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Bloomberg BNA eDiscovery Advisory Board Member Thomas Y. Allman reviews and critiques the actions taken by the Civil Rules Advisory Committee at its April 12 meeting.

Rules Committee Adopts 'Package' of Discovery Amendments

BY THOMAS Y. ALLMAN

I. Introduction

On Friday, April 12, 2013, the Civil Rules Advisory Committee (the "Rules Committee") adopted a proposed replacement for Federal Rule of Civil Procedure 37(e) to complement other discovery proposals endorsed the previous day. Adoption of these amendments caps a multi-year effort by the Rules Committee begun at the Duke Litigation Review Conference in 2010, including Mini-Conferences held to review interim rule formulations.[1]

The resulting "package" of disparate proposals is the subject of this Memorandum. A "text only" version of each proposal—after action at the April Meeting—is reproduced in Appendix A and B.[2]

The package will be reviewed by the Standing Committee at its June 2013 Meeting, and, if approved, released for public comment this summer. Public Hearings are likely in November and December 2013.

The 2006 Amendments

Many of the proposals stem from perceived inadequacies in the 2006 Amendments which became effective in December 2006.[3] Those Amendments involved "technologically neutral" changes designed to address some of the key e-discovery issues. A total of 31 states have also adopted provisions based in whole or in part on the Amendments.[4]

Much of the emphasis in 2006 was on "front-loading" Rules 26(f) and 16(b) to encourage party agreements and greater court participation.

However, Rules 26(b)(2)(B) and 37(f), now 37(e), introduced innovative provisions restricted to discovery of "electronically stored information" (ESI).

The Amendments failed to address the scope or onset of preservation obligations or the disproportionate

[1] *See* Thomas Allman, Federal Rule of Civil Procedure 37(e): Is Replacement or Modification the Answer?, (12 *DDEE* 19, 1/19/12) (describing alternative approaches discussed at 2011 Mini-Conference on preservation and spoliation). The Duke Subcommittee also conducted a conference at the same Dallas location in 2012 to discuss its alternative rules "sketches."

[2] The Proposals as initially presented to the meeting are found in the AGENDA BOOK, April 11-12, 2013, at 77-104 ("Duke" rules) and 143-163 (Rule 37(e)); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf. (hereinafter "AGENDA BOOK").

[3] TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219, 221-251 (2006).

[4] Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi (as of mid-2013), Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.

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 ISSN 1941-3882

costs of some e-discovery requests. Other deficiencies have since become evident.

II. The 2013 Proposals

Since the Duke Conference, the task of developing concrete proposals has been delegated to the Discovery Subcommittee (preservation and spoliation) and the Duke Subcommittee (the balance of the discovery topics). These separate ''streams'' of proposals merged into the ''package'' described in this Memorandum. The reader is cautioned, however, that all provisions are subject to further change as a result of the review at the Standing Committee Meeting in June 2013.

Among the outside groups which have actively monitored the process and submitted proposals for consideration has been Working Group 1 of the Sedona Conference®[5] and Lawyers for Civil Justice (LCJ).[6] Where relevant, the comments and proposals of each are referenced.

The reader is cautioned, however, that all provisions are subject to further change as a result of the review at the Standing Committee Meeting in June 2013.

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.[7]

Instead, the Rules require participation by counsel and parties in ''good faith'' in preparing discovery plans and attending case management conferences.[8]

Many Local Rules and other initiatives specifically invoke cooperation as an aspirational standard, suggesting its importance 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].''[9]

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.''[10]

The 2013 Proposal. Prior to its Oct. 8, 2012 Mini-Conference at Dallas, the Duke Subcommittee was considering a requirement to amend Rule 1 to provide that the parties should ''cooperate to achieve these ends.'' However, substantial opposition expressed by participants at the Mini-Conference ultimately convinced the Subcommittee 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.''[11]

The Committee agreed, instead, to amend the rule, specifying it is to be ''employed by the court and the parties'' to meet the goals set forth in Rule 1; cooperation is addressed in the Committee Note.

The proposed Note states that ''most lawyers and parties cooperate'' and that ''effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.''[12]

This approach is consistent with the Sedona Conference® recommendation that the Committee Note emphasize that cooperative behavior does not conflict with an attorney's professional duties.[13]

2. Timing (Rules 4, 26)

The current Rules on service of process (Rule 4(m)) and the timing of issuance of a scheduling order (Rule 26(b)(2)) are to be cut back, respectively, to 60 days and 90 days, in contrast with their current limits of 120 days for each.

Similarly, the Rule 26(d)(1) discovery moratorium will be cut back to allow early service of requests for production, with the response time running from the first Rule 26(f) conference.

The justification given for these changes is that they aim ''directly'' at the goal of promoting ''early case management.'' The Department of Justice, however, has raised concerns about the accelerating issuance of the scheduling order.[14]

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[5] Letter from Sedona Conference® (WG 1) to Hon. D. G. Campbell, October 3, 2012, at 1 (hereinafter ''Sedona Proposals'')(copy on file with author).

[6] Comment, Supporting Publication, LCJ, April 1, 2013, 13 (hereinafter ''LCJ Proposals (Rule 37e'')''; copy at https://docs.google.com/file/d/0B2KR7hOpxE3DN0tnMm80aFNoSzg/edit?usp=sharing&pli=1 and Comment, ''Producer Pays Default Rule,'' LCJ, April 1, 2013 (''LCJ Proposals II (Costs)''); copy at https://docs.google.com/file/d/0B2KR7hOpxE3DU2kzaHYwN1lyMmc/edit?usp=sharing&pli=1.

[7] 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'').

[8] *See, e.g.*, Fed. R. Civ. P. 16(f); Fed. R. Civ. P. 37(f).

[9] *See [Model] Stipulated Order*, ¶ 2, copy at http://www.cand.uscourts.gov/eDiscoveryGuidelines (scroll to Model Stipulated Order Re: the Discovery of Electronically Stored Information).

[10] E.D.N.Y. & S.D.N.Y. L.R. 26.4.

[11] Report to Standing Committee, December 5, 2012, 147 (''[t]his provision has been abandoned''), Agenda Book, January 3-4, 2013, 237, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf#pagemode=bookmarks.

[12] Agenda Book, at 88-89 (explanatory comment and draft Note).

[13] 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'').

[14] Agenda Book, 77-80.

  DDEE ISSN 1941-3882

3. Preservation (Rules 16, 26(f))

In its ''classic'' form,[15] the common law duty to preserve in anticipation of reasonably foreseeable litigation is defined solely by case law.

As noted at the time of the 2006 Amendments, the ''difficulties of drafting a good rule [are] so great that there is no occasion even to consider the question whether preservation rule would be an authorized or wise exercise of Enabling Act authority.''[16]

Instead, the 2006 Amendments encouraged parties to address ''issues about preserving discoverable information'' in Rule 26(f) conferences.[17] However, the topic of preservation disputes was ignored in listing the required contents of discovery plans (Rule 26(f)(3)) and in the list of permitted contents of Rule 16(b) scheduling orders.

At the 2010 Litigation Review Conference, these omissions were noted and suggestions for changes were made.[18]

The 2013 Proposals. The 2013 Proposals address the omissions in Rules 16 and 26(f) by including ''preservation'' as a component of discovery plans and adding it to the list of permissible topics for scheduling orders.[19]

The Sedona Conference®, while supporting similar amendments, suggested that greater emphasis be given to promoting resolution of disputed preservation issues.[20]

Although the Committee declined to address directly the elements of preservation in rules,[21] the replacement for Rule 37(e) (discussed below in (7)) lists five factors for consideration in making retroactive determinations as to whether information ''should have been preserved.''

The approach tracks a similar effort in the Ohio equivalent of [original] Rule 37(e), adopted in 2008.[22]

However, this author believes the listed factors are ambiguous, non-judgmental, and will not serve, in the preservation context, as a useful tool for in-house counsel trying to develop and implement a program based on known requirements.[23]

Both the Sedona Conference® and LCJ continue to advocate for inclusion of rules defining preservation obligations and scope in the Federal Rules.[24]

4. Proportionality (Rule 26)

Rule 26(b)(2)(C)(iii)—the ''proportionality'' portion of the current Rule 26—requires a court to limit discovery if it determines that ''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 2006 Amendments made no attempt to emphasize or alter the (modest) role of proportionality, which in the pre-ESI context generated little interest. However, in the period since 2006, ''proportionality'' has emerged as the *de facto* discovery limitation of choice.

The proportionality doctrine also informs the duty to preserve, as reflected in *Pippins v. KPMG* and authoritative comments.[25]

It may well be possible for the Committee Notes to emphasize the role of proportionality . . . that are applicable to preservation of ESI.

A number of ''proportionality-based'' presumptive limitations have been included in local Rules, Guidelines, Model Orders and other initiatives, which may serve as a harbinger for national rulemaking.[26] The Seventh Circuit E-discovery Pilot Program[27] and the

[15] 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'').

[16] Civil Rules Advisory Committee Minutes, April 14-15, 2005, at 39, copy available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf.

[17] Fed. R. Civ. P.26(f)(2).

[18] Thomas Y. Allman, Preservation and Spoliation Revisited: Is It Time for Additional Rulemaking?, Duke E-Discovery Panel Paper, 21 (April 9, 2010), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Thomas%20Allman,%20Preservation%20and%20Spoliation%20Revisited.pdf.

[19] The Committee Proposal also includes a discussion of possible FRE 502 agreements in both rules.

[20] 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).

[21] A Panel on E-Discovery also recommended that the Rules Committee revisit the issue of defining the elements that a preservation rule might contain. Richard Marcus, Is Rulemaking a Cure for Preservation Headaches?, ABA Section on Litigation (2011).

[22] Oh. Civ. R. Rule 37(f).

[23] LCJ suggests 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 involved. LCJ Proposals, at 8.

[24] Sedona has suggested that the scope of the duty to preserve be defined in Rule 26(b)(1). Sedona Proposals, at 4 (''reasonable steps in good faith'' subject to proportionality). LCJ argues for a ''clear, bright-line standard to clarify the time at which a duty to preserve information is triggered.'' LCJ Proposals, at 6.

[25] 279 F.R.D. 245 (S.D. N.Y. Feb. 3, 2012); Sedona Conference® Commentary On Proportionality In Electronic Discovery, 11 Sedona Conf. J. 289 (2010); *accord* 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'').

[26] Thomas Y. Allman, Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-discovery) Road, 19 Rich. J. L. & Tech. 8, ¶ 49 (2013)(''[i]t would be preferable . . . to adopt these presumptive limitations as a national rule'').

[27] [Proposed] Standing Order, Seventh Circuit E-Discovery Pilot (listing six categories of ESI whose possible preservation or production must be raised ''at the meet and confer or as soon thereafter as practicable''), copy at http://www.discoverypilot.com/ .

District of Delaware Default Standards,[28] for example, identify specific categories of ESI which need not be preserved, absent notice and discussion, given that they are typically not subject to discovery.

The 2013 Proposals. The Committee adopted a recommendation that Rule 26(b)(1) be amended so 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 factors from Rule 26(b)(2)(C)(iii)]. *Information need not be admissible in evidence to be discoverable.*'' (new material in italics).[29]

The amended rule would also delete the reference to the discovery of material relevant to the subject matter for ''good cause.'' As the draft Committee Note puts it, ''[p]roportional discovery relevant to any party's claim or defense suffices.''[30]

Rule 26(b)(2)(C) would be amended to speak of limiting the frequency or extent of discovery if it is ''outside the scope permitted by Rule 26(b)(1).''

This approach also has appeal to states as well.Thus, effective on July 1, 2013, Minnesota Rule 26.02 (b)(''Scope and Limits'') will provide that discovery is limited to ''matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [listing factors].''[31]

In contrast to the Sedona Proposals, however, the Committee has not recommended amending Rule 26(b)(1) to relate proportionality to the scope of preservation. It may well be possible for the Committee Notes to emphasize the role of proportionality—and perhaps encourage use of presumptive limits in local rules or Guidelines—that are applicable to preservation of ESI.

5. Discovery Limits (Rules 30, etc.)

The Federal Rules 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.[32]

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).[33]

In addition, the Subcommittee discussed limits on the number of Rule 36 requests for admissions.

The 2013 Proposals. At its meeting on April 11, 2013, the Committee agreed to lower the limits in Rules 30, 31, and 33 and to add 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 meeting.[34]

Rule 26(b)(2)(A) was also amended to conform to the proposed changes.

The specific changes, as adopted, include:

- Rule 30: From 10 oral depositions to five, with a deposition limited to one day of six hours, down from seven hours;
- Rule 31: From 10 written depositions to five;
- 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).

In addition, the Committee amended Rule 34 to require more specificity in the objections to Rule 34 requests, including a requirement that an objection state whether any responsive materials are being withheld on the basis of the objection.[35] It also clarified that Rule 37(a) authorizes motions to compel for both failures to permitting inspection and failures to produce.[36]

6. Discovery Costs (Rule 26(c))

The U.S. Supreme Court 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).[37]

In *Zubulake v. UBS Warburg (Zubulake I)*, however, the court stated that only production from ''inaccessible'' sources of ESI is eligible for cost shifting.[38] The court also opined that a producing party should ''*always* bear the cost of reviewing and producing electronic data (emphasis in original).''[39]

One of the primary reasons for convening the 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''])[40] and agree-

[28] D. DEL. Default Standard for Discovery, at ¶ 1(c)(ii)(referring to App. A) (listing 13 categories of ESI which need not be preserved), copy at http://www.ded.uscourts.gov/court-info/local-rules-and-orders

[29] LCJ endorses this approach but also suggests that a concept of ''materiality'' be included. *See LCJ Proposals*, 10 (''it is difficult to see why discovery should be allowed into matters that are immaterial to any party's claims or defenses'').

[30] AGENDA BOOK, at 93 (Committee Note).

[31] The relevant Minnesota Supreme Court Order is found at http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-04%20Order%20Civ%20Proc%20&%20Gen%20Rls%20Amendments.pdf.

[32] FED. R. CIV. P. 26(b)(2)(A)(also providing that the court may limit the number of requests for admissions under Rule 36).

[33] Report to Standing Committee, December 5, 2012, at Agenda Book, January 3-4, 2013, 230-231.

[34] 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'' in part because ''Rule 34 requests may be reduced to a preliminary role to identify subjects of inquiry'').

[35] FED. R. CIV. P. 34 (b)(2)(B) & (C) .

[36] FED. R. CIV. P. 37 (a)(3)(B)(iv).

[37] Oppenheimer Fund v. Sanders, 437 U.S. 340, 358 (1978).

[38] Zubulake v. UBS Warburg (Zubulake I), 217 F.R.D. 309, 322 & 324 (S.D. N.Y. May 13, 2003).

[39] Zubulake v. UBS Warburg (Zubulake III), 216 F.R.D. 280, 290 (S.D. N.Y. July 24, 2003).

[40] Joseph H. Looby [FTI], E-Discovery—Taking Predictive Coding Out of the Black Box, November, 2012, copy at http://www.fticonsulting.com/global2/critical-thinking/fti-journal/predictive-coding.aspx.

  DDEE ISSN 1941-3882

ments under Rule of Evidence 502[41]—a case can also be made that a ''requester pays'' regime has merit.[42]

Local Rules and Initiatives are moving in that direction.[43] Model Orders such as the one recommended for Patent Litigation by the Federal Circuit provide that ''[c]osts will be shifted for disproportionate ESI production requests pursuant to [FRCP] 26.''[44]

This tracks case law such as *Boeynaems v. LA Fitness Int'l*,[45] where a court ordered prepayment of the costs of disproportionate additional discovery, including ''appropriately allocated'' salaries of individuals employed by the defendant including ''managers, in-house counsel, paralegals, computer technicians and others involved in the retrieval and production of Defendant's ESI.''[46]

The 2013 Proposals. The Committee adopted a modest amendment to Rule 26(c) acknowledging 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].''[47]

7. Spoliation Sanctions (Rule 37(e))

Rule 37(e), adopted in 2006, limits sanctions for the failure to preserve ESI when losses occur despite ''routine, good-faith'' operation of information systems.

A ''safe harbor'' for such losses was advocated because the threat of being branded as a ''spoliator'' had caused producing parties to ''over-preserve.''

The Committee adopted a standard based on ''good faith'' because of concerns that a negligence standard ''would not be effective in preventing sanctions for merely inadvertent failures to preserve.''[48]

Application of the rule has been uneven, with some courts refusing to apply it once a duty to preserve has attached, thereby negating the intended purpose of the rule.

Other courts have more appropriately applied it, in the absence of a showing of bad faith, to losses resulting from routine operation of information systems even after a duty to preserve attached.[49]

At the Duke Litigation Review Conference in 2010, one of the recommendations of the E-Discovery Panel was that ''sanctions for noncompliance resulting in prejudice'' should be specified, with distinctions drawn based on the ''state of mind of the offender.''[50]

At the Dallas Mini-Conference in 2011, the Discovery Subcommittee proposed a ''sanctions-only'' approach under which the ''good faith'' standard would be replaced by affirmative requirements for a high threshold of culpability to authorize imposition of rule-based sanctions and an adverse inference.[51]

The Mini-Conference also developed a rich body of useful information on the causes and costs of ''over-preservation.''[52]

The 2013 Proposals. After considerable study and discussion, the Rules Committee ultimately decided to concentrate on replacement of Rule 37(e) with a new rule emphasizing a uniform national culpability standard for spoliation sanctions. The rule would apply to all forms of discoverable material lost through preservation failures.

Thus, 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.''

Absent such findings, however, a court may still order ''curative measures'' or other remedial measures for failures to preserve.

This is believed to be preferable to existing Rule 37(e),[53] because it is more direct, applies to all types of preservation losses, and is more likely to encourage restraint in use of inherent authority. It may be necessary, however, to more precisely define the scope of ''willful'' conduct.

Connecticut bars sanctions ''in the absence of a showing of intentional actions designed to avoid known preservation obligations.''[54] Indeed, using that stan-

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[41] Act of Sept. 19, 2008, PL 110-322, 122 Stat. 3537.

[42] *See* LCJ PROPOSALS II (COSTS), April 1, 2013, copy at https://docs.google.com/file/d/0B2KR7hOpxE3DU2kzaHYwN1lyMmc/edit?usp=sharing&pli=1.

[43] 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'').

[44] MODEL PATENT ORDER, at ¶ 3, copy at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf.

[45] 285 F.R.D. 331, 341 (E.D. Pa. 2012), (ordering cost shifting because plaintiffs had ''already amassed, mostly at Defendant's expense, a very large set of documents'').

[46] *Id.* at 342.

[47] AGENDA BOOK, at 94 (Committee Note).

[48] Allman, Federal Rule of Civil Procedure 37(e), *supra*, (12 *DDEE* 19, 5 (1/19/12)) (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).

[49] 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 BL 332802 (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).

[50] Elements of a Preservation Rule (2010), Duke Conference E-Discovery Panel (Hon. S. Scheindlin, Hon. J. Facciola and Mssrs. Allman, Barkett, Garrison, Joseph and Willoughby); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Elements%20of%20a%20Preservation%20Rule.pdf.

[51] Allman, Federal Rule of Civil Procedure 37(e), *supra*, 12 DDEE 19, 5 (1/19/12).

[52] *See* Conference Minutes, Sept. 9, 2011, at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

[53] 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.''

[54] CONNECTICUT PRACTICE BOOK, CT. R. SUPER CT CIV, § 13-14 (2012).

dard, existing Rule 37(e) could serve as a vehicle to achieve the same goals of national uniformity.[55]

Planning Guidance

As noted earlier, the Rules Committee has rejected adoption of a ''bright-line'' preservation rule in the 2013 Proposals, opting, instead, for a list of factors for courts to consider in assessing sanctions.

It is argued that these factors, combined with the ban on sanctions absent prejudice and a showing of willfulness or bad faith, will enable decisions—including prelitigation decisions—to be made with a reasonable prospect of avoiding being branded as a ''spoliator.''

The Sedona Conference® proposals continue to focus on good faith conduct, but require a showing of its absence, along with factors such as ''material prejudice in its ability to prove or respond'' to claims and defenses, prior to issuance of sanctions (which are defined).[56]

Exceptional Circumstances

As adopted at the April meeting, the ban on sanctions in Rule 37(e)(1)(B)(i) is inapplicable if a party is 'irreparably deprived'' of the ability to present or defend against claims. This exception—in (B)(ii)—was prompted by the *Silvesteri* case, involving harsh sanctions imposed for loss of timely access by a manufacturer to a damaged automobile despite limited fault on the part of auto owner.[57]

Many questioned the fairness of imposing sanctions without any showing of fault. Accordingly, prompted by questions raised by the impact of ''acts of god'' like Hurricane Sandy, the draft of (B)(ii) released by the Discovery Subcommittee on March 22, 2013 added a requirement that a showing of ''negligent or grossly negligent'' conduct was required.

The Subcommittee also suggested publication of an alternative version of Rule 37(e) without the exception restricted to ESI.[58]

The additional language in (B)(ii) on fault and the alternative version of the Rule were dropped by the Committee after discussions at the April 11-12 meeting. Inserting a lesser standard for sanctions from *Residential Funding*[59] into the rule as an alternative raised serious concerns that the exception might ''swallow'' the primary rule found in (B)(i).[60] The Committee concluded that the need for public comment could best be elicited by providing questions upon publication.

Conclusion

Some—but by no means all—of the deficiencies identified since the 2006 Amendments are addressed in the current package of proposals. For example, emphasizing the role of proportionality to help refocus discovery scope in Rule 26(b)(1) is a welcome development.

Moreover, by avoiding the creation of open-ended obligations like a duty to ''cooperate'' or a duty not to be ''evasive,''[61] the Committee has avoided traps for the unwary that would trigger ancillary litigation.

[E]mphasizing the role of proportionality to help refocus discovery scope in Rule 26(b)(1) is a welcome development.

There remains a need, however, to move beyond ''tinkering'' and to use the preservation principle to identify the types of ESI which presumptively are not subject to discovery or preservation absent explicit notice and discussion.

At its March 2012 Meeting in Ann Arbor, for example, the Rules Committee was provided with an ''informal'' draft of amendment to Rule 26(b)(1) which would place ''default limitations on discovery of [ESI].''[62]

Perhaps the most difficult issue is the efficacy of the replacement of Rule 37(e) by proposed Rule 37(e). It is problematic to assert that it will help reduce costly ''over-preservation'' by reassuring preservation planners given the broad (and perhaps unnecessary) ''exception'' in (B)(ii).

There are also substantial issues about the value of listing five arguably non-judgmental, vague, and ultimately limited ''factors'' which are susceptible to many meanings.

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[55] *See* Thomas Y. Allman, Change in the FRCP: A Fourth Way, September 9, 2011, Paper Submitted to the Mini-Conference at DFW Airport, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Thomas%20Allman.pdf.

[56] Sedona Proposals, at 10-12.

[57] Silvestri v. GM, 271 F.3d 583, 593 (4th Cir. Nov. 14, 2001)(''even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case''). Current Rule 37(e) handles the issue by prefacing its text with the phrase ''absent exceptional circumstances,'' as was pointed out at the Meeting.

[58] Agenda Book, at 160-161 (text) and 163 (related questions about the alternative). One argument is that the problems of ''irreparable deprivation'' primarily involve losses of ''tangible things'' such as cars, stoves, lamps, etc.—not ESI.

[59] Residential Funding v. DeGeorge, 306 F.3d 99, 107 (2nd Cir. Sept. 26, 2002)(a showing of ''mere negligence'' is sufficient to justify an adverse inference instruction).

[60] LCJ vigorously opposed inclusion of the language. *See* LCJ Proposals, at 3 (''absent willfulness and bad faith, there should be no sanction'').

[61] Agenda Book, at 87 (''That proposal has been put aside in the face of concerns that 'evasive' is a malleable concept, and that malleability will invite satellite litigation'').

[62] Memo, Adapting Rule 26(b)(1) for [ESI], Agenda Book, March 22-23, 2012, 274-276 (proposing, *inter alia*, that discovery ''need not be provided'' from nine sources of ESI, nor from ''key custodians'' and that search terms may be used); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf.

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APPENDICES

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 * * *

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.

(2)[sic] *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 ***the grounds for objecting to the request with specificity***, including the reasons. ***If the responding party states 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.***

(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

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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

Replacement Rule Text (as amended and Adopted April 12, 2013)[1]

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

* * * * *

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

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

(A) permit additional discovery, order ~~the party to undertake~~ 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 was willful or in bad faith; or

(ii)irreparably deprived a party of any meaningful opportunity to present ***or defend against the*** ~~a~~ claim***s***.

(2) *Factors to be considered* ~~*Determining reasonableness and willfulness or bad faith.*~~ In determining whether a party failed to preserve discoverable information that ~~reasonably~~ should have been preserved ***in the anticipation or conduct of litigation and*** whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be 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 engaged in good-faith consultation 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.

* * * * *

[1] Based on text in Agenda Book, April 11-12, 2013, pages 152-153, with modifications adopted at Committee Meeting on April 12, 2013.