e)(1) and (e)(2).<sup>140</sup> In order to address “over-preservation,”<sup>141</sup> harsh measures based on mere negligence or gross negligence are no longer be available in the absence of a showing of “intent to deprive.”<sup>142</sup>

## Scope

Rule 37(e) excludes “documents” and “tangible” things from the scope of its coverage. This stands in contrast with the initial proposal issued in August, 2013<sup>143</sup> which did not differentiate as to the type of information whose loss would be covered. The change was made after public comments because considerations governing loss of unique tangible objects were deemed too difficult to capture in a rule.<sup>144</sup>

However, excluding documents while including ESI creates a “thorny” issue “where a party fails to preserve both ESI and hard-copy evidence.”<sup>145</sup> Courts are well advised to resolve spoliation issues in such instances by applying the Rule to both forms of information, by analogy to Rule 34 (a).<sup>146</sup> The Committee has noted the similarity of “a printout of a vanished e-mail message.”<sup>147</sup>

A possible remedy is additional rulemaking.<sup>148</sup> The more logical route would be for the individual Circuit courts to simply conform their “spoliation law” to the rule’s requirements.<sup>149</sup>

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<sup>140</sup> 2016 WL 4537847 (E.D. Mich. Aug. 31, 2016).((a) the existence of ESI of a type that should have been preserved (b) which is lost (c) because of a failure to take reasonable steps and (d) which cannot be restored or replaced through additional discovery).

<sup>141</sup> Committee Note (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions “if a court finds [a party] did not do enough”).

<sup>142</sup> *Lorie Applebaum v. Target*, \_\_Fed.Appx. \_\_, 2016 WL 4088740 (6<sup>th</sup> Cir. Aug. 2, 2016)(“[a] showing of negligence or even gross negligence will not do the trick”).

<sup>143</sup> 2013 PROPOSAL, *supra*, at 314-317 of 354.

<sup>144</sup> April 2014 Minutes at lns. 927-939.

<sup>145</sup> *Stinson v. City of New York*, 2016 WL 54684, at n. 5 (S.D. N.Y. Jan. 5, 2016).

<sup>146</sup> Letter Comment, Thomas Y. Allman, November 16, 2013 (existing Rule 34(a) distinguishes “designated tangible things” from “designated documents or [ESI]”).

<sup>147</sup> April 2014 Minutes at lns. 1271-1274 (cited as example as to whether lost information qualifies as ESI); *accord* *Ericksen v. Kaplan*, 2015 WL 6408180, at \*6 and n. 6 (D. Md. Oct 21, 2015).

<sup>148</sup> April 2014 Minutes at lns. 1277-1280 (noting need to monitor the rule closely and explaining that “we can think seriously” about extending it to other forms of information if appropriate).

<sup>149</sup> Joseph, *supra*, 36.

## “Reasonable Steps”

Rule 37(e) applies only when a party makes a showing that the “loss” of ESI occurred because of a failure to take “reasonable steps.” The mere fact that some ESI is not preserved is not decisive. The “reasonable steps” requirement serves as both a carrot and a stick. As the Committee Note puts it, “reasonable steps to preserve suffice; it does not call for perfection.”<sup>150</sup> It is fair to call it a “real” safe harbor.<sup>151</sup>

In *Marten v. Platform Advertising*, the court held that since the preservation efforts undertaken were “reasonable steps,” measures under Rule 37(e) were not available even though ESI was lost. The court refused to use a “‘perfection’ standard or apply ‘hindsight’” in assessing the conduct.<sup>152</sup> In contrast, in *Living Color v. New Era Acquaculture*, the failure to disable an auto-delete function prevented the court from finding that the party had acted reasonably.<sup>153</sup> In *GN Netcom v. Plantronics*, an entity was held responsible for deletion of massive amounts of email by a top executive under conditions which led the court to conclude that the conduct was “the opposite” of taking reasonable steps.<sup>154</sup>

A “good faith” adherence to pre-existing policies and practices<sup>155</sup> should weigh in favor of finding “reasonable steps.”<sup>156</sup> This is similar to the role of business judgment in retrospective assessments of compliance<sup>157</sup> and in regard to efforts to prevent or detecting corporate misconduct.<sup>158</sup>

The Committee Note emphasizes that “proportionality” is a factor in any analysis of preservation conduct under the Rule. The effort should be proportional to the burdens and costs involved.<sup>159</sup> It may, for example, be reasonable under the circumstances for a party to delay in imposing litigation holds<sup>160</sup> or to fail to retain ephemeral ESI unlikely to

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<sup>150</sup> Committee Note, 41.

<sup>151</sup> James S. Kurz & Daniel D. Mauler, *A Real Safe Harbor: The Long-Awaited Proposed FRCP Rule 37(e), It's Workings, and Its Guidance for ESI Preservation*, 62-AUG FED. LAW. 62 (2015).

<sup>152</sup> *Marten Transport v. Platform Advertising*, 2016 WL 492743, at \*10 (D. Kan. Feb. 8, 2016)(since no duty was breached “the Court need not reach the issue of whether curative measures or sanction under Rule 37(e) are appropriate”).

<sup>153</sup> *Living Color v. New Era Aquaculture*, 2016 WL 1105297 (S.D. Fla. March 22, 2016).

<sup>154</sup> 2016 WL 3792833, at \*6 (D. Del. July 12, 2016)(the conduct was not excused by his belief that IT personnel would continue to have access to the deleted email).

<sup>155</sup> Committee Note.

<sup>156</sup> See, e.g., The Sedona Conference® *Commentary on Legal Holds: The Trigger and the Process*, 11 SEDONA CONF. J. 265, 270 (2010)( providing recommendations for effective legal hold policies in Guidelines 8-11).

<sup>157</sup> John J. Jablonski and Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure*, 82 DEF. COUNS. J. 411, 427 (2015)(challenges to policies dealing with retention of ESI should be assessed by the business judgment rule).

<sup>158</sup> USCG Guidelines Manual, §8B2.1, Para. (b)(a failure to prevent a violation does not necessarily mean that the program is not effective).

<sup>159</sup> The Sedona Conference® *Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 162 (2013).

<sup>160</sup> *Siggers v. Campbell*, 2014 WL 4978655, at \*3 (E.D. Mich. Oct. 6, 2014)(no sanctions under all the circumstances despite failure to implement litigation hold until four years after suit filed).



be sought in discovery<sup>161</sup> or to fail to interrupt auto-deletion functions when alternative methods are available.<sup>162</sup>

The influential *Rimkus* opinion explained that “reasonable” conduct is best determined by whether it is proportional to the case and “consistent” with established preservation standards.<sup>163</sup> The duty to preserve in such cases is also tempered by the “accessibility” limitations added in 2006 by Rule 26(b)(2)(B). ESI which requires additional steps to retrieve is often not required to be preserved absent notice.<sup>164</sup>

### Additional Discovery

Before any measures are available under the Rule, the court must first find that the missing ESI “cannot be restored or replaced through additional discovery.” The Note explains that “[b]ecause electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.” This may involve recreation of lost information or the undertaking of further discovery from additional custodians or from sources that would be considered inaccessible.<sup>165</sup>

In *First American Title v. Northwest Title*, the court refused to apply Rule 37(e) when it was not established that the ESI could not be restored or replaced through additional discovery.<sup>166</sup> In *Fiteq v. Venture Corporation*, the moving party did not demonstrate that “other responsive documents ever existed” other than the emails which were restored.<sup>167</sup> In *GN Netcom v. Plantronics*,<sup>168</sup> however, the court shifted the burden to show restoration was possible to the non-moving party because of the extent of the culpability involved and the failure to show that additional discovery had mitigated the loss.<sup>169</sup>

In *CAT3 v. Black Lineage*, email was not deemed to be “restored” or “replaced” where questions about the authenticity of both the original and subsequently produced email remained at issue.<sup>170</sup>

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<sup>161</sup> Paice LLC v. Hyundai Motor Company, 2015 WL 4984198 (D. Md. Aug. 18, 2005)(refusing sanctions for deleting raw data not normally retained).

<sup>162</sup> Mead v. Travelers, 2014 WL 6832914, at \*2 (E.D. Pa. Dec. 4, 2014)(failure to interrupt auto-destruction of notice of intent to cancel).

<sup>163</sup> Rimkus Consulting v. Cammarata, 688 F.Supp.2d 598, 613 (S.D. Tex. Feb. 19, 2010); *see also* Chin, *supra*, 685 F.3d 135 at 162 (the better approach is to “consider [the failure to adopt good preservation practices] as one factor” in the determination of whether discovery sanctions should issue).

<sup>164</sup> Delaware Fed. Ct. Default Standard (2011), Para. 1(b), copy at <http://www.ded.uscourts.gov/> (listing categories of ESI that need not be preserved absent a showing of good cause by the requesting party).

<sup>165</sup> *See, e.g.*, In re Delta/AirTran Baggage Fee Antitrust Litigation, 770 F. Supp.2d 1299, 1311 (N.D. Ga. Feb. 22, 2011).

<sup>166</sup> 2016 WL 4548398, at \*3 (D. Utah Aug. 31, 2016 (“[the party has] fail[ed] to establish that the emails, or a significant portion of them, ‘cannot be restored, or replaced through additional discovery’”).

<sup>167</sup> Fiteq v. Venture Corporation, 2016 WL 1701794, at \*3 (N.D. Cal. April 28, 2016).

<sup>168</sup> GN Netcom v. Plantronics, 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>169</sup> *Id.*, at \*9-10 (the burden of proof on prejudice shifted once bad faith was shown).

<sup>170</sup> CAT3, Inc. v Black Linage et al, 2016 WL 154116, at \*7(S.D. N.Y. Jan. 12, 2016).

## Measures Available

Assuming that relevant ESI has been “lost” under the threshold conditions, Rule 37(e) authorizes “measures” to address prejudice and, under certain conditions, severe sanctions upon a showing of intent to deprive a party of the use of the ESI.<sup>171</sup>

### Subdivision (e)(1): Addressing Prejudice

Subdivision (e)(1) authorizes courts to order curative measures “upon finding prejudice to another party from the loss of information” once the threshold requirements are met. The focus is on “solving the problem, not punishing the malefactor.”<sup>172</sup> Prejudice results from conduct which has “impair[ed] the ability to go to trial” or “threaten[s] to interfere with the rightful decision of the case.”<sup>173</sup>

While the measures listed in Rule 37(b)(2)(A) provide examples,<sup>174</sup> including preclusion of claims and evidence, the Note cautions that it would be inappropriate to preclude a party from offering evidence in support of the “central or only claim or defense in the case” absent a finding of “intent to deprive.” Measures should be no greater than necessary to cure prejudice; but a court does not need to cure every prejudicial effect.<sup>175</sup>

Given that “serious sanctions”<sup>176</sup> are possible under subdivision (e)(1) for negligent or inadvertent conduct,<sup>177</sup> it is not surprising that some suggest that “[c]ompanies may be well-advised to see how courts interpret new Rule 37(e) before going too far toward revamping existing preservation practices” to reduce over-preservation.<sup>178</sup>

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<sup>171</sup> Thomas Allman, *Standing Committee Oks Federal Discovery Amendments*, Law Technology News (Online), June 2, 2104 (available on LEXIS NEXIS), at 4 (noting that the word “only” was inserted at the outset of (e)(2) was done to make the point that the harsh measures cabined by that rule are *not* a subset of the broad remedies of subsection (e)(1)).

<sup>172</sup> ABA Litigation News, Summer 2014, 18, *Less is More: Proposed Rule 37(e) Strikes the Right Balance*.

<sup>173</sup> *Burton v. Walgreen*, 2015 WL 4228854, at \*3 (D. Nev. July 10, 2015)(failure to preserve did not “prejudice plaintiff’s ability to prove causation”).

<sup>174</sup> The list - which does *not* reference presumptions or adverse inferences - includes measures such as (i) designating facts as established (ii) precluding support of claims or defenses or the introduction of evidence (iii) striking pleadings (iv) staying proceedings (v) dismissing actions in whole or in part (vi) or rendering default judgment or treating failure to obey an order as contempt of court.

<sup>175</sup> Committee Note, 44 (much is entrusted to the discretion of the court).

<sup>176</sup> Joseph, Rule 37(e), *supra*, at 39-40 (the “serious sanctions” which may be imposed as “curative measures” under the subdivision include (1) directing that designated facts be taken as established; (2) prohibiting the party from supporting or opposing designated claims or defenses; (3) barring introduction of designated matters; (4) striking pleadings; (5) introducing evidence of failure to preserve; (6) allow argument on failure to preserve; and (7) giving jury instructions other than adverse inference instructions).

<sup>177</sup> John W. Griffin Jr., *A Voice for Injured Plaintiffs*, 51-AUG TRIAL 16, 20 & 22 (August 2015)(“[i]n the end, the committee preserved the rights of district court judges to remedy the negligent spoliation of evidence”).

<sup>178</sup> H. Christopher Boehning and Daniel J. Toal, *New Rule 37(e) Overrules Second Circuit on Sanctions for Loss of ESI*, New York Law Journal, Volume 251, No. 105 (June 3, 2014).

## Examples

In *Core Laboratories v. Spectrum Tracer Services*,<sup>179</sup> the court found “prejudice” because it inferred that a party had been deprived of valuable information and ordered an adverse inference despite not finding an “intent to deprive.” In *CAT3 v. Black Lineage*,<sup>180</sup> where the court made such a finding, the court imposed a lesser sanction by precluding the use of alternative versions of email because of the prejudice involved in raising authenticity issues. It also awarded attorney’s fees because of the “economic prejudice” in seeking relief.<sup>181</sup>

In *Ericksen v. Kaplan*, the party was permitted to present evidence relating to loss of ESI to the jury while also recovering its attorney’s fees use in order to “cure the prejudice created” by the destruction of information. In *GN Netcom v. Plantronics*,<sup>182</sup> a court awarded monetary sanctions in the form of fees as a component of addressing prejudice and also imposed a \$3M “punitive monetary sanction.”<sup>183</sup> Given that it was designed to punish, it seems questionable whether the court was acting under subdivision (e)(1).<sup>184</sup>

In *Nuvasive v. Madsen Medical*, the court permitted admission of spoliation evidence and argument before the jury so as a “remedy or recourse” under subdivision (e)(1) citing the Committee Note without further explanation.<sup>185</sup> The Note authorizes submissions to the jury accompanied by instructions to assist in its evaluation of such evidence if no greater than necessary to cure prejudice.<sup>186</sup> Similarly, in *BMG Rights Management v. Cox Communications*,<sup>187</sup> the court allowed a party to argue spoliation during opening arguments and gave an instruction alerting the jury to the fact of spoliation which permitted them to consider it in their deliberations.<sup>188</sup>

In contrast, in *Marshall v. Dentfirst* the loss of the internet browsing history of a terminated employee was not prejudicial in the subdivision (e)(1) sense because it was not relied upon in making termination decisions.<sup>189</sup> In *Living Color v. New Era Aquaculture*, the “minimal” prejudice<sup>190</sup> involved in the loss of ESI did not justify measures because the preserved information was sufficient to meet the needs of the moving party. Courts also

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<sup>179</sup> 2016 WL 879324 (W.D. Okla. March 7, 2016).

<sup>180</sup> 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016).

<sup>181</sup> *Id.* at \*6, \*8 & \*10 (“multiple versions of the same document at the very least “obfuscates” the record).

<sup>182</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>183</sup> *Id.* at \*13.

<sup>184</sup> The author suspects that resort to inherent authority was intended although not identified. The requisite findings of bad faith existed and there was no explicit conflict with Rule 37(e).

<sup>185</sup> *Nuvasive v. Madsen Medical*, 2016 WL 305096, at \*3 (S.D. Cal. Jan. 26, 2016).

<sup>186</sup> Committee Note, 46. *See, e.g.*, *Russell v. U. of Texas*, 234 Fed. Appx. 195, 208 (5<sup>th</sup> Cir. June 28, 2007) (“the jury heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit”).

<sup>187</sup> 2016 WL 4224964 (E.D. Va. August 8, 2016).

<sup>188</sup> *Id.* at \*19.

<sup>189</sup> 313 F.R.D. 691 (N.D. Ga. March 24, 2016) (“no evidence to support that the allegedly spoliated documents were reviewed, relied upon or even available” at the relevant times).

<sup>190</sup> *Living Color v. New Era Aquaculture*, 2016 WL 1105297 (S.D. Fla. March 22, 2016).

failed to find prejudice sufficient to take action in *Best Payphones v. City of New York*,<sup>191</sup> *Fiteq v. Venture*<sup>192</sup> and *Matthew Enterprise v. Chrysler*.<sup>193</sup>

### Burden of Proof

The rule does not assign the burden of proof on this element to the moving party, which is left to the discretion of the trial judge.<sup>194</sup> Under the amended Rule, “each party is responsible for providing such information and argument as it can” and the court may ask one or another party, or all parties, for further information.”<sup>195</sup> However, “conjecture [as to prejudice] does not constitute evidence” that it exists.<sup>196</sup>

In *Sekisui American*,<sup>197</sup> a critic of the initial proposal held that missing emails were prejudicial since gross negligence was involved.<sup>198</sup> The court relied on *Residential Funding* for the position that it is “sufficient circumstantial evidence” that missing evidence was unfavorable if the destruction was willful.<sup>199</sup> Similarly, in the Ninth Circuit, a “finding of spoliation” has served to shift the burden of proof to the “guilty party” to show that no prejudice resulted.<sup>200</sup>

In *GN Netcom v. Plantronics*, in a case applying Rule 37(e), the court shifted the burden to the defendant to show a lack of prejudice resulting from the deletion of email by a senior executive because of “bad faith” in doing so, relying on Circuit case law.<sup>201</sup>

### Admission of Spoliation Evidence.

As noted, before and after Rule 37(e) courts routinely admit evidence of spoliation and permit argument about it.<sup>202</sup> In *Accurso v. Infra-Red Services*<sup>203</sup> and *SEC v. CKBI68*

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<sup>191</sup> 2016 WL 792396, at \*5-6 (E.D. N.Y. Feb. 26, 2016)(“[since no showing] they are prejudiced by its destruction, and therefore, there has been no spoliation under . . . under Rule 37(e)”).

<sup>192</sup> 2016 WL 1701794 (N.D. Cal. April 28, 2016)(duplicates recovered from other parties).

<sup>193</sup> 2016 WL 2957133, at \*4 (N.D. Cal. May 23, 2016)(“failure to ‘come forward with plausible, concrete suggestions’ about what the internal emails might have contained”).

<sup>194</sup> Committee Note.

<sup>195</sup> June 2014 RULES REPORT.

<sup>196</sup> *Yoder & Frey Auctioneers v. EquipmentFacts*, 774 F.3d 1065, 1071 (6<sup>th</sup> Cir. 2014)(affirming denial of sanction request for failure to show relevance of missing ESI to contested issues).

<sup>197</sup> *Sekisui American v. Hart*, 2013 WL 4116322 (S.D. N.Y. 2013).

<sup>198</sup> *Id.*, \*7 (because the destruction was “willful,” the “prejudice [of the contents of any missing email] is therefore presumed”). The court disagreed that the burden to prove prejudice should fall “on the innocent party.” *Id.* at \*9.

<sup>199</sup> *Id.* at \*5 (citing *Residential Funding v. DeGeorge*, 306 F.3d 99, 109 (2<sup>nd</sup> Cir. 2002)).

<sup>200</sup> *Fleming v. Escort*, 2015 WL 5611576, at \*2 (D. Idaho 2015)(non-moving party in “much better position to show what was destroyed”).

<sup>201</sup> 2016 WL 3792833, at \*9 (July 12, 2016)(concluding that the defendant had not met a “heavy burden” to show a lack of prejudice).

<sup>202</sup> *See, e.g., Savage v. City of Lewisburg, Tenn.*, 2014 WL 6827329, at \*3 (M.D. Tenn. Dec. 3, 2014)(“Plaintiff may argue that the jury should infer that the unavailable audio recordings contain evidence that Plaintiff’s fellow patrol officers failed to provide her adequate backup assistance after she filed sexual harassment complaints”).

<sup>203</sup> 2016 WL 930686 (E.D. Pa. March 11, 2016).

*Holdings*,<sup>204</sup> for example, where “intent to deprive” was not immediately found, the courts assumed that spoliation evidence would be admitted at trial and further relief under Rule 37(e) might follow if justified.

This practice is similar to the holding in *Mali v. Federal Insurance Company*,<sup>205</sup> announced during the Committee deliberations. In that decision, the court allowed a jury to draw inferences from non-production of certain information on the theory that it “was not a punishment” but “simply an explanation to the jury of its fact-finding powers.”

However, FRE 403 cautions that exclusion of evidence is necessary where there is a danger of undue prejudice, confusing the issues and misleading the.<sup>206</sup> An adverse inference instruction “may tip the balance in ways the lost evidence never would have”<sup>207</sup> and may create “powerful incentives to over-preserve, often at great cost.”<sup>208</sup> In *Delta/AirTran Baggage Fee*, the court did not permit the plaintiffs to present spoliation evidence to the jury because it would “transform what should be a trial about [an] alleged antitrust conspiracy into one on discovery practices and abuses.”<sup>209</sup>

### Attorneys’ Fees.

There has been a virtually automatic award of attorney’s fees and reimbursement of moving party expenses” when the threshold requirements are met. This was apparently intended<sup>210</sup> although it is not mentioned in the rule or the Committee Note. In *CAT3 v. Black Lineage*, the court held that an award of attorneys’ fees “ameliorates the economic prejudice imposed on the defendants.” Others courts cite to Rule 37(a),<sup>211</sup> especially in cases where additional ESI is produced after the filing of the motion for sanctions.<sup>212</sup> This has been criticized as an “inappropriate” use of Rule 37(a).<sup>213</sup>

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<sup>204</sup> 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016).

<sup>205</sup> See *Mali v. Federal Insurance Company*, 720 F.3d 387, 393 (2<sup>nd</sup> Cir. June 13, 2013)(noting that findings of culpable conduct would not be required as in the case of another “type” of adverse inference instruction such as that of Residential Funding). See also Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV.1299, 1315 (2014)(the rule does not prohibit a “Mali-type permissive instruction that leaves all factual findings, including whether spoliation occurred, to the jury”).

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

<sup>207</sup> Committee Note.

<sup>208</sup> June 2014 RULES REPORT.

<sup>209</sup> In re *Delta/AirTran Baggage Fee Antitrust Litigation*, 2015 WL 4635729, at \*14 (N.D. Ga. Aug. 3, 2015); see also In re *General Motors LLC Ignition Switch Litigation*, 2015 WL 9480315 (S.D. N.Y. 2015)(barring introduction of evidence and argument since probative value would be substantially outweighed by the dangers of unfair prejudice and juror confusion).

<sup>210</sup> Discovery Subcommittee Minutes, March 4, 2014, 4 (“it is a “commonplace measure”).

<sup>211</sup> *Ericksen v. Kaplan*, 2016 WL 695789 (D. Md. Feb. 22, 2016) and *Marshall v. Dentfirst*, 2016 WL 1222270 (N.D. Ga. March 24, 2016).

<sup>212</sup> *Best Payphones v. City of New York*, 2016 WL 792396, at \*8 (E.D. N.Y. Feb. 26, 2016).

<sup>213</sup> John M. Barkett, *The First 100 Days (or So) of Case Law Under the 2015 Amendments to the Federal Rules*, 16 DDEE 178 (April 14, 2016), copy at <http://www.bna.com/first-100-days-n57982069891/>.

Rule 37(e), does not explicitly authorize imposing measures against counsel, including attorneys' fees, only the party.<sup>214</sup> However, in *CAT3, supra*, the only reason the court did not sanction counsel was that "there was no evidence of culpability on [their] part."<sup>215</sup>

### Subdivision (e)(2): Cabining Harsh Measures

Subdivision (e)(2) limits authority to impose specified and very severe measures without a finding of "intent to deprive another party of the lost information's use in the litigation." Only when that finding is made may a court order any of the following case-dispositive measures:

- presumptions that lost ESI was unfavorable when ruling on pretrial motions or presiding at a bench trial,
- instructions to a jury that they may or must conclude that lost ESI was unfavorable to the party, and
- dismissal of the action or entry of a default judgment.

The rule also bars use of functionally equivalent measures without the finding of intentionality spelled out in the rule. This serves a two-fold purpose; it provides a uniform national standard and, in addition, encourages more cost effective preservation conduct by removing some of the uncertainty causing "over-preservation."

### Intent to Deprive

The Rules Committee concluded that a uniform requirement for harsh measures should be akin to the "bad faith" or "bad conduct" requirement in use in many Circuits<sup>216</sup> and rejected<sup>217</sup> the *Residential Funding* logic that negligent or grossly negligent behavior justified the imposition of such measures.<sup>218</sup> That court had concluded that it made "little difference" to the party that did not have access to the information whether it was done "willfully or negligently."

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<sup>214</sup> Cf. *Sun River Energy v. Nelson*, 800 F.3d 1219, 1226 (10<sup>th</sup> Cir. Sept. 2, 2015)(refusing to award fees under Rule 37(c) against counsel because not explicitly mentioned); accord Shira A. Scheindlin, *Electronic Discovery and Digital Evidence in a Nutshell (2<sup>nd</sup> Edition)*, 323 ("Rule 37(e) 'measures,' unlike the sanctions available under Rule 37(b), appear to be only against the party").

<sup>215</sup> 2016 WL 154116, at n. 7 (S.D. N.Y. Jan. 12, 2016).

<sup>216</sup> See, e.g., *Guzman v. Jones*, 804 F.3d 707, 713 (5<sup>th</sup> Cir. Oct. 22, 2015)("[w]e permit an adverse against the spoliator" only upon a showing of 'bad faith' or 'bad conduct' which "generally means destruction for the purpose of hiding adverse evidence"); see also *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7<sup>th</sup> Cir. 2013)("for the purpose of hiding adverse information").

<sup>217</sup> Committee Note, 45 (the rule "rejects cases such as *Residential Funding Corp.* [306 F.3d 99, 108 (2<sup>nd</sup> Cir. 2002)](the culpable state of mind factor is satisfied by a showing that the evidence was destroyed "knowingly, even if without intent to [breach a duty to preserve it], or negligently")(emphasis in original)]").

<sup>218</sup> *Id.* ("[n]egligent or even grossly negligent behavior does not logically support that inference [since] it may have been favorable to either party, including the party that lost it").

Subdivision (e)(2) thus “changes the law in several Circuits” including the First, Second, Sixth, Ninth and sometimes the D.C. Circuit.<sup>219</sup> Indeed, the “intent to deprive” requirement could have barred use of such instructions in decisions such as *Zubulake V*,<sup>220</sup> *Pension Committee*<sup>221</sup> and *Sekisui v. Hart*.<sup>222</sup>

Some have expressed concerns that courts will simply designate conduct which is willful or reckless as equivalent to an “intent to deprive.” However, a finding of reckless<sup>223</sup> or willful<sup>224</sup> conduct does not necessarily include an intent to deprive another party of the evidence. As one observer has pointed out, the intent to deprive test “is the toughest standard to prove that the Advisory Committee could have adopted.”<sup>225</sup>

Some argue that findings of intent should be made by the jury. In contrast, in *Brookshire Brothers v. Aldridge*,<sup>226</sup> the Texas Supreme Court held that it was reversible error to introduce evidence of spoliation that was unrelated to the issues of the case. In that jurisdiction, the judge, not the jury, must determine if a party has spoliated evidence and, if so, the appropriate remedy.<sup>227</sup>

## Examples

In *Brown Jordan v. Camicle*,<sup>228</sup> a court found the requisite “intent to deprive” to justify harsh measures when a party with substantial IT experience deleted information.<sup>229</sup> In *CAT3 v. Black Lineage*, it was “more than reasonable to infer” that the intentional altering of emails was done in order to manipulate ESI for purposes of the litigation.<sup>230</sup> In *DVComm v. Hotwire*, the court found that the “double deletion” of crucial information was

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<sup>219</sup> Joseph, *New Law of Electronic Spoliation*, *supra*, 40 & n. 1 (collecting cases). See, e.g., *Hawley v. Mphasis Corporation*, 302 F.R.D. 37, at n. 4 (S.D. N.Y. 2014)(acknowledging the “significant revision” in the final rule, but noting that it “retained the fundamental move away from a negligence standard for spoliation sanctions”); see also *Mazzei v. Money Store*, 2014 WL 3610894, at n. 1 (S.D. N.Y. 2014)(the initial proposal would “abrogate Residential Funding”).

<sup>220</sup> *Zubulake v. UBS Warburg* (“*Zubulake V*”), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).

<sup>221</sup> *Pension Committee v. Banc of America*, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010).

<sup>222</sup> *Sekisui American v. Hart*, 945 F.supp.2d 495, 509-510 (S.D. N.Y. Aug. 15, 2013).

<sup>223</sup> As one Committee Member put it “[n]ot even [a] reckless loss will support those measures.” Minutes, April 2014 Rules Committee Meeting, 18 (lines 785-786).

<sup>224</sup> *Victor Stanley*, *supra*, 269 F.R.D. at 530 (to find “willfulness,” it is sufficient that the actor merely intended to destroy the evidence”).

<sup>225</sup> Patricia W. Moore, *Civil Procedure & Federal Courts Blog*, September 12, 2014.

<sup>226</sup> 57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9, 2014 WL 2994435 (S.C. Tex. July 3, 2014)(remanding for a new trial after jury verdict where the jury was allowed to hear evidence and argument about failure to preserve video footage and permitted to decide if spoliation occurred).

<sup>227</sup> See Hon. Xavier Rodriguez, *Brookshire Bros: Cleanup on Aisle 9: The Current Messy State of Spoliation*, 46 St. Mary’s L.J. 447, 480 (contrasting the Texas decision unfavorably with Rule 37(e) in regard to negligent spoliation).

<sup>228</sup> 2016 WL 815827 (S.D. Fla. March 2, 2016).

<sup>229</sup> *Id.* at \*36 (“*Camicle* was familiar with the preservation of metadata and forensic copies of electronic data in light of his educational and professional background and [the] fact that he has at all relevant times been represented by counsel”).

<sup>230</sup> *CAT3 v. Black Lineage*, 2016 WL 154116 at \*8-9 (S.D.N.Y. Jan 12, 2016).

done with an intent to deprive.<sup>231</sup> In *O’Berry v. Turner*, the loss of the only copy of subsequently deleted ESI could “only” have resulted if defendants had “acted with the intent to deprive.”<sup>232</sup>

In *GN Netcom v. Plantronics*, the court concluded that a top executive “acted in bad faith with an intent to deprive” because the court “[could] only conclude that at least part” of the motivation was to deprive the party of the discovery.<sup>233</sup> In *Internmatch v. Nxbigthing*<sup>234</sup> a court concluded that the party “acted with the intent to deprive” because it had failed to communicate preservation obligations and subsequently gave an excuse for the loss that was not credible.

In *Living Color Enterprises v. New Era Aquaculture*,<sup>235</sup> however, the court declined to find an “intent to deprive” merely because a party failed to negate the auto-delete feature of his cell.<sup>236</sup> In *Nuvasive v. Madsen Medical*, deletion of text messages was not indicative of an intent to deprive.<sup>237</sup> A similar conclusion was reached in *SEC v. CKB168 Holdings*.<sup>238</sup> In both cases, the courts vacated pre-December 1, 2015 rulings allowing adverse inference instructions because of a lack of evidence.<sup>239</sup>

In *Orchestratehr v. Trombetta*, the court refused to find an intent to deprive based on “equivocal evidence” about a party’s state of mind at the time he deleted emails.<sup>240</sup> Similarly, in *Accurso v. Infra-Red Services*, the court refused to find “intent to deprive” but left the issue open for renewal at the trial.<sup>241</sup>

A finding that the party acted in good-faith in implementation of policy was important in *Marshall v. Dentfirst*,<sup>242</sup> where wiping of computer records during a company-wide upgrade was undertaken.<sup>243</sup>

## Prejudice and Subdivision (2)

While a showing of prejudice is not specified under Subdivision (e)(2), that is because it is presumed to exist when a party “acted with the intent to deprive another party

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<sup>231</sup> DVComm. v. Hotwire, 2016 U.S. Dist. LEXIS 133661, at ¶¶37, 38, 52-62 (Feb. 3, 2016).

<sup>232</sup> *O’Berry v. Turner*, 2016 WL 1700403, \*4 (M.D. Ga. April 27, 2016)(“the loss of the at-issue ESI was beyond the result of mere negligence” and such “irresponsible and shiftless behavior can only lead to one [adverse] conclusion”).

<sup>233</sup> 2016 WL 3792833, \*7 at (D. Del. July 12, 2016).

<sup>234</sup> 2016 WL 491483 (N.D. Cal. Feb. 8, 2016).

<sup>235</sup> 2016 WL 1105297 (S.D. Fla. Mach 22, 2016).

<sup>236</sup> *Id.* at \*6.

<sup>237</sup> 2015 WL 4479147, at \*2 (S.D. Cal. July 22, 2015).

<sup>238</sup> 2016 U.S. Dist. LEXIS 16533, at \*14 (E.D. N.Y. Feb. 2, 2016)(“the existing record is not sufficiently clear” but permitting SEC to renew its motion at trial based on evidence there adduced).

<sup>239</sup> 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)(*Nuvasive*); 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016)(*SEC*).

<sup>240</sup> 2016 WL 1555784, at \*12 (N.D. Tex. April 18, 2016).

<sup>241</sup> 2016 WL 930686, at \*4 (E.D. Pa. March 11, 2016).

<sup>242</sup> 313 F.R.D. 691 (N.D. Ga. March 24, 2016).

<sup>243</sup> *Id.* at 701.



of the information's use in the litigation."<sup>244</sup> In *Global Material Technologies v. Dazheng Metal Fibre*, the court imposed a default judgment without finding prejudice based on Rule 37(e)(2) logic.<sup>245</sup> This does not reflect a "change in the law" some contend.<sup>246</sup> Prejudice is best seen as a requirement of both subsections, as is the case of spoliation under the common law.<sup>247</sup> This is consistent with existing case law.<sup>248</sup>

The Standing Committee modified the Committee Note to strike the observation that in "rare cases" conduct which is "reprehensible" justifies serious measures in the absence of prejudice.<sup>249</sup> It would appear that the Committee was prepared to leave it to the discretion of the trial court to invoke inherent authority tailored to the circumstances if necessary.<sup>250</sup>

## APPENDIX

### Final Rules Text

#### Rule 1 Scope and Purpose

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

#### Rule 4 Summons

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

\* \* \*

#### Rule 4 Summons

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<sup>244</sup> Committee Note.

<sup>245</sup> 2016 WL 4765689, at \*10 (N.D. Ill. Sept. 13, 2016)(citing Committee Note).

<sup>246</sup> Joseph, *New Law of Electronic Spoliation*, *supra*, 41 (conceding that the lack of prejudice impacts whether any sanction is appropriate).

<sup>247</sup> Minutes, April 2014 Rules Committee, at 25 (lines 1015-1017 ("[t]he Committee Note will say that the court should not dismiss or default simply for deliberate loss of immaterial information. But if there is prejudice - including what may be inferred from the deliberate intent to deprive - dismissal or default is available").

<sup>248</sup> *See, e.g., Vicente v. Prescott*, City of, 2014 WL 3939277, at \*10-11 (D. Ariz. Aug. 13, 2014)(refusing to consider sanctions where a "complete lack of prejudice" existed despite the fact that "preservation efforts were inadequate").

<sup>249</sup> Minutes, Standing Committee, May 29-30, 2014, at n. 2 (showing initial and revised Note); *see also* Memo, May 22, 2014, Dave Campbell to Jeff Sutton, *Revision to Proposed Rule 37(e) Committee Note* (copy on file with Author)(noting that a Member of the Standing Committee had "questioned the wisdom" of suggesting that severe measures could be imposed "when no prejudice resulted from the loss").

<sup>250</sup> CAT3, Inc. v Black Linage et al, 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016)(plaintiffs incorrectly argue that even if their misdeeds were discovered and the information recovered "they cannot be sanctioned").

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

## Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

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

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

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

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

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

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

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

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, [~~considering the amount in controversy, the importance of the issues at stake in the action,~~]** **considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.** —~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b) (2) (C).~~

\* \* \*

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

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

\* \* \*

(c) PROTECTIVE ORDERS.

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

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

(2) *Early Rule 34 Requests.*

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

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

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

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

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

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

\* \* \*

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

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

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

(D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether

to ask the court to include their agreement in an order **under Federal Rule of Evidence 502;**

### **Rule 30 Depositions by Oral Examination**

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

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

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

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

### **Rule 31 Depositions by Written Questions**

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

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

### **Rule 33 Interrogatories to Parties**

(a) IN GENERAL.

(1) *Number.*

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

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

\* \* \*

(b) PROCEDURE. \* \* \*

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

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

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state **with specificity the grounds for objecting to the request,** including the reasons. **The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.**

(C) *Objections.* **An objection must state whether any responsive materials are being withheld on the basis of that objection.** An objection to part of a request must specify the part and permit inspection of the rest. . \* \* \*

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

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

(3) *Specific Motions.* \* \* \*

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: \* \* \*

(iv) a party **fails to produce documents or** fails to respond that inspection will be permitted – or fails to permit inspection – as requested under Rule 34.

\* \* \* \*

(e) FAILURE TO ~~PROVIDE~~ **PRESERVE** ELECTRONICALLY STORED INFORMATION

~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to~~

~~provide electronically stored information lost as a result of the routine, good faith operation of an electronic system. **If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:**~~

*(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or*

*(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:*

*(A) presume that the lost information was unfavorable to the party;*

*(B) instruct the jury that it may or must presume the information was unfavorable to the party; or*

*(C) dismiss the action or enter a default judgment.*

## **Rule 55. Default; Default Judgment**

\* \* \*

(c) Setting Aside a Default or a Default Judgment.

The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

\* \* \*

## **Rule 84. Forms**

**[Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015.)]**

\* \* \*

## **APPENDIX OF FORMS**

**[Abrogated (Apr. \_\_, 2015, eff. Dec. 1, 2015.)]**