The “Package” of Discovery Amendments Released for Public Comment on August 15, 2013

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Introduction
The 2013 Package

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I. Introduction

The Civil Rules Advisory Committee (the “Rules Committee”) has completed its work on a “package” of proposed amendments to the Federal Rules of Civil Procedure, capping a multi-year effort begun at the Duke Litigation Review Conference in 2010. On August 15, 2013, after some minor changes made with the approval of the Standing Committee, the amendments were released for Public Comment.2

The resulting “package” of proposals is the subject of this Memorandum. A “text only” version of each proposal is reproduced in Appendix A and B.

Public Hearings on the package were held on November 7, 2013 and are also scheduled for January and February, 2014. The WG1 Steering Committee of the Sedona Conference® submitted a comprehensive set of proposals in 2012 and, where

1 © 2013 Thomas Y. Allman. Mr. Allman is a former General Counsel and Chair Emeritus of Working Group 1 of the Sedona Conference® and currently serves as an Adjunct Professor at the University of Cincinnati College of Law. He testified at the November 7, 2013 Public Hearing on the Proposed Amendments. An early version of this Memorandum appeared in Bloomberg BNA Digital Discovery and e-Evidence, 13 DDEE 9, p. 200 (April 2013) as “Rules Committee Adopts ‘Package’ of Discovery Amendments.”

2 The official text of the proposals is in the Advisory Committee Report, May 8, 2013, as supplemented June, 2013 (the “REPORT”), which is located at pages 259 – 328 of Request for Comments, dated August 15, 2013 (the “RULES PACKAGE”), copy at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.
relevant, this Memorandum contrasts those proposals with the amendments proposed by the Committee.3

**Relation to the 2006 Amendments**

Some of the Committee proposals stem from perceived inadequacies in the 2006 Amendments which became effective in December, 2006.4 Those Amendments involved “technologically neutral” changes designed to address some of the key issues involved in discovery of electronically stored information (“ESI”). A total of thirty two (32) states and the District of Columbia have adopted provisions based in whole or in part on the Amendments.5

**II. The 2013 Proposals**

The Duke Conference generated a wide range of suggestions for further rulemaking. The task of developing concrete proposals was split between the Discovery Subcommittee (preservation and spoliation) and the “Duke” Subcommittee (the balance of the discovery topics). The resulting “streams” of proposals merged into the “package” described in this Memorandum.

**(1) Cooperation (Rule 1)**

Rule 1 of the Federal Rules currently 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.6 Instead, the Rules require participation by counsel and parties in “good faith” in preparing discovery plans and attending case management conferences.7

Many Local Rules and other e-discovery initiatives invoke cooperation as an aspirational standard, suggesting its use as a best practice. The Northern District of California, for example, prefaces its recommended Model Order with the observation that

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3 Letter from Sedona Conference® (WG 1) to Hon. D. G. Campbell, October 3, 2012, at 1 (hereinafter “SEDONA PROPOSALS”) (copy on file with author). Unfortunately, the Rules Committee did not make either that letter or related subsequent submissions part of the Public Record.
5 Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Massachusetts (eff. 2014), Minnesota, Mississippi, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.
6 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”).
7 See, e.g., FED. R. CIV. P. 16(f); FED. R. CIV. P. 37(f).
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“[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].”

Local Rule 26.4 for the Southern and Eastern Districts of New York cautions, however, that cooperation of counsel must be “consistent with the interests of their clients.”

The 2013 Proposal

Prior to its October 8, 2012 Mini-Conference at Dallas, the Duke Subcommittee was considering adding a requirement in Rule 1 requiring parties to “cooperate to achieve these ends.” However, substantial opposition expressed by participants at the Mini-Conference ultimately convinced the Committee to drop the reference. Much of the opposition rested on concerns that the “cooperation is an open-ended concept” that, if included in rules, could lead to less cooperation and an increase in disputes in which parties accuse each other of “failing to cooperate.”

The Committee agreed, instead, to amend the rule to be “employed by the court and the parties” to meet the goals set forth in Rule 1. The Committee Note observes, consistent with the Sedona Cooperation Proclamation, that “most lawyers and parties cooperate” and that “effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.”

Sedona had recommended that the Committee Note emphasize that cooperative behavior does not conflict with an attorney’s professional duties.

The initial day of hearings on the Proposed Amendments produced no comments by practitioners for or against the proposed change. However, the former Reporter for the Rules Committee (Prof. Carrington) did testify that he felt it inappropriate to make the change.

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

The Proposed package includes a number of relatively minor changes designed to enhance early case management. First, the time limits in Rule 4(m), governing the service of process, and Rule 16(b)(2), regulating issuance of a scheduling order, are to be cut back to 60 days and 90 days, respectively, in contrast with their current limits of 120

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12 SEDONA PROPOSALS, 1 (“[c]ooperation by attorneys to meet the scope and purpose of these Rules . . . does not conflict with the attorney’s professional duties to his or her client”).
days for each. The latter may also be extended for “good cause.” No significant public testimony was given on this topic on November 7.

Similarly, the moratorium on delivery of discovery requests prior to the “meet and confer” found in Rule 26(d)(1) is to be eliminated to allow earlier service of Rule 34 requests for production, with the response time running from the first Rule 26(f) conference. Several practitioners testified at the November 7 hearing in favor of this provision given its useful influence on early discussions of discovery.

Finally, authority is provided for courts to mandate pre-motion conferences with the courts and the form of the scheduling order discussion is no longer authorized to occur by “telephone, mail or other means.” The Committee Notes to Rules 4, 16, 26 and 34 provide explanations for all the changes. No oral testimony was given at the first public hearing on this change, but one written submission by a District Judge objected to the change.

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

The 2006 Amendments encouraged parties to address “issues about preserving discoverable information” in Rule 26(f) conferences. However, the Committee refused to articulate the relationship between the scope of the duty to preserve and the scope of discovery even after presumptively limiting ESI discovery based on inaccessible sources in Rule 26(b)(1).

At the 2010 Litigation Review Conference and the subsequent Dallas Mini-conference, the Committee was informed that the requirement of early discussion had not reduced the practice of defensive over-preservation due to the conflicting Circuit decisions on culpability. It was also pointed out that by the time of early stages of litigation, binding preservation decisions are either already made or impossible to predict with certainty, given the lack of discovery and possible future changes.

The 2013 Proposals

The Committee has nonetheless “doubled-down” on its belief that it is possible to rationally plan for the scope of the duty to preserve prior to commencement of litigation. The Proposed Committee Note to Rules 16 and 26 states that a duty to preserve “may arise before an action” and may be shaped by “prefiling requests to preserve and responses to them.”

Thus, the Committee proposes that Rule 26(f) be amended to require that the “discovery plan” prepared prior to the scheduling conference must include any unresolved issues about preservation of ESI and whether the parties seek court inclusion

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13 The Proposed Committee Note to Rule 26 explains that this is designed to facilitate focused discussion during the Rule 26(f) Conference.
14 FED. R. CIV. P. 26(f)(2).
of agreements reached under FRE 502. Parallel amendments to Rule 16(b)(3) provide for both topics to be included in scheduling orders. In addition, Rule 37(e)(2)(D) asks courts to assess whether a party made clear demands for preservation and whether, if disagreements exist, the parties consulted in “good faith” about the scope of preservation.\textsuperscript{15} No witness spoke in favor of or against these provisions at the first day of Public Comments.

\textbf{Sedona Proposals}

The Sedona Proposals also support an enhanced early effort to resolve preservation disputes by suggesting that greater emphasis be given to identifying and resolving disputed preservation issues.\textsuperscript{16} Thus, Rule 26(f) would list topics for discussion and parties would be required to prepare a joint “Preservation and Discovery Conference Report” which details the issues of agreement and proposals for resolving issues in contention. Rule 16 would also authorize scheduling orders to address preservation and legally protected privacy interests and require courts to consider and take actions on the issues at any pretrial conference.

The list of factors bearing on “good faith” in Proposed Rule 37(e)(3) does not, however, encourage use of preservation demands or speculate on their impact if made.

\textbf{(4) Scope of Discovery/Proportionality (Rule 26)}

Rule 26(b)(1) defines the scope of discovery as “nonprivileged matter that is relevant to any party’s claim or defense” while authorizing, for good cause, a court to order “discovery of any matter relevant to the subject matter involved in the action.”

Rule 26 limits the frequency and extent of discovery generally and the 2006 Amendments added a presumptive limit on production from inaccessible sources of ESI. Rule 26(b)(2)(C)(iii) - the “proportionality” - test requires that any form of discovery be limited 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.”

The proportionality principle informs the duty to preserve, as reflected in \textit{Pippins} v. \textit{KPMG} and authoritative comments,\textsuperscript{17} although the Committee deleted references from

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  \item \textsuperscript{15} The Committee Note states that the request “may provide insights” into what must be preserved but concedes that a party “should make its own determination about what is appropriate preservation.”
  \item \textsuperscript{16} \textit{SEDONA PROPOSALS}, Rule 16(a)(3), (b)(3)(B)(ii) & (iv)(adding need to include privacy agreements), (c); Rule 26(b)(1)(scope of preservation obligation); Rule 26(f)(2)(A); (f)(5)(report on open and remaining preservation issues).
  \item \textsuperscript{17} 279 F.R.D. 245 (S.D. N.Y. Feb. 3, 2012); Sedona Conference® \textit{COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY}, 11 \textit{SEDONA CONF. J.} 289 (2010); \textit{accord} Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 \textit{RICH. J. L. & TECH.} 9, ¶26 (2007)(“Just as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions”).
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the 2006 Committee Note to Rule 26(b)(2)(B) as to the potential impact of inaccessibility on the scope of the duty to preserve.

The 2013 Proposals

The Committee has proposed to amend Rule 26(b)(1) to state that a party 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 [listing the factors from Rule 26(b)(2)(C)(iii)] (new material in italics).” Many witnesses involved in asserting constitutional and individual rights or employment claims objected to this and related changes in Rule 26(b)(1) at the initial Public Hearing on November 7.

The Committee Note describes the amended rule as limiting “the scope of discovery to what is proportional to the needs of the case.”18 This change is necessitated, according to Committee, by the fact that “excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior.”19 As noted by Judge Shaffer, the proposal to incorporate the proportionality factors from Rule 26(b)(2)(C)(iii) “does not affect any substantive change to the scope of discovery” and “will not materially change obligations already imposed upon litigants, their counsel, and the court.”20

The essential premise that nothing would be changed was challenged by the witnesses from the plaintiff’s bar who portrayed the change as a potential denial of access to discovery in asymmetric litigation. They also pointed out that the Committee Note to Proposed Rule 26 states that it modifies the scope of discovery.

The amendment to Rule 26(b)(1) would also delete the statement that relevant information need not be admissible at trial if it “appears reasonably calculated to lead to the discovery of admissible evidence” would be deleted.21 The Committee Note explains that discovery is not justified “simply because it is ‘reasonably calculated’ to lead to discovery of admissible evidence.”22 A number of the same witnesses that objected to adding references to “proportionality” in the clause also objected to deletion of this phrase.

In addition, similar objections were made to deletion of the discovery of material relevant to the subject matter for “good cause.”

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18 REPORT, 16. Rule 26(b)(2)(C) would be changed to require the limiting of the frequency or extent of discovery if it is “outside the scope permitted by Rule 26(b)(1).”
19 REPORT, [unnumbered] 265.
21 The amended Rule would also provide, however, that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”
22 REPORT, 17. The Committee Note explains that inadmissible evidence is discoverable only when “[i]nformation within the scope of discovery, namely that which is relevant to a party’s claim or defense and proportional to the needs of the case.” Id.
Note: The proportionality doctrine is also cited in Rule 37(e)(2) as a factor in guiding preservation efforts. No witnesses addressed whether the scope of the preservation obligation acknowledged thereby is also affected by the modification in the scope of discovery. While the Committee Note to Rule 37(e) acknowledges that Rule 26(b)(1) would be amended to make proportionality a “central factor” in determining the “scope of discovery,” it merely states that prospective litigants who call for preservation efforts “should keep those proportionality principles in mind.”

Sedona Proposals

Sedona recommended in its October 2012 proposals that Rule 26(b)(1) add a subparagraph dealing with the “Scope of Preservation in General.” A cross reference to the existing proportionality rule was included, the introduction of which would be expanded to refer to limits on the “scope of preservation” in addition to limits on the frequency or extent of discovery. Similarly, the protective order provisions in Rule 26(c) would be available to persons who are or may be subject to preservation demands and would authorize limits to preservation obligations based on proportionality by challenges.

(5) Numerical 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 on the number of depositions that may be conducted by written questions under Rule 31. In addition, a party is limited in the number of interrogatories which it may serve under Rule 33. A court may, by order, alter the limits.

As part of its review, the Duke Subcommittee seriously considered imposing numerical limits on the number of Rule 34 requests for production (although not on the requests under Rule 45) as well as limits on the number of Rule 36 requests for admissions.

The 2013 Proposals

The Committee proposes to lower the limits in Rules 30, 31 and 33 and to add new limits on the numbers of requests for admissions in Rule 36. The Subcommittee proposal to limit requests for production in Rule 34 was dropped prior to the April, 2013 Rules meeting.

23 See Proposed Rule 37(e)(2)(D)(“the proportionality of the preservation efforts to any anticipated or ongoing litigation”).
24 Committee Note, Subdivision (e)(2), 47.
27 AGENDA BOOK, 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”).
Many of the same lawyers who objected to the changes in Rule 26(b)(1) as potential barriers to discovery made the same objections as to the change in presumptive limits.

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. One theme of those objecting to the change is that it would be harder to get agreement or a court order to raise the limits from a lower base (“manging up”), although most conceded that both opponents and courts have been generous when asked to agree to increase numbers.

(6) Discovery Costs (Rule 26(c))

The Supreme Court has acknowledged in *Oppenheimer Fund v. Sanders* that courts have authority to protect a party from “undue burden or expense” by conditioning discovery on payment of expenses under Rule 26(c). In *Zubulake v. UBS Warburg* ("Zubulake I"), however, the court stated that only production from “inaccessible” sources of ESI is eligible for cost shifting. The court also opined that a producing party should “always bear the cost of reviewing and producing electronic data (emphasis in original).”

One of the primary reasons for the convening of 2010 Duke Litigation Conference was a perception that there was a need to address excessive discovery costs. While a variety of useful techniques have emerged to address the issue - such as predictive coding (and other forms of TAR [“Technology Assisted Review”]) and agreements under Rule of Evidence 502 - a case can also be made that a “requester pays” regime has merit. Local Rules and Initiatives are moving in that direction.

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33 Thomas Y. Allman, Local Rules, Standing Orders, and Model Protocols, *supra*, 19 RICH. J. L. & TECH. 8, ¶ 55-58 (2013)(the provisions could be “fine-tuned” in order to “differentiate between costs related to core information and those which exceed presumptive limitations”).
Model Orders such as the one recommended for Patent Litigation by the Federal Circuit provide, for example, that “[c]osts will be shifted for disproportionate ESI production requests pursuant to [FRCP] 26.” This tracks case law such as Boeynaems v. LA Fitness Int’l, where a court ordered pre-payment of the costs of disproportionate additional discovery involved in the retrieval and production of Defendant’s ESI.

The 2013 Proposals

The Committee has proposed amending Rule 26(c) to acknowledge that, for good cause, a court may protect a party from undue burden or expense by an “allocation of expenses” of disclosure or discovery. The proposed Committee Note notes 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].”

The proposed change was both supported and criticized by a handful of witnesses at the November 7 Public Comment hearing. No mention was made of the announced intention of the Committee to address the topic in the near future in more detail.

(7) Discovery Requests (Rule 34, 37)

Rule 34(a) permits a request that a party “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 period after service of the request. Under Rule 26(d), absent an agreement or order, however, the party may not seek any form of discovery until after the meet and confer conference under Rule 26(f).

The 2013 Proposals

The Committee proposes to amend Rule 34(b) to permit a party to state that it will produce copies of documents or ESI instead of permitting inspection. Any objection must state the grounds for the objection with “specificity” and also state whether any responsive materials are being withheld on the basis of the objection. Rule 37(a) is to be amended to authorize motions to compel for both failures to permitting inspection and failures to produce.

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35 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”).
36 Id. at *12.
37 FED. R. CIV. P. 34 (b)(2)(B) & (C).
The Committee Note explains that it is intended to end the “confusion” that happens when a party states objections but still makes production, leaving the requesting party “uncertain” if relevant and responsive information has been withheld.

One witness at the Public Comment hearing on November 7 strongly objected to the proposal as potentially impossible to comply with in the ESI context when hundreds of databases are not being searched but are among the reasons proportionality or other relevance objections are made.

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

The duty to preserve in anticipation of reasonably foreseeable litigation - a duty owed to the court, not to an individual party - is governed by case law and is incidental to the spoliation doctrine typically enforced under the inherent authority of courts to avoid litigation abuse. It is not “inherent in the rules.” At the time of the 2006 Amendments, the Rules Committee refused to even consider whether incorporation of the preservation duty into the Federal Rules “would be an authorized or wise exercise of Enabling Act authority.”

The 2013 Proposal

Proposed Rule 37(e) (Appendix B) does not explicitly define the duty to preserve, instead deferring to the common law to define when a party has “failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation.” Despite recommendations of the Duke E-Discovery Panel, the Committee ultimately rejected the inclusion of a detailed Rule 26.1 which would have articulated the trigger and scope of the duty and expressly conditioned relief from sanctions on strict compliance with the Rule.

Instead, the Proposed Rule purports to provide guidance as to assessment of the duty to preserve by listing certain factors for use by parties and courts. The five factors

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39 Surowiec v. Capital Title, 790 F. Supp.2d 997, 1006 (D. Ariz. May 4, 2011)(“once a party knows that litigation is reasonably anticipated, the party owes a duty to the judicial system to ensure preservation of relevant evidence”).
40 Cf. Dale A. Oesterle, 61 TEX. L. REV. 1185, 1240 (April, 1983)(recommending that Rule 26 be amended to require that a person who anticipates participation as a party “shall exercise due care in preserving documents and other tangible things within his possession, custody, or control that are, without regard for claims of privilege, within the scope of discovery defined in rule 26(b)”). See also id. at 1242 -43 (explaining that “[n]ot only is intentional destruction prohibited, but negligent destruction is prohibited” so as to avoid a “motive” defense, and “even inadvertent destruction is a violation unless the inadvertence is nonnegligent.”)
42 The proposed Committee Note states that the preservation obligation “[is] not created by Rule 37(e), but has been recognized by many court decisions.”
43 The factors listed Proposed Rule 37(e)(2) are:
   (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
- down from an original eight suggested in the draft presented to the Subcommittee in April, 2011 \(^{44}\) famously include “the reasonableness of the party’s efforts to preserve the information” and “the proportionality of the preservation efforts.” The Committee believes that this guidance, combined with the ban on sanctions in Rule 37(e)(1)(B)(i) is sufficient to reassure parties that if they make reasonable preservation planning decisions they will avoid being branded as a “spoiliator.”

However, the Rule does not purport to require that a party undertake reasonable conduct. The guidance in Rule 37(e)(2) is intended to encourage, not mandate. During the 2006 Amendment drafting process, the Committee dropped, after public comment, a proposal that would have required, as a condition of relief from sanctions, that “the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action.”\(^{45}\) The Committee was concerned that mere mistakes would be found not to be reasonable, “defeating” the protection of the rule.\(^{46}\)

A similar risk exists in the 2013 version as well. The draft Committee Notes seem to imply that the exemption from sanctions requires use of litigation holds and the interruption of automatic deletion be undertaken, thus risking undermining the flexibility intended for party conduct. For example, the proposed Committee Note speaks of providing “protection” for parties who make “reasonable” preservation decisions” in light of the factors “identified in Rule 37(e)(2)\(^{47}\)” which “should be considered.”\(^{48}\) These include the interruption of routine operations (“as under the current rule”)\(^{49}\) and the use of litigation holds.\(^{50}\) This assessment is to be made based on whether parties “should have known” of the likelihood of losing information if did not act differently.\(^{51}\)

Accordingly, it is not surprising that to some, the value of the factors as guidance for parties or their counsel in trying to develop, \textit{ex ante}, a practical preservation


\(^{45}\) See Andrew Hebl, Spoliation of [ESI], Good Faith, and Rule 37(e), 29 \textit{NO. ILL. U. LAW REV.} 79, 93 (2008)(reproducing original draft rule from August 2004 as released for public comment).


\(^{47}\) \textit{REPORT}, 41.

\(^{48}\) \textit{REPORT}, 39.

\(^{49}\) \textit{Id.} (“As under the current rule, the prospect of litigation may call for altering that routine operation”).

\(^{50}\) \textit{REPORT}, 45.

\(^{51}\) \textit{Id.}
compliance program based on predictable requirements may be outweighed by their risks of misinterpretation.\textsuperscript{52}

Several witnesses at the November 7 Public Comment hearing pointedly remarked that the failure to adopt a detailed preservation rule dealing with trigger and scope meant that over-preservation was likely to continue to be the only viable alternative since one could not know, in advance, if pre-trial preservation efforts would be sufficient.

\textbf{Sedona Proposals}

Sedona has suggested incorporation of a provision in Rule 26(b)(1) defining the scope of preservation as involving “reasonable steps in good faith to preserve documents, \[ESI\] and tangible things relevant to any party’s claims or defenses.” Sedona also explicitly urges that proportionality be considered in the mix of assessing the scope of the duty to preserve.

However, the Sedona Proposals as to Rule 37(e) makes it very clear that while a court may consider the reasonability of a party’s conduct in connection with analyzing its good faith, a harsh sanction (defined in Rule 37(e)(4)(J)) is not to be imposed unless the failure to preserve was the result of the requisite degree of intentionality.\textsuperscript{53}

\textbf{(9) Spoliation Sanctions (Rule 37(e))}

The typical remedy for “missing evidence” in federal and state courts involves instructing a jury as to the inferences it may draw from the circumstances involved. Typically, requirements for such “spoliation” remedies are framed through the exercise of inherent sanctioning power, as Rule 37 famously does not provide for sanctions for failures to produce caused by failures to preserve.\textsuperscript{54}

Federal Circuits have utilized conflicting common law culpability standards for the imposition of spoliation sanctions.\textsuperscript{55} Some Circuits are “less stringent” than others,\textsuperscript{56}

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\textsuperscript{52} LCJ has suggested that the five factors belong in the Committee Notes given that they do not serve as a rule which is intended to proscribe or authorize conduct but as checklist of some of the issues that may be involved.
\textsuperscript{53} Sedona Proposed Rule 37(e)(5)(C)(“absent exceptional circumstances, “ no harsh sanctions “unless the party’s failure to preserve was intentional”).
\textsuperscript{54} See, e.g., Dale A. Oesterle, 61 TEX. L. REV. 1185, 1222 (April, 1983)(“Incredibly, the rule provides no explicit sanctions against parties who unjustifiable frustrate [discovery] by using the office paper shredder”).
\textsuperscript{55} Some Federal Circuits have described the topic as an evidentiary matter, thus distinguishing it from a substantive matter for Enabling Act purposes. Periodically, commentators have suggested that the matter be treated as a Rule of Evidence and provisions - bearing remarkable resemblance to the common law and, ultimately, the Proposed Rule 37(e) have emerged. \textit{See especially} Donald H. Flanary, Jr. and Bruce M. Flowers, 60 DEF. COUNS. J. 553, 555-56 (October 1993)(proposing FRE 303 to require payment of costs of reconstruction or, if not feasible, a presumption that it would have been unfavorable and, “upon a finding of intentional conduct” the full range of sanctions under Rule 37, including dismissal or default); accord, Student Note, 18 AM. J. TRIAL ADVOC. 449, 464 (Fall 1994).
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leading entities to routinely practice “defensive [over] preservation” and forcing individual litigants into costly spoliation/sanctions battles that they did not anticipate\(^\text{57}\) and do not have the economic resources to fight.\(^\text{58}\)

Rule 37(e),\(^\text{59}\) adopted in 2006, sought to limit certain rule-based sanctions caused by losses of ESI despite “routine, good-faith” operation of information systems. It did not affirmatively authorize sanctions for failures to preserve, as some had long advocated.\(^\text{60}\) The Committee substituted a “good faith” standard because of concerns that a standard based on requiring reasonable conduct “would not be effective in preventing sanctions for merely inadvertent failures to preserve.”\(^\text{61}\)

However, the existing rule has been little used. Many courts have refused to apply Rule 37(e) based on the logic that it cannot be “good faith” to fail to preserve all discoverable ESI once a duty to preserve attached. Others have simply used inherent powers and avoided the rule. A minority of courts have, however, applied it in the absence of a showing of bad faith, which they have seen as the antithesis of “good faith.”\(^\text{62}\)

The Proposed Rule

At the Duke Litigation Review Conference in 2010, the E-Discovery Panel recommended adoption of both a detailed preservation rule and one which authorized sanctions based on the “state of mind of the offender.”\(^\text{63}\)

\(^{56}\) Compare 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) \textit{with} Residential Funding Corp. v. DeGeorge Fin. Corp, 306 F.3d 99 (2nd Cir. 2002)(need only show that evidence was destroyed “knowingly, even if without intent [to breach a duty to preserve it], or \textit{negligently}”)(emphasis in original).

\(^{57}\) Shawback v. Wells Fargo, 2013 WL 3306078 (D. Alaska July 1, 2013)(arguing “as a lay person” that she “could not foresee the need to preserve materials relating to her efforts to find employment” until the time when Wells filed discovery requests).


\(^{59}\) Rule 37(e) provides that, “absent exceptional circumstances,” sanctions may not be imposed “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.”

\(^{60}\) See, \textit{e.g.}, Dale A. Oesterle, \textit{supra}, 61 TEX. L. REV. 1185, 1231 (April, 1983)(advocating amendment to Rule 37(a) authorizing sanctions for failure to “exercise due care” in violation of [a new rule] and information is unavailable from alternative sources

\(^{61}\) Thomas Y. Allman, Federal Rule of Civil Procedure 37(e), \textit{supra}, 12 DDEE 19, 2 (January 19, 2012)(noting rejection of initial proposal to limit sanctions only if a party took reasonable steps after it knew or should have known of a duty to preserve – a “negligence” test).

\(^{62}\) In the absence of a finding of bad faith - the “antithesis of good faith” – the rule bars sanctions where losses occurred after a duty to preserve attaches. Point Blank v. Toyobo America, 2011 WL 1456029 (S.D. Fla. April 5, 2011)(refusing sanctions, citing Rule 37(e), in the absence of proof that failure to institute litigation hold was undertaken in bad faith).

Ultimately, however, the Committee settled on a “sanctions-only” approach under which existing Rule 37(e) would be replaced by a similarly-numbered rule broadened to cover both ESI, documents and tangible property. A copy of the Proposed Rule is attached as Exhibit B.

Rule 37(e)(1)(B)(i) authorizes “sanctions” (those listed in Rule 37(b)(2)(A) or an “adverse –inference jury instruction”) only if a failure to preserve has “caused substantial prejudice in the litigation and was willful or in bad faith.” The desired uniformity is achieved by rejecting the principle adopted in some Circuits that negligence or gross negligence is sufficient for spoliation sanctions, as articulated in the Second Circuit decision in Residential Funding. It cannot be avoided exercising their inherent authority.

However, a court unable to make those finding can nonetheless order “curative” or remedial measures for any failure to preserve without dealing with prejudice or culpability under Rule 37(e)(1)(A). These may include the functional equivalent of sanctions, including the shifting of attorney fees and comments to juries about missing evidence. Judge Schaffer has recently written in support of the Proposed Rule that it has the “salutary effect of re-focusing attention on the ‘remedial’ aspects of a spoliation motion”.

The Proposed Rule also authorizes sanctions in Subsection (B)(ii) if a party is ‘irreparably deprived” of a “meaningful” ability to present or defend against claims. This exception was prompted by the Silvesteri case, where General Motors was excused from having to defend a case when it was deprived of timely access to a damaged automobile which was crucial to mounting its defense.

Testimony on November 7, 2013

A number of witnesses associated defense-oriented organizations as well as individual practitioners and in-house corporate counsel spoke in support of the Proposed Amendment at the November 7 Public Comment hearing. In the main, the witnesses focused on (B)(i), and raised the possibility that “willful” conduct might be misinterpreted to mean merely intentional conduct. The Proposed Rule does not define “willful” conduct, which some courts see as merely requiring intentional conduct to

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64 See, e.g., Batson v. Neal Spelce Associates, 765 F.2d 511, 514 (5th Cir. July 18, 1985)(sanctions authorized only when the failure [in that case, a failure to comply with a discovery order] “results from willfulness or bad faith” and the trial preparation of the other party is “substantially prejudiced”).
65 REPORT, [unnumbered], 272 of 354 of the RULES PACKAGE (rejecting Residential Funding).
66 Id. (“[the Proposed Rule] should remove any occasion to rely on inherent power”); see United States v. Aleo, 681 F.3d 290, 310 (6th Cir. May 15, 2012)(“a judge may not use inherent power to end-run a cabined power”)(Sutton, J., concurring in result).
68 Submitted in October, 2012, but not placed in the Public Record by the Committee (copy available at Sedona).
suffice.\textsuperscript{69} Courts could find that a failure to preserve was “willful” within the meaning of the Rule, and find sufficient prejudice by presuming it to exist under \textit{Residential Funding}.\textsuperscript{70}

The same witnesses largely objected to inclusion of (B)(ii), under which no culpability must be shown under circumstances of extreme prejudice. The author proposed opening (B)(i) with “absent exceptional circumstances” and deleting (B)(ii) or, if unacceptable, confining the Rule to “documents and ESI” much as Rule 34(a) does now.

Many of the same witnesses objected to the listed five factors as trying to do too much, and suggested deletion or relegation to Committee Note.

\textbf{The Sedona Proposal}

The Sedona Proposal for a revised Rule 37(e) authorizes “sanctions” for failures to preserve\textsuperscript{71} only if a movant shows, \textit{inter alia}, that the party sought to be sanctioned “did not act in good faith” and the party seeking sanctions was “materially prejudiced.”\textsuperscript{72} In determining whether a party acted in “good faith,” the court must consider whether the party made reasonable efforts and may not issue harsh sanctions unless the failure to preserve was “intentional.” The Proposal also explicitly states that the rule is inapplicable to “remedial or case management orders” which are necessary to effectuate discovery or trial preparation.\textsuperscript{73}

The Sedona Proposal also defines “sanctions” without differentiating between sanctions and remedial measures, but acknowledges the role of case management and remedial orders necessary to “effectuate discovery or trial preparation.” It also provides guidelines on sanction selection, including that they be proportional to the degree of prejudice inflicted.

\begin{quote}
\textsuperscript{69} Sekisui American v. Hart, 2013 WL 4116322, at *5 (intentional destruct 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)).
\textsuperscript{70} Id., 2013 WL 4116322, at *7 (“the destruction [of email] was willful and . . . prejudice is therefore presumed” citing Residential Funding, 306 F. 3d at 108-109).
\textsuperscript{71} Unlike the Proposed Rule, which refers to loss of discoverable “information,” the Sedona Proposal would apply to losses of “documents, [ESI] or tangible things.”
\textsuperscript{72} Rule 37(e)(2)(Violation Showing)(listing five elements that must be established, including (1) did not act in good faith, (2) relevant information was lost, (3) no alternative source exists for the information, (4) the party was materially prejudiced in ability to prove or respond and (5) the sanction motion was timely)
\textsuperscript{73} Rule 37(e)(6).
\end{quote}
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 420 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 420 days after any defendant has been served with the complaint or 90 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 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.
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 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 be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

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

* * * * *

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

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

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

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

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

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

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

(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.