The 2013 "Package" of Federal Discovery Rule Amendments

Thomas Y. Allman[1]

Introduction
The 2013 Package

I. Introduction

The Civil Rules Advisory Committee (the "Rules Committee") is currently receiving public comment on a "package" of disparate proposals for amendments to the Federal Rules of Civil Procedure, capping a multi-year effort begun at the Duke Litigation Review Conference in 2010. The amendments were released for Public Comment on August 15, 2013.[2]

The initial Public Hearing on the rules package was held in Washington, D.C. on November 7, 2013 followed by a second hearing on January 9, 2014 in Phoenix Arizona. The final Hearing will be held on February 7 at the DFW (Dallas) airport. The deadline for final written comments is February 14, 2014. The Committee plans to review the comments and testimony and consider changes, if any, at its meeting in Portland, Oregon on April 10-11, 2014.

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[1] © 2013 Thomas Y. Allman. Mr. Allman is a former General Counsel and currently serves as an Adjunct Professor at the University of Cincinnati College Of Law. He is Chair Emeritus of the Sedona Conference® WG 1 on E-Discovery and a former Chair of the E-Discovery Committee of Lawyers for Civil Justice.

[2] The Request for Public Comments, dated August 15, 2013 can be found at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf. Explanatory remarks explaining the evolution of individual rules, as well as the final text and Committee Notes are part of the Advisory Committee Report of May 8, 2013, as supplemented June, 2013 (the "REPORT"), located at pages 259 – 328 of the Request for Comments.

A "text only" version of the final proposals is reproduced as, collectively Appendix A (the "Duke" proposals) and Appendix B (Proposed Rule 37(e)). In addition, approximately 450 written Comments have been submitted and are available on the "Regulations.gov" website which has been designated to handle the comments. The website – which can be accessed via http://www.uscourts.gov (scroll to Rules and Policies)[3] - enables interested parties to make comments or post letters, memoranda as desired.

II. The 2013 Proposals

The impetus for the Rules proposals stems was the May, 2010 Conference on Civil Litigation held by the Committee at the Duke Law School to determine if it needed to "totally rethink the current approach taken by the civil rules."[4] As the then Chair of the Rules Committee subsequently put it, "[f]or years we [had] heard a steady chorus of complaints from parts of the bar about the increasing costs and delays in federal litigation."[5] For example, a provocative report in 2009 contended that the civil justice system, while not necessarily "broken," was badly "in need of repair."[6]

The Duke Conference generated a substantial body of empirical research and scholarly papers and involved dialogue stretching over two days.[7] To the extent there was disagreement, it centered on whether there was excessive costs stemming from and unfettered scope of discovery, especially because e-discovery, resulting in a turn away from jury trials towards less formal means of dispute resolution. The contentions were supported and denied by competing empirical studies.

However, there was consensus that better case management, cooperation among parties and application of the long-ignored principle of "proportionality" were keys to further reform. In addition, largely through the work of the E-Discovery Panel, on which the Author participated,[8] attention was drawn to the inadequacies of the current treatment of preservation and spoliation and the need for uniform national treatment of the topic.

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[3] *See* "Submit or Review Comments on the Proposed Amendments to the Federal Rules of Civil Procedure," at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.
[4] Mary Kay Kane, *Pretrial Procedural Reform and Jack Friedenthal,* 78 GEO. WASH. L. REV. 30, 38 (2009).
[5] Hon. Mark B. Kravitz, Examining the State of Civil Litigation, July 2010, available http://www.uscourts.gov/News/TheThirdBranch/10-07-01/Examining_the_State_of_Civil_Litigation.aspx
[6] Final Report, American College of Trial Lawyers and the Institute for the Advancement of the American Legal System ("ACTL/IAALS Final Report")(2009), 2, copy at http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx (scroll to "Empirical Research, Part 1").
[7] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 540-541 (2010).
[8] The Duke Conference E-Discovery Panel consisted of Hon. S. Scheindlin and. Facciola as well as Mssrs. Allman, Barkett, Garrison, Joseph and Willoughby; *see* Executive Summary, Gregory P. Joseph, May 11, 2010, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Executive%20Summary.pdf.

The task of developing individual rule proposals was divided between the Discovery Subcommittee (spoliation sanctions) and a "Duke" Subcommittee (the balance of the discovery issues) of the Rules Committee. The resulting proposals were vetted at "mini-conferences" conducted in 2011 and 2012 and finalized thereafter.

Each of the proposals stands on its own, but there are important themes which are worthy of attention. We discuss the individual proposals - grouped by topic - in chronological order based on the primary Rule involved.

(1) Cooperation (Rule 1)

Rule 1 of the Federal Rules provides that the civil rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The rule does not include a "duty to cooperate," as proposals to that effect were rejected in former times.[9] Instead, other Federal Rules require participation by counsel and parties in "good faith" in preparing discovery plans and attending case management conferences.[10]

Many Local Rules and other e-discovery initiatives invoke cooperation as an aspirational standard, however, reflecting its use as a best practice. The Northern District of California, for example, prefaces its recommended Model Order with the observation that "[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation covered by the Order]."[11] Local Rule 26.4 for the Southern and Eastern Districts of New York emphasize that cooperation of counsel must be "consistent with the interests of their clients."[12]

Prior to its October 8, 2012 Mini-Conference at Dallas, the Duke Subcommittee considered modifying Rule 1 to require parties to "cooperate to achieve these ends." The Rules Committee abandoned the effort because it might generate excessive collateral litigation and conflict with professional responsibilities of effective representation.[13]

Much of the opposition centered on concerns that the "cooperation is an open-ended concept" which, if included in the federal rules, could lead to less cooperation and an increase in disputes in which parties accuse each other of "failing to cooperate."[14]

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[9] Steven S. Gensler, Some Thoughts on the Lawyer's E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 547 (2009) (a 1978 proposal requiring cooperation was deleted "in light of objections that it was too broad").
[10] *See, e.g.*, FED. R. CIV. P. 16(f); FED. R. CIV. P. 37(f).
[11] *See* [MODEL] STIPULATED ORDER, ¶ 2, copy at http://www.cand.uscourts.gov/eDiscoveryGuidelines (scoll to Model Stipulated order Re: the Discovery of Electronically Stored Information).
[12] E.D.N.Y. & S.D.N.Y. L.R. 26.4. In its Comment, the Advisory Committee of the Eastern District supported the "explicit recognition" of the cooperation principle in the text of Rule 1. Comment, December 6, 013, at 2.
[13] REPORT, May 8, 2013, supplemented June, 2013, at unnumbered 270 of 354
[14] Report to Standing Committee, December 5, 2012, at 147.

The 2013 Proposal

The Committee proposes to amend Rule 1 so that it will be "employed by the court and the parties" to meet the goals set forth in Rule 1. The Committee Note observes that "most lawyers and parties cooperate" and that "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

Testimony and Comments

Witnesses and comments have, by and large, avoided discussion of the proposal. The Sedona Conference® Working Group 1 Steering Committee Comment (hereinafter "Sedona Conference® Comment") supported the proposal as consistent with the Sedona Cooperation Proclamation[15] effort to change the culture of discovery.[16] The N.Y. State Bar Association also endorsed the proposed but suggested that the duty to cooperate should be articulated in the Rule, not the Committee Note.[17]

Lawyers for Civil Justice ("LCJ"), on the other hand, objected to extending the duties of Rule 1 to "parties" because it would permit them to "game the system" by filing motions claiming failures to cooperate. As LCJ put it, "[u]ntil the concept of 'cooperation can be defined so as to provide objective ways to evaluate a party's compliance – including the proper balance between cooperative actions and the ethics rules and professional requirements of effective representation – the Committee Note should be amended to include an unlimited exhortation to cooperation.[18]

No witness opposed the change to Rule 1 at either the Washington or Phoenix hearing, with the notable exception of a former Reporter for the Committee, who challenged the need to place the responsibility on the court "to punish parties and counsel for excessive zeal in contesting their cases."[19]

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

Active case management of discovery by members of the judiciary was advocated at the 2010 Duke Litigation Conference by participants and in papers as an antidote to massive rule changes.[20]

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[15] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[16] Sedona Conference® Comment, November 26, 2013, at 3.
[17] N.Y. State Bar Assn. Comment, 8 (opposing form of Rule 1 Amendment).
[18] LCJ Comment, August 30, 2013, at 20.
[19] Testimony of Paul D. Carrington, November 7, 2013.
[20] Milberg LLP and Hausfeld LLP, E-Discovery Today: The Fault Lies Not In Our Rules, 4 FED. CTS. L. REV. 131 (2011); Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 DUKE L. J. 669 (2010); Paul W. Grimm and Elizabeth J. Cabraser, The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burdens, or Can Significant Improvements Be Achieved Within The Existing Rules?, at 5 ("the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process").

The following proposals are included in the Rules Package.

The 2013 Proposals

First, the time limits in Rule 4(m), governing the service of process is to be cut back to 60 days in contrast its current limit of 120 days, in order to reduce delay at the outset of the litigation. Similarly, unless there is "good cause for delay," the scheduling order required under Rule 16(b) must issue as soon as practicable, but no later than 90 days after any defendant has been served or 60 days after any appearance of a defendant.

Rule 16(b) would also be modified to encourage "direct simultaneous communications" as a feature of the scheduling conference, ruling out conferences conducted by mail.[21] However, the Committee rejected suggestions to mandate a scheduling conference and to provide a uniform list of actions exempted from the requirement.[22]

Another proposal is to modify Rule 26(d) so as to allow delivery of discovery requests prior to the "meet and confer" required by Rule 26(f). The Committee Note explains this change as designed to facilitate focused discussion during the Rule 26(f) Conference. The running of the response time to the request would not commence, however, until after the first Rule 26(f) conference.

Finally, a provision would be added to Rule 16(b)(3) whereby a scheduling order could include a requirement that parties seek a conference with the court prior to moving for a discovery order. Whether or not to require such conferences would be left to the discretion of the judge in each case.[23]

Testimony and Comments

Few witnesses have commented on these proposals.

An objection as the need for the reduction from 120 days to 60 days in Rule 4(m) was lodged by an employment lawyer as unneeded since if there is a problem with delay, "it is more likely [to be] because of defendants attempting to evade process."[24] Another comment suggested that the Committee should first assess the ongoing pilot projects involving more active case management procedures.[25]

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[21] Committee Note, Rule 16 ("The conference may be held in person, by telephone, or by more sophisticated electronic means").
[22] REPORT, May 8,2013, as supplemented June 2013, at unnumbered page 262 of 354.
[23] Committee Note, Rule 16.
[24] Dean R. Fuchs Comment, Oct. 30, 2103, at 4 (suggesting alternatives such as making Rule 4(d) mandatory and expanding shifting of costs to include attorney's fees associated with having to perfect service upon any defendant).
[25] Joseph M Sellers, Cohen Milstein, November 6, 2013, at 5-6 (noting that the IAALS expects state pilot projects prompted by the Duke Conference to produce meaningful data later in 2013 or in 2014).

Opposition to the change in Rule 4 was also stated because of the problems in effecting service through the US Marshals Service in regard to *in forma pauperis* litigants.[26]

(3) Preservation Planning (Rules 16, 26(f), 37(e))

One goal of the 2006 Amendments was to address (and thus prevent) unnecessary preservation disputes by encouraging early discussion of the topic. Accordingly, Rule 26(f) was amended to require parties to address "issues about preserving discoverable information"[27] at the "meet and confer" conference.

However, no parallel change was made to authorize or require discovery plans or Rule 16(b) scheduling orders to deal with preservation, probably because of concerns about encouraging unnecessary preservation orders.[28] The Committee also ignored the fact that preservation decisions are often required prior to that time and, as was illustrated in *Texas v. City of Frisco,* pre-litigation disputes over preservation obligations do not typically present justiciable issues.[29]

The 2013 Proposals

The Committee proposes to amend Rule 26(d)(2) to permit service of requests for production under Rule 34 prior to the first Rule 26(f) conference.[30] According to the Committee Note, "[t]his relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conferences [so that] changes [can be made] in the requests." It would also, of course, inform the preservation discussions.

The "factors" proposed for inclusion in Rule 37(e)(2) suggest the use of early preservation demands and timely resort to courts to deal with preservation disputes.[31] The Committee Note explains that a request "may provide insights" into what must be preserved but states that a party "should make its own determination about what is appropriate preservation." The Note also suggests that courts should examine whether parties have consulted in "good faith" about the scope of preservation.[32]

The Committee Note also states that "a duty to preserve discoverable information may arise before an action is filed, and may be shaped by pre-filing requests to preserve

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[26] The Legal Aid Society Comment, October 30, 2013, at 4.
[27] FED. R. CIV. P. 26(f)(2).
[28] Committee Note, Rule 26, subdivision (f)[at 234 F.R.D. 219, 324 (2006)]("[t]he requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders [and] ex parte preservation orders should issue only in exceptional circumstances").
[29] Texas v. City of Frisco, 2008 WL 828055 (E.D. Tex. March 27, 2008).
[30] Delivery of Rule 34 requests could be as early as 21 days after service, although the time for response under Rule 34(b) would not begin to run until after the first Rule 26(f) conference.
[31] Rule 37(e)(2)(C)("request to preserve information") & (E)("timely sought the court's guidance on any unresolved disputes about preserving discoverable information").
[32] Rule 37(e)(2)(C)(whether parties consulted in good faith about the scope of preservation).

and responses to them."[33] The Note to Rule 37(e)(2) concedes, however, that "[u]ntil litigation commences, reference to the court may not be possible," and no provision is made for pre-litigation access under Rule 27.

Finally, the Committee proposes that Rule 26(f) be amended to require that the "discovery plan" prepared by the parties prior to the scheduling conference include any unresolved issues about preservation of ESI (as well as whether the parties seek court inclusion of agreements reached under FRE 502).[34] Rule 16(b)(3) would also be amended to encourage the resolution of open preservation issues in scheduling orders.

Testimony and Comments

No substantive oral comments were made about these proposals at either the Washington or Phoenix hearings, although several witnesses suggested that the Rule 37(e)(2) encouragement of routine preservation demands might encourage "gotcha" tactics. In written comments, Pfizer suggested that courts should develop "standard discovery orders or case management plans" issued in concert with or as part of the Rule 16 scheduling order. These orders could require parties to present a reasonably proportional document preservation and discovery plan, with relevant time frames for preservation and collection.[35]

The Sedona Conference® suggested that the protective order provisions of Rule 26(c) should be made available to parties who are "or may be" subject to preservation demands.[36]

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

As noted, at the Duke Conference in 2010, there was considerable disagreement as to whether the discovery were typically excessive or merely deemed to be so in certain types of complex or highly contested litigation. Competing studies and surveys implied conflicting answers, and provocative proposals for solutions were presented without consensus among participants.

The role of "proportionality" in limiting excessive discovery was an important part of the discussion, with a number of observations about its infrequent use.[37] Rule 26(b)(1), defining the scope of discovery, provides that all discovery is subject to "the

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[33] Committee Note, Rule 26.
[34] It is not clear, however, why the Committee did not include documents and tangible things.
[35] Pfizer Comment, November 5, 2013, at 5.
[36] Sedona Conference ® Comment, November 26, 2013, at 6-8 (with text in Attachment C, showing specific recommended changes to Rules 16(a) & (b) and Rule 26 (b), (c) & (f) superimposed on the Committee Proposals for those sections).
[37] *See, e.g.*, Apple v. Samsung, 2013 WL 4426512, at 3 (N.D. Cal. Aug. 14, 2013)(describing proportionality as "an all-to-often ignored discovery principle").

limitations imposed by Rule 26(b)(2)(C)."[38] That provision includes a subsection [(iii)] which limits discovery when the burden or expense of the proposed discovery "outweighs its likely benefit," considering the needs of the case and certain other factors.[39] Accordingly, the Duke Subcommittee decided to review whether proportionality could be "integrated into Rule 26(b)(1) even more directly than the integration accomplished" by the cross-reference at the end of (b)(1)."[40]

Alternative approaches were vetted at the Mini Conference held by the Subcommittee at the Dallas Airport in October, 2012,[41] and the text thereafter evolved into its current form.[42] By the time of formal adoption by the full Committee, a number of other related potential changes were identified in other aspects of Rule 26(b)(1).[43]

The 2013 Proposals

The Rules Committee proposes to modify Rule 26(b)(2)(1) to permit a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case considering* [the list of the factors adapted from Rule 26(b)(2)(C)(iii)] (new material in italics).[44] The Rules Committee has explained that "the problem is not with the [current] rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands."[45]

The Committee also proposes to delete the authority to order subject matter discovery[46] and to strike the statement that relevant information need not be admissible if it is "reasonably calculated to lead to admissible evidence."[47] Instead, the Rule would merely provide that "[i]nformation within this scope of discovery need not be admissible

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[38] In the 2006 Amendments, a limitation on discovery of ESI invoking the burdens associated with production from inaccessible sources was added as Rule 26(b)(2)(B).

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

[40] Report of Duke Subcommittee, November 7-8, 2011 Agenda Book, at 570.

[41] *See* Questions to Participants, 2012 November Agenda Book, at 400 of 542.

[42] Report to Standing Committee, December 5, 2012, at 136 -138 (explaining the decision to recommend incorporate of all the factors from Rule 26(b)(2)(C)(iii) and not just a reference to "proportional" discovery).

[43] *See* discussion in Duke Conference Rules Package, 2013 April Agenda Book, Rules Committee Meeting, at 83-84 of 324.

[44] Proposed Rule 26(b)(1) will require a court to determine whether the discovery is "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit."

[45] REPORT, May 8, 2013, as supplemented June 2013, at unnumbered page 265 of 354.

[46] Rule 26(b)(1)("[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action").

[47] Rule 26(b)(1)("[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence").

in evidence to be discoverable." The Committee Report believes that the latter clause has been routinely interpreted as setting a "broad standard" for discovery.

The Note explains that the discovery of inadmissible evidence "should not extend beyond the permissible scope of discovery" simply because it is reasonably calculated to lead to the discovery of admissible evidence.

The Committee also proposes to strike the listed examples of the types of relevant evidence that are discoverable.[48]

Testimony and Comments

To supporters, the addition of language dealing with proportionality is a "modest" adjustment[49] which addresses the largely overlooked role of proportionality in limiting the amount of discovery that is permissible. Proportionality has been in the Rule since 1983 and requesting parties are already obligated, by Rule 26(g), to certify that requests meet those criteria.[50] At the Phoenix hearing, witnesses stressed that the change will increase the incentives for meaningful discussions by providing "guideposts" which will help shape the conversation and encourage compromise.

As one witness put it, "it is not a bad outcome" that the move may require parties requesting information to make some choices and prioritize. Sedona endorsed the proposals[51] as did a Bar Committee."[52]

Also at the Phoenix hearing, a Utah State trial Judge described similar Utah rule changes as part of a "cultural shift" to "proportional discovery."[53] Minnesota[54] and Utah have recently amended their Civil Rules to give added prominence to proportionality in determining the scope of discovery, with Utah adhering closely to the model now under consideration by the Rules Committee. [55]

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[48] Rule 26(b)(1)("the existence, description, nature, custody, condition, and location of any documents or other tangible thins and the identity and location of persons who know of any discoverable matter."
[49] Caig B. Shaffer and Ryan T. Shaffer, Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure, 7 FED. CTS. L. REV. 178, 195 (2013)(the proposal will not "materially change obligations already imposed upon litigants, their counsel, and the court").
[50] Rule 26(g)(1)(B)(iii)(attorney signing discovery filings impliedly certifies that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action").
[51] Sedona Conference® Comment, November 26, 2013, at 5.
[52] N.Y. State Bar Assn. Comment, October 2, 2013, 26 (supporting amendment because it would "signal strongly that the scope of discovery should be narrowed).
[53] Testimony by Hon. Derek Pullan, January 9, 2014.
[54] Minn. Rule 26.02(B)(Scope and Limits)(eff. July 1, 2013)("Discovery . . . must comport with the factors of proportionality").
[55] Utah Rule 26(b)(1)(Discovery Scope in General)("Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below"); *see* Philip J. Favro and The Hon. Derek P. Pullan, New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure, 2012 MICH. ST. L. REV. 933 (2012).

Plaintiffs' counsel, on the other hand, have generally opposed the movement of the proportionality factors into Rule 26(b)(1) as unfairly limiting individual and class discovery in cases where it is essential. Prof. Arthur Miller criticized the erection of "stop signs" to discovery and the lack of empirical evidence of a need to restrict discovery. He described the inclusion of proportionality in the 1983 rules ("on his watch") as based on merely "impressionistic" evidence of discovery abuse.[56] He also noted that moving the language would be quite significant, as its the original placement intentionally treated proportionality as a "safety valve."

Professor Miller's assertions have been widely echoed. In the view of some, all relevant information is necessarily proportional.[57] More to the point, many witnesses and comments predict a massive increase in assertions of disproportionality,[58] leading to an increase in motions to compel, which will unfairly increase costs on plaintiffs and are therefore likely to deter filings in federal courts.[59]

There were also issues raised about areas of subjectivity and lack of information and the difficulties which courts would have in making assessments. Some argued that the movement of proportionality means that one is "putting the cart before the horse" since a proportionality analysis is best accomplished by a court only after the issues are developed and there is more information available.[60]

A related argument in opposition to shifting proportionality to Rule 26(b)(1) places the burden of showing proportionality on the requesting party[61] as compared to the person raising the objection. This argument has been widely repeated by witnesses and in written comments.[62] However, as was pointed out at the Phoenix hearings, the Proposal does not alter the obligation on the producing party to assert an objection under Rule 34(b)(2),[63] as is the case today with respect to objections based on a lack of relevance. If a motion to compel is filed, and if a facial showing of proportionality is made by the requesting party, the producing party must demonstrate the basis for the assertion of disproportionality or be compelled to produce the information.[64]

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[56] Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U.L. REV. 286, 354 & n. 261 (April 2013).

[57] Wisconsin Association for Justice Comment, January 24, 2014, at 4 ("If evidence is relevant, how can it not be proportional?).

[58] Professor Miller is quoted as predicting a "tidal wave of defense motions to prevent discovery on the ground that one or more of the five proposed proportionality criteria is absent." *Id*.

[59] Hon. Shira A. Scheindlin Comment, January 13, 2014, at 3.

[60] Testimony by Larry Coben, January 9, 2014.

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

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

[63] Rule 34(b)(2)(B)(Responding to Each Item)(requiring an objection if production or inspection not permitted. The Committee proposes to amend that rule to require that any such objection include "the rounds for objecting to the request with specificity."

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

However, this is not a "one-sided" burden but a discussion to which both parties contribute. Thus, a requesting party will address the amount in controversy and the value and benefits of the information sought, while both will address the importance as respect to the issues with the responding party addressing the burden and expense of complying.[65] As a Committee Member noted during the Phoenix hearing, only if the factors are in "equipoise" will the burden of proof issue even arise.

Nonetheless, numerous plaintiffs' witness and Comments argued that the Committee should address the topic if it did not intend to shift the burden of proving proportionality to requesting parties.

The Department of Justice has also indicated its support for the inclusion of the proportionality factors in Rule 26(b)(1)[66] as providing "an additional emphasis" based on its understanding that it "does not modify the scope of relevant discovery under the amend rule." It has suggested language to be added to the Committee Note to clarify that the movement of the factors is not intended to change the scope of discovery.[67] It has also echoed concerns that improper emphasis might be placed on references to "the amount in controversy" and "the importance of the issues" and suggested additional language for the Committee Note.[68]

A joint Comment filed by the IAALS/ACTL supported the incorporation of proportionality into the scope of discovery and set forth an update of various state rules and pilot projects invoking similar considerations. It also stated its assumption that "the existing procedures that govern resolution of objections to relevance" would also apply to "objections based on proportionality." It also noted that the rule "does not address" who has the burden of proof, which it recommended should be "the party making the objection."[69]

Reasonably Calculated/Subject Matter

Objections were also raised about the deletion of the "reasonably calculated" language from the Rule. To some, this represents the "classic definition of discoverable information[70] A Federal District Judge, for example, wrote to comment that the current

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

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

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

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

[68] *Id*., at 4 (recommending text which states that courts will "continue to recognize" such factors must be balanced against other factors, including "considerations of the public interest," citing to the 1983 Committee Note).

[69] IAALS/ACTL Task Force Joint Comment, January 28, 2014, at 15.

[70] Jonathan J. Margolis Comment, November 4, 2013, at 5 ("although the revised rule would still provide that information need not be admissible to be discoverable, the text and order of the proposed language exalts proportionality over discoverability").

"scope of discovery is defined in terms of whether the discovery is reasonably calculated to lead to discovery of admissible evidence." The Judge expressed concern that dropping the language would lead to more disputes which are less susceptible to principled resolution.[71]

Defense oriented witnesses, however, suggested that "[b]y removing the 'reasonably calculated' language and requiring that discovery be proportional to the needs of the case, parties would be required to . . contemplate the discovery necessary *before* propounding discovery (emphasis in original)."[72]

LCJ also suggested that it would be appropriate to also require that the discovery be both relevant and "material."[73] This suggestion was supported by other Comments based on the fact that it would help focus the actual needs in the case.[74]

Preservation Planning

The Rules Committee, in its discussion of changes to Rule 26(b)(1), does not acknowledge that it would make any change in the scope of preservation required of litigants to qualify for protection under Proposed Rule 37(e). The discussion of proportionality in Proposed Rule 37(e)(2)(D) also ducks the issue, despite the fact that it was raised during the evolution of the rule.[75]

In its November 26, 2013 Comment,[76] Sedona recommended that the Amendments to Rule 26 "go further." Sedona had earlier recommended inclusion of a scope of preservation provision, and the Comment advocates that the Committee address the role of proportionality in preservation in the Preamble to Rule 26(B)(2)(C) and in Rule 26(b)(2)(c)(i) so that parties who are "or may be" subject to a request to preserve could seek protection from undue preservation demands.

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

The Federal Rules currently impose presumptive numerical limits on the number and duration of oral depositions in Rule 30, with similar limits placed on the number of depositions that may be conducted by written questions under Rule 31. In addition, a

[71] Letter, Hon. J. Leon Holmes to Rules Committee, October 22, 2013.
[72] Ford Motor Company Comment, November 22, 2013, at 4.
[73] LCJ Comment, August 30, 2013, at 17 (noting success of materiality in English disclosure system).
[74] Wilson Turner Kosmo Comment, January 24, 2014, at 2, n.2 ("WTK firmly believes that a 'materiality' standard also needs to be a part of this rule because relying simply on the extremely broad concept of relevance invites continued discovery abuses").
[75] Committee Note, Subdivision (e)(2), at 46-47 (discussing the role of proportionality in preservation and noting that "[a] party may act reasonably by choosing the least costly form of information preservation if it is substantially as effective as more costly forms").
[76] Sedona Conference® Comment, November 26, 2013, at 4-8 (with textual suggestions for changes to Rules 16 and 26(b)(1) and 26(f) reproduced in Appendix C).

party is limited in the number of interrogatories which it may serve under Rule 33. A court may, by order, alter the limits.[77]

The Committee decided to impose lower limits as an indirect application of proportionality, given "judicial experience and the FJC findings, and aiming to decrease the cost of civil litigation, making it more accessible for average citizens." [78] The Committee expressed the hope that the change "will result in an adjustment of expectations concerning the appropriate amount of civil discovery."[79]

The 2013 Proposals

The Committee proposes to lower the current limits in Rules 30, 31 and 33 and to add new limits on the numbers of requests for admissions in Rule 36. A proposal to limit requests for production in Rule 34 (although not under Rule 45)[80] was dropped prior to the April, 2013 Rules meeting.[81]

The specific changes include:

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

Rule 26(b)(2)(A), authorizing a court to vary the limits upwards, would also be amended to conform to the proposed changes.

Testimony and Comments

There has been substantial opposition from counsel representing individual claimants in civil rights and employment matters. Many witnesses and filed comments criticize the proposals as part of a series of road blocks to discovery of corporate entities which typically have sole access to the information needed in discovery. One attorney contrasted corporate knowledge, which is "compartmentalized in many departments,

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[77] FED. R. CIV. P. 26(b)(2)(A).
[78] REPORT, May 8, 2013, as supplemented June 2013, at unnumbered page 267 of 354.
[79] *Id*.
[80] Report to Standing Committee, December 5, 2012, at Agenda Book, January, 2013, at 230-231.
[81] Subcommittee Meeting, Feb. 1, 2013, AGENDA BOOK, April, 3013, at 107 ("[t]he Subcommittee unanimously agreed to drop the draft provisions that would implement a presumptive limit on the number of Rule 34 requests).

divisions and key individuals" with an individual party's personal knowledge which is "typically not protected by a sophisticated legal structure."[82]

A typical witness involved in representing civil rights and employment claimants argued that "five depositions are not enough" and the lower limits creates a new argument against discovery that does not exist today.[83] One cited the necessity for nine depositions taken in a recent single-plaintiff employment discrimination case as necessary – and expressed the view that it would not have been possible to secure consent for them under the new Rule.[84]

When challenged by Committee Members on the argument that consent of opponents or courts would be less likely, most - but not all – objecting witnesses conceded that they have had no problems in the past. The Legal Aid Society cautioned that if reduced limits will be taken as a "more restrictive approach" we "may not get what it necessary" in the future.[85] Another related argument was that there is no evidence that parties are "intentionally taking unwarranted depositions,"[86] and that individual claimants already have a strong incentive to keep the number of discovery tools used low since they are paying for them.[87]

The suggestion was made that rather than reducing presumptive limits, the Committee should consider adopting a cooperation provision "with real teeth" and encouraging phased discovery.[88]

Members of the defense bar supported lower presumptive limits in order to encourage parties to reflect on the true needs of each case and encouraging discussion on that point.

LCJ also suggested that the relevant Committee Notes for each lowered limit should state that the purpose of the presumptive limitation at issue was to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices.[89]

(6) Cost Allocations (Rule 26(c))

As the third element to dealing with disproportionate discovery (in addition to limiting the scope of discovery and tightening presumptive limits on discovery devices), the Committee proposes to amend Rule 26(c) to acknowledge that, for good cause, a

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[82] Timothy M. Whiting Comment, October 30, 2013, 2 (the changes would be "devastating to individual plaintiff's seeking to hold better-financed defendants accountable for their wrongdoing").
[83] NELA/NY Comment, February 13, 2013, 5 (there is no logical reason to choose to "manage up from a lower limit" rather than to manage down, especially since existing limits work well in most cases).
[84] Andrew Horowitz Comment, October 23, 2013.
[85] The Legal Aid Society Comment, October 30, 2013, at 3-4.
[86] AAJ Business Torts Section Comment, December 232, 2013, at 3.
[87] Rebecca Heinegg Comment, November 15, 2013.
[88] Testimony by William Butterfield, January 9, 2014.
[89] LCJ Comment, August 30, 2013, at 21-22.

court may issue a protective order which includes provisions for the "allocation of expenses" for the disclosure or discovery.

The proposed Committee Note states that "courts are coming to exercise this authority" and that the addition of "[e]xplicit recognition [of authority to act] will forestall the temptation some parties may feel to contest [it]."

At one level, this merely acknowledges existing case law. In *Oppenheimer Fund v. Sanders*,[90] the Supreme Court acknowledged that courts have authority to protect a party from "undue burden or expense" by conditioning discovery on payment of expenses under Rule 26(c). Local rules, Model Orders and sample protocols increasingly also provide for shifting of disproportionate ESI production requests[91] as does case law.[92]

At another level, the proposal is a placeholder prior to consideration of whether or not excessive discovery costs justify a more radical approach. The Discovery Subcommittee is considering the idea of conducting a "mini-conference" on the topic, once the current round of rulemaking is behind it, to further explore other related issues.[93] Advocates for producing parties have long pushed for consideration of the adoption of a modified "requester pays" approach to significantly reduce if not eliminate any tactical reason to engage in overbroad discovery.[94]

Testimony and Comments

Some defense-oriented counsel characterized the change very important because if "properly and routinely applied," it will help focus discovery and reduce disputes.[95] The US Chamber of Commerce supported the change, but emphasized that since it did not address the "root cause" of the broken discovery system.[96] LCJ supported the proposal as an important first step toward a "requester pays" approach.[97]

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[90] 437 U.S. 340, 358 (1978).
[91] MODEL PATENT ORDER, at ¶ 3, copy at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf; *see generally* Thomas Y. Allman, Local Rules, Standing Orders, and Model Protocols, *supra*, 19 RICH. J. L. & TECH. 8, ¶ 55-58 (2013).
[92] Boeynaems v. LA Fitness Int'l 2012 WL 3536306, at *8 (Aug. 16, 2012)(ordering cost shifting because plaintiffs had "already amassed, mostly at Defendant's expense, a very large set of documents").
[93] Memorandum, "Requester Pays" Issues, November 7-8, 2013 Rules Committee Agenda Book, at189-193 of 248.
[94] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE & DISCOVERY SUBCOMMITTEE, THE UN-AMERICAN RULE: HOW THE CURRENT "PRODUCER PAYS" DEFAULT RULE INCENTIVIZES INEFFICIENT DISCOVERY, INVITES ABUSIVE LITIGATION CONDUCT AND IMPEDES MERIT-BASED RESOLUTIONS OF DISPUTES (April 1, 2013) *available at* http://www.lfcj.com/articles.cfm?articleid=169; LAWYERS FOR CIVIL JUSTICE ET AL, RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40.
[95] Allergan, Inc. Comment, January 22, 2014, at 3 (noting that the power must be "routinely exercised" to achieve its potential).
[96] US Chamber Institute for Legal Reform Comment, November 7, 2013, 2.
[97] LCJ Comment, August 30, 2013, 18.

As noted earlier, evidence of excessive discovery costs is disputed. A number of corporate witnesses offered, in support of the affirmative proposition, data about excessive costs as compared to the meager results,[98] judged by the fact that less than 0.1% of the pages produced become trial exhibits.[99]

Plaintiffs' counsel typically opposed the proposed amendment on the ground, inter alia, that "advances in ESI search and review technology are substantially lowering discovery costs."[100] They also dismissed studies showing the meager utilization as merely showing only that "defendants [preserve and] produce a large number of documents that are not useful as exhibits."[101] Another argument was that plaintiffs have limited resources to bear such costs.[102]

District Judge Scheindlin, in her filed Comments, opposed the change because it "may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without."[103]

The Department of Justice supports the change because "expressing the authority in the Rule will clarify any uncertainty" as to the authority of the courts.[104]

The N.Y. State Bar Assn. Comment also supports the change in Rule 26(c) but suggested that the Committee should not permit shifting of attorney's fees, since a producing party should "*always* bear the cost of reviewing and producing electronic data (emphasis in original), citing a *Zubulake* opinion.[105]

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

Rule 34(a) permits a party to request that its opponent "produce" discoverable information or to permit its inspection or copying. Under Rule 34(b), a party in receipt of the request must either state that inspection will be permitted or provide an "objection." However, Rule 37(a)(2), which permits motions to compel inspections, does not currently authorize motions to compel in the event of a failure to produce. A response to a request is due within a 30 period after service of the request.

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[98] At the 2011 Mini-Conference on Preservation/Spoliation, Microsoft famously provided statistics on the volumes of information it had preserved, collected, processed and produced – and the limited impact that expensive effort had on trial exhibits. An updated summary was supplied to the Rules Committee at the Phoenix Hearing.
[99] Bayer Corporation Comment, October 25, 2013, at 2.
[100] AAJ Class Action Litigation Group Comment, December 23, 2013 (citing Nicholas M. Pace and Laura Zakaras, Where The Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, RAND Corporation (2012), available at http://www.rand.org/pubs/monographs/MG1208.
[101] AAJ Comment, December 19, 2003, at 28.
[102] Joseph M. Sellers, November 6, 2013 at 10 (arguing that any rule should reflect a reluctance to shift costs from parties with greater resources to ones at the other end of the spectrum).
[103] Hon. Shira A Scheindlin Comment, January 13, 2014, at 7.
[104] Department of Justice Comment, January 28, 2014, at 5.
[105] Zubulake v. UBS Warburg (Zubulake III), 216 F.R.D. 280, 290 (S.D. N.Y. July 24, 2003).

The Committee has also identified as a "common lament" that Rule 34 responses often begin with a "laundry list" of objections, then produce volumes of materials subject to the objections leaving uncertainty whether anything has been withhold.[106]

The 2013 Proposals

The Committee proposes to amend Rule 34(b)(2)(B) to indicate whether it will produce copies of documents or ESI instead of permitting inspection.[107] Rule 37(a)(3)(B)(iv) would also be changed to authorize motions to compel for both failures to permitting inspection and failures to produce. The Proposed Committee Notes explain that these changes merely "reflect[s] the common practice of producing copies of documents or [ESI] rather than simply permitting inspection."

The Committee also proposes to amend Rule 34(b) to require that a party objecting to a request for production or inspection must state "the grounds for objecting to the request with specificity" and *also* state whether any responsive materials are being withheld on the basis of that objection."[108]

The Committee Note explains that it is intended to end the "confusion" that happens when a party "states several objections and still makes production, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections." The Note also specifies that an objection that states the limits that have controlled the search, such as a defined period or that the materials were maintained by identified sources "qualifies as a statement that the materials have been 'withheld.'

Testimony and Comments

The obligation to state if materials are being withheld based on a specific objection raised some concerns at both hearings. A in-house counsel testifying in Washington raised some concerns about statements involving databases are not being searched but are among the reasons that proportionality objections are made. The counsel noted that once an objection is made indicating some documents are withheld, a motion to compel will inevitably follow.

Some witnesses and comments expressed raised concerns about how the language would apply in the context of use of TAR procedures. One comment, for example, suggested that there should be no requirement to identify documents that are not identified by search terms, since they are not being "withheld."[109]

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[106] REPORT, May 8, 2013, supplemented June 2013, at unnumbered page 269 of 354.
[107] If production is chosen, it must be completed no later than the time indicated for inspection or a later reasonable time stated in the response.
[108] Rule 34(b)(2)(B) & (C).
[109] Norton Rose Fulbright Comment, January 15, 2014, at 9-11 (suggesting alternative language focusing on disclosing what information the party will either produce or for which it will allow inspection).

Similarly, the New York State Bar Association expressed concern that the requirement could be read to unfairly require a complete review of all potentially relevant materials prior to objecting to requests beyond permissible scope or because of undue burden.[110]

Separately, a trial lawyer cautioned that it might have the unintended consequence of eliminating the "efficient practice of including general objections applicable to all of a counterparty's requests."[111]

(8) Duty to Preserve (Rule 37(e))

The duty to preserve in anticipation of reasonably foreseeable litigation is well established in the common law as necessary to avoid litigation abuse in the form of spoliation. It can best be described as duty owed to the court system, not to individual litigants.[112]

Building on comments made in the Committee Notes to existing Rule 37(e)(2006), some courts have detected support for mandatory preservation standards[113] while others have held that reasonable conduct, undertaken in good faith (i.e., not in bad faith) satisfies the duty to preserve, even if some discoverable information is lost in the process.[114]

The E-Discovery Panel at the 2010 Duke Conference y recommended inclusion of a carefully defined duty to preserve in the federal rules to bring about certainty in preservation planning.[115] The Rules Committee drafted alternatives which provided, with varying degrees of specificity, for the trigger and scope of the duty to preserve.[116]

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[110] N.Y. State Bar Assn. Comment, 39-40, esp. n. 16 (suggesting additional clarification in the Committee Note to make it clear that this was not the intent of the Amendment).

[111] Jeffrey S. Jacobson Comment, December 11, 2013, 3 ("[i]t should not be necessary for a responding party to repeat the same objections to each enumerated request or subpart").

[112] Surowiec v. Capital Title, 790 F. Supp.2d 997, 1006 (D. Ariz. May 4, 2011)("[o]nce a party knows that litigation is reasonably anticipated, the party owes a duty to the judicial system to ensure preservation of relevant evidence"). Several states provide an individual tort-based cause of action for various forms of spoliation which can be enforced in federal courts sitting in diversity. Those claims are not affected by Proposed Rule 37(e).

[113] Peskoff v. Faber, 244 F.R.D. 54, 60 (D.D.C. Aug. 27, 2007)("[t]he Advisory Committee comments to amended Rule 37(f) make it clear that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated").

[114] FTC v. Lights of America, 2012 WL 695008, at *5 (C.D. Cal. Jan. 20, 2012)(Rule 37(e) "instructs" that inadvertent deletion of some emails due to auto-delete system is not sanctionable in absence of evidence it was operated in bad faith).

[115] Elements of a Preservation Rule (2010) (recommending general and specific triggers; requiring that a party act reasonably once the duty was triggered; and suggesting possible use of presumptive limits on types of data and numbers of custodians whose information must be preserved); copy with Executive Summary, Gregory P. Joseph, May 11, 2010, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Executive%20Summary.pdf.

[116] *See* [then] Proposed Rule 26.1 ("Duty to Preserve Discoverable Information"), at Agenda Book, April 2011 Rules Committee Meeting (Category 1)(197-206) and (Category 2)(212-215).

Under both proposals, compliance barred sanctions even if discoverable information were nonetheless lost.[117]

Ultimately, however, the Committee decided not to include a duty to preserve in the Federal rules[118] but to instead rely on the "the backwards shadow of a sanctions rule" to "reassure and give direction to those making preservation decisions."[119] From the outset that proposal has also included a non-exclusive list of "factors" to guide courts in assessing conduct.

The 2013 Proposal

Proposed Rule 37(e) does not create or define a duty to preserve.[120]

The Rule does provides non-exclusive "factors" in Rule 37(e)(2) for use by courts in assessing conduct which bear on the trigger, scope and implementation of the duty. The Committee Note states that "Rule 37(e)(2) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been preserved."

However, neither the Rule nor the Committee Note mention the need to show the relevance of the information or the degree of prejudice suffered by its omissions as a predicate to finding that the missing information "should have been preserved."[121] In contrast, a District Court which adopted the proposed "factors" for assessing entitlement to relief from failures to preserve has already included both relevance and prejudice in its list.[122]

Trigger, Scope and Access to Courts

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[117] *See* [then] Proposed Rule 37(e)(Failure to Make Disclosures or to Cooperate in Discovery; Sanctions)(Category 1)(207)("A court may not impose sanctions . . . if the party has complied with rule 26.1) and (Category 2)(214)(same).

[118] REPORT, May 8, 2013, as supplemented June 2013, at unnumbered page 272 of 354 (because neither proposal provided sufficient "certitude about what would be 'enough' preservation).

[119] *See* discussion of [then]Proposed Rule 37(g)(Category 3), *supra*, April 2011 Agenda Book at 216-219, especially at 219.

[120] Committee Note, at 39 (the preservation obligation "[is] not created by Rule 37(e), but has been recognized by many court decisions"); REPORT, May 8, 2013 as supplemented June 2013, at unnumbered pages 274 - 275 of 354 (the "rule does not attempt to prescribe new or different rules on what must be preserved" but the goal of "Rule 37(e)(2) is to provide the parties with guidance on how to approach preservation decisions"); *cf.*, NY State Bar Comment, 43 (treating Rule 37(e) as "codifying the obligation to preserve").

[121] Proposed Rule 37(e) is predicated on a showing that "a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation." In the common law practice of many circuits, this typically includes a required showing that the missing information must be relevant and its loss prejudicial.

[122] *See* Individual Rules of Practice (Schoenfeld, J.), copy at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=838.

Three of the five "factors" in Subsection (e)(2) are largely procedural in nature. They suggest that courts should look at the degree of "notice" that litigation is likely,[123] whether or not demands for preservation were made (and whether "good faith" consultations ensued)[124] and whether the producing party sought timely guidance sought from a court in the face of disagreements.[125]

The Committee Note suggests that a "variety of events" may alert a party to the "prospect of litigation" but that "reasonability and good faith" may not require any special preservation efforts despite the request. The Note also suggests that a party "need not honor an unreasonably broad preservation demand" and states that a party "may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms."

Standard of Conduct

The remaining two factors invoke a standard of conduct based on "the reasonableness of the party's efforts to preserve the information,"[126] including "the proportionality of the preservation efforts."[127] In other words, "perfection" is not required.[128]

The Committee Note states that a party will be "protected" if it "made reasonable preservation decisions in light of the factors "which emphasize both reasonableness and proportionality."[129] A party may act "with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."[130]

However, experience has shown that interpretive Committee Notes are far from ideal substitutes for rulemaking. For example, the stated assurances will be hollow courts retain the discretion to apply preservation standards without examining the reasonability or proportionality of the conduct.[131] The Committee Note already speaks

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[123] Rule 37(e)(2)(A)("the extent to which the party was on notice that litigation was likely and that the information would be discoverable").

[124] Rule 37(e)(2)(C)(" whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of reservation").

[125] Rule 37(e)(2)(E)(" whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information").

[126] Rule 37(e)(2)(B).

[127] Rule 37(e)(2)(D).

[128] Hon. James C. Francis IV Comment, January 10, 2014, 3 & 6 ("a party's preservation efforts are expected to be proportional and reasonable, not perfect").

[129] Committee Note, Subdivision (e)(1)(B)(i), at 41 ("[d]espite reasonable efforts to preserve, some discoverable information may be lost").

[130] Committee Note (Introduction), at 38.

[131] See Sekisui American v. Hart, 945 F.Supp.2d 494 (S.D. N.Y. Aug. 15, 2013)(a failure to "implement appropriate document retention practices" is "inexcusable"); *but cf.*, Brown v. West Corporation, 2013 WL 6263632, at *2-3 (D. Neb. Dec. 4, 2013)(no spoliation party used "good faith" in repurposing former employee computers after preserving relevant information); *see also* Mastr Adjustable Rate, 2013 WL 5745855, at *7 (S.D.N.Y. Oct. 23, 2013)(litigation hold implementation was reasonable because emails were printed out and retained separately, not subject to the autodeletion policy).

as if a failure to interrupt routine operations ("[a]s under the current rule")[132] or to use of litigation holds[133] is *per se* unreasonable.

Moreover, the Committee deleted without explanation a reference to the role of proportionality in "calibrating a reasonable preservation regime."[134] The adoption of a unilateral decision to fail to preserve based on proportionality grounds is anathema to some courts.[135] The Note merely advises *requesting* parties to keep "proportionality principles in mind."[136] The DOJ has urged the Committee to clarify the Committee Note so that "the scope of discovery a party anticipates" is consistent with the concept of proportionality framed in the proposed Rule 26(b)(1).[137]

In contrast, and consistent with emerging case law,[138] discussions of an agreements about proportionality in preservation planning is at the core of local rules, protocols and guidelines.[139] It is also the cornerstone of the Seventh Circuit Pilot E-Discovery principles dealing with preservation obligations.[140]

Testimony and Comments

Plaintiffs' Counsel, as counsel to requesting parties have largely avoided discussion of the implications of Rule 37(e) or the listed factors on the duty to preserve, despite growing numbers of case where individual claimants have been held to be subject to the duty to preserve.[141] Generally speaking the plaintiffs' bar attributes corporate complaints about confusion over the duty to poor planning and a lack of effective records management.[142]

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[132] Committee Note, at 39 ("[a]s under the current rule, the prospect of litigation may call for altering that routine operation").
[133] Committee Note, Subdivision (e)(2), at 45.
[134] Thomas Y. Allman Comment, October 24, 2013, at 3 of 10 (referencing the Rules Committee Report to the Standing Committee, May 8, 2013, at 59.
[135] In re Pradaxa, 2013 WL 6486921, at *17 (S.D.Ill. Dec. 9, 2013)(sanctioning defendants for, *inter alia*, a "unilateral decision" not to require employees to preserve text messages on company furnished or personal cell phones).
[136] Committee Note, Subdivision (e)(2), at 47 ("[a] party may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms").
[137] DOJ Comment, January 28, 2014, at 18.
[138] Pippins v. KPMG, 279 F.R.D. 245 (S.D. N.Y. Feb. 3, 2012)("[p]reservation and production are necessarily interrelated" and should be a "factor" in determining preservation obligations); Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 RICH. J. L. & TECH. 9, ¶26 (2007)("[J]ust as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions").
[139] N.D. Cal. Guideline 2.01 (Preservation).
[140] Seventh Cir. Pilot Program, Principle 1.03 (Discovery Proportionality), at Principles Relating to the Discovery of Electronically Stored Information (Rev. 08/01/2010), copy at http://www.discoverypilot.com/ (scroll to "Principles").
[141] See, e.g., Moore v. Citgo Refining, 735 F.3d 309 (5th Cir. 309)(affirming dismissal of employee claims under FLSA because of failures to preserve handwritten notes and personal emails).
[142] Victor Li, Georgetown Panelists Spar Over Proposed Rule for Preservation, LTN News, November 25, 2013 (quoting Millberg partner Ariana Tadler), copy at http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1382367239028.

Most Defense-oriented witnesses appear to anticipate that raising the bar on sanctions and making the rule uniform will resolve the confusion over conflicting standards required of those seeking to preserve. (See discussion in the next section on Spoliation Sanctions). The rejection of *Residential Funding* by a uniform sanctions rule is seen as having a positive "trickle-down" impact on preservation conduct.

However, some supporters of the Proposed Rule have expressed concern that Rule 37(e) will not adequately address the uncertainty caused by "divergent preservation standards."[143] In particular, concerns about possible misinterpretation about the "factors" are widespread. As one comment put it, these factors "will actually generate additional claims for sanctions."[144]

The author has cautioned that courts may "unfairly or inadvertently" determine that protection from sanctions is "forfeited in the absence of following the advice of the Committee Note.[145] Others raised similar concerns that the "factors could [be converted] into mandates whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule.[146]

LCJ suggested that the factors should either be dropped entirely or confined to Committee Notes[147] and that the Committee should consider establishing a "bright-line" standard for the onset of the duty to act *affirmatively* at the "commencement of litigation."[148]

(9) Spoliation Sanctions (Rule 37(e))

The lack of a rule-based national approach to spoliation sanctions has resulted in some Circuits requiring more "stringent" showings of entitlement to sanctions than others.[149] This in turn has contributed to an explosive growth in assertions of spoliation.[150]

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[143] AHIMA Comment, October 10, 2013, at 3 ("we are concerned that [the rule] will not resolve the issues surrounding divergent preservation standards and the perceived need for "over-preservation").
[144] Shawe, Rosenthal Comment, December 4, 2013, at 3(suggesting that the complaining party be required to demonstrate substantial prejudice before permitting further discovery or other proceedings in connection with a claim for sanctions).
[145] Thomas Y. Allman Comment Transmittal letter, October 25, 2013, at 2 (the description of the "factors" in the Committee Notes [may be treated by unsympathetic courts as] condition precedent to the protection of the rules, as opposed to approved practices."
[146] Boehringer Ingelheim Comment, January 13, 2014, at 2.
[147] LCJ Comment, August 30, 2013, at 9-13.
[148] *Id*., 13; Bayer Corporation Comments, October 25, 2013, 6 (urging adoption of an "easily identifiable triggering event"); s*ee also* Martin R. Redish, Electronic Discovery and the Litigation Matrix, 51 DUKE L. J. 561, 624-25 (2001)(advocating trigger of the duty upon receipt of discovery request).
[149] Bracey v. Grondin, 712 F.3d 1012, 1020-1021 (7th Cir. March 15, 2013)(a showing of "destruction for the purpose of hiding adverse information" is required in the Seventh Circuit).
[150] The author's ongoing request of the ALLFEDS database of WESTLAW for reported decisions involving "spoliation w/20 sanctions" returns one or more such opinions on the average each day. This is a dramatic acceleration from the already elevated levels reported to the 2010 Duke Conference. *See* Dan

While a somewhat quixotic attempt was made in 2006 to address part of the problem by the adoption of then Rule 37(f), now Rule 37(e),[151] the impact has been ineffectual at best.[152] As one District Judge put it, "[o]rganizational litigants" must divert resources to "defensive preservation" and individual litigants "may face costly spoliation/sanctions battles" that they "do not have the economic resources to fight."[153] The Committee noted that in some cases "very serious sanctions [can] be imposed even for merely negligent, inadvertent failures(s) to preserve some information later sought in discovery."[154]

Ultimately, the Rules Committee decided to replace the current Rule 37(e) with an entirely new rule governing spoliation sanctions which would limit the exercise of inherent powers as a source of authority to act.[155] The stated intent is to reduce the excessive costs of preservation by inducing parties to undertake more rational behavior.[156]

The 2013 Committee Proposal

Proposed Rule 37(e)(1)(B) authorizes sanctions for failures to preserve[157] which have caused substantial prejudice in the litigation and are the result of "willful or bad faith" conduct ["(B)(i)"][158] *or* which involve failures to preserve which have 'irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation ["(B)(ii)"]. [159] It would completely replace existing Rule 37(e).

H. Willoughby, Jr. et. al., Sanctions for E-Discovery Violations: By the Numbers, 60 DUKE L. J. 789 (2010).

[151] Rule 37(e)(2006), formerly Rule 37(f), provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

[152] REPORT, May 8, 2013, as supplemented June 2013, unnumbered page 274 of 354 ("[s]ome say it has provided almost no relief from growing preservation burdens").

[153] Bozic v. City of Washington, 2012 WL 6050610, at n. 2 (W.D. Pa. Dec. 5, 2012)("[n]either state of affairs is a good one").

[154] Committee Note (Introduction), at 38.

[155] REPORT, *supra*, at nnumbered page 272 of 354 ("[i]t should remove any occasion to rely on inherent power").

[156] REPORT, *supra*, at unnumbered page 271 of 354 (the "costs of preservation" are such as to "warrant attention).

[157] Rule 37(e)(1)("[i]f a party failed to preserve discoverable information that should have been preserved I the anticipation or conduct of litigation, the court may . . . . .").

[158] Rule 37(e)(2) identifies the same five non-exclusive factors offered to guide preservation conduct as guidance in assessing whether the conduct was "willful or in bad faith."

[159] The initial draft of the Rule authorized sanctions for a failure to preserve which "was willful, in bad faith, or caused irreparable prejudice in the litigation). It also permitted a court to order additional, including the payment of expenses, including attorney's fees, caused by the failure, whether or not sanctions were imposed. *See* "Possible Rule 37(g)," copy in Minutes, Subcommittee Meeting, February 20, 2011 (Appendix), April 2011 Rules Committee Agenda Book, at 229.

The "central focus" of (B)(i) is to address *Residential Funding Corp. v. DeGeorge Fin. Corp.*,[160] a Second Circuit ruling which stated that negligence is sufficient culpability to support sanctions.[161] The Rule "rejects decisions that have authorized the imposition of sanctions - as opposed to measures authorized by Rule 37(e)(1)(A) - for negligence or gross negligence."[162] Subsection (1)(A), however, permits a court to order "curative" measures which can be tantamount to sanctions[163] without proof of *either* culpability or prejudice.[164]

Subsections (B)(i) and (1)(A) thus combine to "raise the bar" for imposition of spoliation sanctions, while simultaneously making available a wide range of measures which are intended to address the losses of discoverable information[165] while leaving harsh sanctions as a possible remedy in the cases which qualify.[166]

Rule 37(e)(2) provides, in determining whether "the failure [to preserve] was willful or in bad faith" that a court should consider all relevant factors, including the five examples listed in the Rule, none of which, however, focus on the definition or either.

As an alternative to (B)(i), Subsection (B)(ii) authorizes "sanctions" where "irreparable" prejudice exist but there is no showing of bad faith or willful conduct.[167] This basis for sanctions has historically been used to excuse defendants from defending product claims where the physical evidence is missing through no fault of their own.[168] It

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[160] 306 F.3d 99 (2dCir. 2002).
[161] REPORT, May 8, 2013, as supplement June 2013, at unnumbered page 272 of 354. *See also*
[162] Committee Note, Subdivision (e)(1)(B)(i).
[163] Committee Note, Subdivision (e)(1)(A)("a variety of measures that are not sanctions"). *See, e.g.*, Mali v. Federal Insur. Co., 720 F.3d 387, 392 -93 (2nd Cir. June 13, 2013)(distinguishing adverse inference instructions issued as "a sanction, or in other words, a punishment for misconduct" and a "fundamentally different" type of adverse inference that "simply explains to the jury" that is not a punishment but "simply an explanation to the jury of its fact-findings powers"); *see also* Herrman v. Rain Link, 2013 WL 4028759, at *6 (D. Kan. Aug. 7, 2013)("[a]part from sanctions, the judge [could]find that admission of some evidence concerning spoliation of evidence might be helpful for determining the probative value of the documents [which may be placed in evidence]").
[164] Committee Note, Subdivision (e)(1)(A)(requiring discovery from inaccessible sources, or involving disproportionate burdens; ordering restoration of sources or development of substitute information; or ordering payment of reasonable expenses caused by failure to preserve; or permitting introduction of evidence about losses or allowing argument to the jury).
[165] REPORT, *supra*, at unnumbered page 272 of 354 ("[a]nother central focus of the proposed amendment is to encourage use of curative measures" if they "can substantially undo the litigation harm resulting from the failure to preserve").
[166] *Compare* Moore v. Citgo Refining, 735 F.3d 309,316 (5th Cir. Nov. 12, 2013)(approving application of "Conner factors" requiring showing of "willfulness or bad faith" accompanied by proof of "substantially prejudice" to justify dismissal of plaintiff's failure to preserve handwritten notes and emails).
[167] A last minute proposal to add a culpability requirement to Subsection B(ii) was rejected at the April, 2013 Rules Committee. *See* Thomas Y. Allman, Rules Committee Adopts 'Package' of Discovery Amendments, Bloomberg BNA Digital Discovery and e-Evidence, 13 DDEE 9, p. 200 (April 2013); copy at http://www.theediscoveryblog.com/wp-content/uploads/2013/06/2013RulePackageBLOOMBERGBAsPublished1.pdf.
[168] The common law counterpart is focused on preventing unfairness in the defense of claims where the primary relevant evidence - typically a tangible object - has not been preserved. *See* Silvestri v. GM, 271 F.3d 583 (4th Cir. 2001) *and compare* Gutman v.Klein, 515 Fed. Appx. 8, 2013 WL 1136587 (2nd Cir.

is described in the Committee Note as available only in "narrowly limited circumstances."[169]

Testimony and Comments – Generally

Defense-oriented counsel, whose clients typically (but not always) function as producing parties, support a national standard for spoliation sanctions which confines the most serious sanctions to a narrower set of situations.[170] The DOJ, however, has objected to deletion of the provisions of current Rule 37(e) given that the Proposed Rule "does not expressly provide a safe harbor or address the routine operation of a computer system."[171]

It has been stated by witnesses and in Comments that this will provide "much-needed" predictability as to sanctions without lessening the appropriate focus on preserving relevant information.[172] It will allow companies to formulate a "single strategy" geared towards complying with the "national standard." It is likely impact state court practice as well, and thereby 'increase uniformity between federal and state courts."[173]

The point has also been made that restricting the scope of potentially sanctionable conduct should have tangible benefits for plaintiffs as well, given that the use of social media by individual plaintiffs changes the "calculus" about risks of sanctions for individuals.[174]

In contrast, opponents predict that a reduction in "sanctions" for misconduct will increase incentives to fail to preserve - or to affirmatively destroy - discoverable information.[175] Moreover, some opponents argue that the rule ignores a "fundamental" policy position [recognized in *Residential Funding*][176] that the party responsible for the

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March 20, 2012)(concern over "windfall" for plaintiff when the doctrine is used affirmatively by a requesting party).

[169] Committee Note, Subdivision (e)(1)(B)(ii), at 42 (describing the "steps" which should be taken to reduce the prejudice before concluding that the clause is applicable).

[170] Jeffrey S. Jacobson, Debevoise & Plimpton, December 11, 2013, at 1.

[171] DOJ Comment, January 28, 2014, at 19 (suggesting incorporation of existing rule or reference in Committee Note as a "carrot" to move towards a better electronic document and information management system").

[172] Pfizer Comment, November 5, 2013, 2; *accord,* Testimony of David Howard (Microsoft), January 9, 2014 (suggesting that the Proposed Rule will permit a focus on employees likely to have relevant information rather than going "well beyond" merits based preservation).

[173] Ballard Spahr Comment, January 16, 2014, at 3.

[174] *Id.*, at 4.

[175] Edward G. Hawkins Comment, Sept. 9, 2013, at 1 ("[e]liminating the adverse inference instruction by changing Rule 37(e) will serve only to encourage rule breaking plaintiffs and defendants to withhold evidence"); Hon. Shira A. Scheindlin Comment, Janury 13, 2014, at 9-10 ("If only bad faith conduct can be sanctioned then why should any party be careful about preservation and make a real effort to preserve relevant non-privileged information").

[176] Sekisui v. Hart, 945 F. Supp.2d 494, 508-09 (S.D. N.Y. Aug. 15, 2013)(once willfulness is established, the imposition of the burden to show prejudice from the missing evidence on an innocent party is "contrary to law" [citing Residential Funding] and prejudice is presumed [citing Pension Committee]).

loss of evidence should "[always] be responsible for the consequences that follow."[177] Similar arguments are made against the requirement that movants show a loss of relevant and prejudicial information.

The Author challenged these predictions as to the impact on corporate counsel conduct from "raising the bar" on sanctions as unfair, given the ample ethical and practical reasons for continued diligence and best efforts.[178]

A more general criticism of the Proposed Rule is that it unnecessarily restricts a trial court's discretion to sanction misconduct.[179] The AAJ takes the position that the Committee should retain "Rule 37(e), which is limited to ESI" because it "appropriately balances the responsibility for preserving discoverable information on the custodial party."[180]

Testimony and Comments – The Rule 37(e)(2) Factors

The initial draft of the Rule as presented to the Rules Committee at the April 2011 Rules Committee Meeting listed six factors.[181] At the November, 2012 meeting, the list of exemplars was reduced to the current five factors.[182]

LCJ noted that "[n]one of the] five non-exclusive factors] informs the assessment of culpability and prejudice, the considerations most crucial to the spoliation analysis."[183] LCJ argued that since they provide such limited guidance that they "should be mentioned, if at all, in the Committee Note.[184]

Testimony and Comments - Willfulness

A witness in the Phoenix hearing suggested that the Committee should avoid leaving any "wiggle room" in the rule, lest courts not in sympathy with the Committee's goals find it easy to avoid the intended result.[185] The example given was the potential

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[177] Hon. James C. Francis IV Comment, January 10, 2014, at 5 (the Rules Committee has not "addressed, let alone rebutted" the principle of unfairness involved).
[178] Thomas Y. Allman Comment (Cover letter), October 25, 2013, at 2 (also suggesting that the Committee Note should explain that the rejection of Residential Funding logic "extends to all aspects" including the argument that proof of negligence or gross negligence excuses a party from the "burden of showing prejudice" under the Rule).
[179] The Legal Aid Society, October 30, 2013, at 10.
[180] AAJ Comment, December 19, 2003, at 23.
[181] April 2011 Agenda Book, at 217-218.
[182] *Cf.* Ohio Civ. Rule 37(f)(2008), as applied in Altercare v. Clark, 2013 WL 3356577 (C.A. Lorain Co. June 28, 2013)(approving court sanctions under multi-factor test in state equivalent of current Rule 37(e)).
[183] LCJ Comment, August 30, 2013, at 10 ("the list of factors is incomplete and potentially misleading in its implications").
[184] *Id*., 12-13.
[185] *See also* Norton Rose Fulbright Comment, January 15, 2014, at 14-16 (suggesting that an additional definition of "willfulness" is "the single most important thing the Committee can do to improve the proposed amendments to Rule 37(e)").

mischief in use of the term "willful," as illustrated in the *Sekesui* decision[186] which held that "willfulness" merely requires a showing of intentional action.[187] .

A Comment noted that if that approach were followed, a failure to interrupt auto-delete could be deemed to be a "willful" act without respect to whether it was also reasonable and not intended to deprive the requesting party of information.[188] Such an interpretation would have the effect of "dragging down" the current thresholds for adverse inferences in many Circuits.[189] Even plaintiffs' counsel conceded at the Phoenix hearing that the use of "willful" was problematic.

A number of witnesses suggested defining that the Committee should define "willful" conduct as designed to deprive the requesting party of information known to be subject to a preservation obligation, an approach consistent with existing case law.[190] Another approach would be to make "willful" and "bad faith" conjunctive, rather than alternative, requirements.[191]

Others argued for striking "willful" from the rule entirely and relying solely on "bad faith," given that it more clearly reflects action "*with intent* to spoliate" (emphasis in original).[192] Unfortunately, even "bad faith" has its drawbacks. That risk was illustrated at the Phoenix hearing when it was suggested by one Plaintiffs' counsel that it would be *per se* "bad faith" not to interrupt auto-delete functions.

Testimony and Comments – the (B)(ii) Alternative

A frequently expressed concern by supporters of the Rule centered on the alternative authorization of sanctions in Subsection (B)(ii) without requiring any showing of culpability. It was argued that this so-called "rare"[193] exception could be easily misapplied to avoid the primary rule by overstating the impact of loss of evidence.[194]

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[186] Sekisui v. Hart, 945 F. Supp.2d 494 (S.D. N.Y. Aug. 15, 2013).
[187] *Id*., at 504 ((intentional destruction of relevant information after a duty to preserve has attached is "willful," citing to Pension Comm. v. Banc of America, 685 F. Supp. 2d 456, 465 (S.D. N.Y. May 28, 2010)).
[188] Bayer Corporation Comment, October 25, 2013, 6. *See also* FDCC Comment, November 14, 2013, 2 ("[o]ne often cited willful act is the use of a standard auto-delete function" [which] could be willful, but not in bad faith").
[189] In Circuits like the Seventh, Eighth and Tenth, where "bad faith" is the required standard of culpability, an expanded view of "willfulness" could expand the availability of adverse inferences as sanctions under (B)(i) as compared to current case law.
[190] The Sedona Conference Comment, November 26, 2013, at 13 & n.15 (suggesting a requirement that the party acted with specific intent to deprive the opposing party of material evidence relevant to the claims and/or defenses involved in the matter).
[191] LCJ Comment, August 30, 2013, at 8.
[192] Jeffrey S. Jacobson Comment, December 11, 2013, at 1. Judge Scheindlin argues that this "sets the bar too high," and suggests that the language "include 'gross negligence' 'reckless' or 'bad faith' rather than 'willful' or 'bad faith.'"). Hon. Shira A. Scheindlin Comment, January 13, 2014, at 9-10.
[193] Committee Note, 39 (describing (B)(ii) as applying only "in very rare cases").
[194] *Cf.*, NY State Bar Assn. Comment, at 47 (arguing that the B(ii) subsection should not be eliminated "simply because it could present opportunities for parties acting in bad faith for purposes of harassment").

As one Comment put it, "[the (B)(ii) provision] should be excised or explicitly cabined" in the Rule.[195] Thus, (B)(i) could be prefaced by the phrase "absent exceptional circumstances" as is the case with current Rule 37(e). In the alternative, the Proposed Rule could be made applicable only to losses of "documents and ESI," tracking the distinction in Rule 34(a) and leaving further development of the (B)(ii) principle to the common law.[196] A compromise position would be to leave the (B)(ii) exception in the rule, but have it apply only to "tangible property."

Testimony and Comments – Curative Measures

The Sedona Conference® Comment has pointed out that "[i]n practice, there is often no difference between the ultimate effect of many 'sanctions' and 'curative measures,'"[197] and suggested that the authority to take similar measures would not be limited by the Proposed Rule. Indeed, the identification of "curative measures" apparently is intended to embrace "lesser sanctions"[198] of "issue related"[199] sanctions, including permissive inference jury instructions,[200] which are primarily remedial rather than penal.[201]

When the term was added to the evolving draft of then-Rule 37(g), the explanatory note added that curative measures are not sanctions but "an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data."[202]

Magistrate Judge Francis has applauded the focus on "curative measures" and not sanctions because of the "professional repercussions for attorneys who have been subject to sanctions."[203] As he pointed out, "the term 'sanction' implies a response to morally reprehensible conduct and should therefore be reserved for acts done in bad faith."[204] He has thus suggested dropping the sanctions portion of the rule [*ie,* (B)(i) and (B)(ii)]

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[195] Jeffrey S. Jacobson Comment, December 11, 2013, at 2.
[196] Thomas Y. Allman Supplementary Comment, November 16, 2013, 2 (positing that 90-95% of current reported spoliation cases do not involve spoliation of tangible things).
[197] Sedona Conference® Comment, November 26, 2013, at 9.
[198] *See* Gilley v. Eli Lilly, 2013 WL 1701066, at *8-9 (E.D. Tenn. April 2, 2013)(fashioning a "lesser sanction" consisting of a permissive adverse-inference instruction because it "remedies any advantage that the spoliating party may have gained while allowing the jury to act as fact finder).
[199] Ronda Nunnally v. District of Columbia, 2013 WL 6869665, at *16 (D.D.D. Dec. 19, 2013).
[200] Proposed Committee Note, Subdivision (e)(1)(A)("[a]dditional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information").
[201] The DC Circuit refers to these as a "negative evidentiary inference arising from spoliation of records." Grosdidier v. Board of Governors, 709 F.3d 19, 28 (D.C. A. March 8, 2013)(holding that neither it nor the Fourth or Second Circuits require "evidence of bad faith as a prerequisite" since there is a need to remedy the damage whether or not the spoliator has acted in bad faith).
[202] April 2011 Rules Committee Agenda Book, at 216.
[203] James C. Francis IV Comment, January 10, 2014, at 5-6.
[204] *Id*. 6.

and focusing on the authority to issue curative measures "unless the court finds that the party that failed to preserve acted in bad faith."[205]

John Rabiej noted that as currently described, the availability of "curative measures" may be invoked in a particular case without a showing of prejudice, which seems counterintuitive and erroneous if intended to substitute for sanctions.[206]

Others have also noted that the premise of applying curative measures is that the loss of relevant evidence has been caused by a breach of the common law duty to preserve.[207] It was suggested that greater emphasis on showings of relevance and be made by inclusion of the terms as "factors"[208] or in the Committee Notes.

(10) Answers to Questions (Rule 37(e))

The Committee has raised a number of drafting issues about the Proposed Rule.[209] A composite summary of responses to simplified versions of the questions follows. In general, these are the responses of those who support some form of a revised Rule 37(e). A substantial number of witnesses and comments oppose any change in the current rule, largely those who represent plaintiffs in individual or collective actions.

Questions 1, and 3: Should existing Rule 37(e) be retained and/or, if a new rule is added, should it be restricted to "ESI" or expanded to cover all forms of "discoverable information" (assuming, for this answer, that "tangible" property is a form of "information")?

Response: Most witnesses and comments do not favor retaining Rule 37(e), based on the problematic assertion in the Committee Note that the results under the existing rule will be protected under the Proposed Rule. The American College gave a more nuanced answer, namely that Rule 37(e) should be retained unless the (B)(ii) exception is dropped and the standard for imposition of sanctions is limited to "bad faith."[210]

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[205] *Id*. 6

[206] John K. Rabiej, Director, Duke Law Center for Judicial Studies, September 11, 2013 (noting that "it seems a bit odd not to refer to a prejudice standard for a curative measure").

[207] Norton Rose Fulbright Comment, January 15, 2014, at 12-13 (curative measures should not be available "where the party has acted reasonably" or the requesting party cannot establish some form of prejudice).

[208] *See* Section (8)("Duty to Preserve"), *supra*, at "Testimony and Comments – the Factors" (suggesting expansion of list of factors to include consideration of relevance of lost information and resulting prejudice).

[209] REPORT, May 8, 2013, as supplemented June 2013, at unnumbered page 275 of 354.

[210] ACTL Comment, December 19, 2013, at 3 (otherwise, "parties who claim that they have lost 'any meaningful opportunity' to prosecute or defend a case as the result of the ordinary, good faith operation of an [ESI] system will seek sanctions").

However, given the reluctance of some courts to abandon the *per se* sanction approach of *Pension Committee*[211] - despite *Chin*[212] - it may be necessary to revitalize and reference the "good faith" standard if the Committee is not prepared to explicitly repudiate that approach.

Similarly, most comments agree with the ACTL that leaving "documents and tangible" things outside the scope of the rule would perpetuate "divergent rules from court to court."[213]

Question 2: Should the exception in Rule 37(b)(1)(B)(ii) be retained in the Rule?

The defense bar largely advocating dropping (B)(ii) from the rule because it could foster a culture of evading the prime rule by use of inherent sanctioning power.

The primary rule in (B)(i) could be prefaced with the phrase "absent exceptional circumstances" as in the current Rule 37(e) does, thus dropping the express exception. If this is not acceptable - and the Committee is concerned about opening the issue up to uncertainty - the Proposed Rule could be amended to relate only to losses of "documents and ESI," tracking the distinction between those forms of evidence and tangible property in Rule 34(a), or, alternatively, the (B)(ii) exception could be confined to "tangible property" for the same reasons.

Questions 4 and 5: Should "willfulness or bad faith" and "substantial prejudice" standards be further defined?

Response: There use of "willfulness" - if left undefined in this context - is ambiguous as to the required intent, if any, associated with the actions involved. Accordingly, the B(i) standard should either be revised to require a showing of both "willfulness *and* bad faith" or the use of "willfulness" should be dropped and the rule should rely solely on a requirement of "bad faith." Alternatively, willfulness could be defined so that it would not suffice that a loss of evidence was "merely the result of one's intentional conduct."[214] There are a number of options available, including language suggested by the Sedona Conference® in its November 26, 2013 Comments.

If one of these options is not exercised, the use of "willfulness" could lower the threshold already required in Circuits like the Eighth, Tenth and elsewhere which rely on "bad faith" as the threshold culpability standard.

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[211] Pension Comm. v. Banc of America, 685 F. Supp. 2d 456, 471 (S.D. N.Y. May 28, 2010))("the failure to adhere to contemporary standards can be considered gross negligence").
[212] Chin v. Port Authority, 685 F. 3d 135, 162 (2nd Cir. July 10, 2012)("we reject the notion [citing Pension Committee] that a failure to institute a 'litigation hold' constitutes gross negligence *per se*"); *cert denied sub. nom* Eng v. Port Authority, __ U.S. __, 133 S.Ct. 1724, 185 L. Ed. 2d 785 (2013).
[213] ACTL Comment, December 19, 2013 (supporting uniform rule pertaining to all evidence).
[214] U.S. Chamber Institute for Legal Reform Comments, November 7, 2013, at 11.

Few respondents took the invitation to discuss the definition of "substantial prejudice." However, a number of plaintiffs' counsel echoed Judge Scheindlin's comments in *Sekesui*[215] that the rule or Committee Note should state that the burden of proof on prejudice should fall on the party that failed to preserve, not the "innocent" party.[216]

[215] Sekisui American v. Hart, 945 F.Supp.2d 494, 2013 WL 4116322, at *4, at n. 51 ("I do not agree that the burden to prove prejudice from missing evidence lost as a result of wilful or intentional misconduct should fall on the innocent party").

[216] NY State Bar Section Comments, October 2, 2013, at 44-45 ("[t]he proposed rule should be clarified to state that the burden of demonstrating that there was no substantial prejudice should fall on the party acting willfully or in bad faith [because otherwise] [a] party that destroys evidence . . .could be rewarded, even if it acted in bad faith, because of the difficulty of shown the content of the information destroyed").

APPENDIX A

Rules Text (new material in bold italics)

Rule 1 Scope and Purpose

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

Rule 4 Summons

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ ***60*** 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, 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).~~

(2) *Limitations on Frequency and Extent.*

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

* * *

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

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

* * *

(c) PROTECTIVE ORDERS.

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

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

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

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

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

(2) Early Rule 34 Requests.

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

Rule 30 Depositions by Oral Examination

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

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

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

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

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

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of ~~7~~ ***6*** 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):

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

(i) the deposition would result in more than ~~10~~ ***5*** defendants, or by the third-party defendants;

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

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

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

(b) PROCEDURE. * * *

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

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

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

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

Rule 36 Requests for Admission

(a) SCOPE AND PROCEDURE.

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

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

(B) the genuineness of any described document.

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

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

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

(3) *Specific Motions.* * * *

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

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

APPENDIX B

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

* * * * *

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

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

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

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

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

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

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

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

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

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

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

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

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

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