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TAB 2A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair
Advisory Committee on Federal Rules of Civil Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Civil Rules

I. Introduction

The Civil Rules Advisory Committee met at the University of Oklahoma College of Law on April 11-12, 2013. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part IA of this Report presents for action a proposal recommending publication for comment of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations are little changed from the proposals that were presented for discussion, but not for action, at the January meeting of the Standing Committee. They form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending publication for comment of a revised Rule 37(e). Publication was

approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to this June meeting. The revisions provide both remedies and sanctions for failure to preserve discoverable information that should have been preserved. In addition, they describe factors to be considered both in determining whether information should have been preserved and also in determining whether a failure was willful or in bad faith. This report describes the outcome of deliberations by the Discovery Subcommittee and Advisory Committee in addressing the matters raised at the January meeting, and also lists the questions that will be specifically flagged in the request for public comment.

Part IC presents for action a recommendation to approve for publication a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part II presents information on several matters that were discussed at the April meeting. Several of these matters remain on the Committee agenda. Others have been put aside. The Committee is not now seeking guidance on these matters, but will welcome discussion on any of them.

The matters that remain on the agenda include some specific new questions: Should Rule 17(c)(2) be amended to address the circumstances that may require a court to inquire whether it need appoint a guardian for an unrepresented party who may be incompetent? Is it time to reexamine the procedures for stays pending appeal under Rule 62 in conjunction with possible consideration of the same questions by the Appellate Rules Committee?

Several new matters have been referred to the Committee by the Committee on Court Administration and Case Management, mostly in conjunction with development of the next generation CM/ECF program. These questions involve such issues as use of the Notice of Electronic Filing as a certificate of service and the acceptance of electronic signatures. The Committee anticipates that these and a number of other issues involving electronic filing and service will be addressed in a joint committee constituted by representatives from all of the advisory committees. Other of the CACM issues await further development in CACM's work.

Other matters have been on the agenda for some time but do not yet seem ripe for present development. These include the development of pleading standards in response to the Supreme Court's *Twombly* and *Iqbal* decisions, and emerging issues in class-action practice.

Two items have been removed from the agenda. The Committee concluded there is no need to reconsider the provision in Rule 41 that allows dismissal of an action without prejudice on stipulation by all parties. It also concluded that there is no need to adopt a rule recommending speedy trial and appellate action on a petition to return a child to its home country under the Hague Convention on the Civil Aspects of International Child Abduction.

Finally, the Committee benefited from a panel discussion of the use of Technology Assisted Review in discovery of electronically stored information.

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PART I: ACTION ITEMS

A. Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37: Action to Recommend Publication of Revised Rules ("Duke Rules" Package)

The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation, including many that seem suitable subjects for incorporation in the rules. Advanced drafts were discussed at the January meeting of the Standing Committee. Suggestions made during the meeting and other refinements were explored in two conference calls of the Duke Conference Subcommittee. The Advisory Committee recommends publication for comment of the package presented to it by the Subcommittee.

Judge Koeltl, chair of the Duke Conference Subcommittee, recalled that three main themes were repeatedly stressed at the Duke Conference. Proportionality in discovery, cooperation among lawyers, and early and active judicial case management are highly valued and, at times, missing in action. The Subcommittee worked on various means of advancing these goals. The package of rules changes has evolved over a period of nearly three years through many drafts and meetings and discussions in Advisory Committee meetings. The Committee is unanimous in proposing that each part of the amendments be recommended for publication.

The rules proposals are grouped in three sets. One set looks to improve early and effective judicial case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third hopes to advance cooperation. The rules involved in these three sets overlap. The changes are described first, set-by-set. The rules texts showing the changes follow, along with Committee Notes. The final step is a clean set of the rules texts as they would appear after amending.

Case-Management Proposals

The case-management proposals reflect a perception that the early stages of litigation often take far too long. "Time is money." The longer it takes to litigate an action, the more it costs. And delay is itself undesirable. The most direct aim at early case management is reflected in Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, setting the time to respond to begin at the first Rule 26(f) conference.

Rule 4(m): Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. The effect will

be to get the action moving in half the time. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long. Concerns that circumstances occasionally justify a longer time to effect service are met by the court's duty, already in Rule 4(m), to extend the time if the plaintiff shows good cause for the failure to serve within the specified time.

The Department of Justice has reacted to this proposal by suggesting that shortening the time to serve will exacerbate a problem it now encounters in condemnation actions. Rule 71.1(d)(3)(A) directs that service of notice of the proceeding be made on defendant-owners "in accordance with Rule 4." This wholesale incorporation of Rule 4 may seem to include Rule 4(m). Invoking Rule 4(m) to dismiss a condemnation proceeding for failure to effect service within the required time, however, is inconsistent with Rule 71.1(i)(C), which directs that if the plaintiff "has already taken title, a lesser interest, or possession of" the property, the court must award compensation. This provision protects the interests of owners, who would be disserved if the proceeding is dismissed without awarding compensation but leaving title in the plaintiff. The Department regularly finds it necessary to explain to courts that dismissal under Rule 4(m) is inappropriate in these circumstances, and fears that this problem will arise more frequently because it is frequently difficult to identify and serve all owners even within 120 days.

The need to better integrate Rule 4(m) with Rule 71.1 is met by amending Rule 4(m)'s last sentence: "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)." The Department of Justice believes that this amendment will resolve the problem. The Department does not believe that there is any further need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) now provides that the judge must issue the scheduling order within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. Several Subcommittee drafts cut these times in half, to 60 days and 45 days. The recommended revision, however, cuts the times to 90 days after any defendant is served or 60 days after any defendant appears. The reduced reductions reflect concerns that in many cases it may not be possible to be prepared adequately for a productive scheduling conference in a shorter period. These concerns are further reflected in the addition of a new provision that allows the judge

to extend the time on finding good cause for delay. The Committee believes that even this modest reduction in the presumed time will do some good, while affording adequate time for most cases.

The Department of Justice, however, expressed some concerns about accelerating time lines at the onset of litigation. Many of the reasons are much the same as those that underlie the Rule 12 provisions allowing it 60 days to answer. It is not just that the Department is a vast and intricate organization. Its clients often are other vast and intricate government agencies. The time required to designate the right attorneys in the Department is followed by the time required to identify the right people in the client agency to work with the attorneys and to begin gathering the information necessary to litigate. More generally, there is room to be skeptical that shortening the time to serve and the time to enter a scheduling order will do much to advance things. It is important that lawyers have time at the beginning of an action to think about the case, and to discuss it with each other. More time to prepare will make for a better scheduling conference, and for more effective discovery in the end. The Note should reflect that extensions should be liberally granted for the sake of better overall efficiency.

Other attorneys have expressed similar concerns that there are cases in which it is not feasible to prepare for a meaningful scheduling conference on an accelerated schedule. A defendant may take time to select its attorneys, compressing the apparent schedule. And some cases are inherently too complex to allow even a preliminary working grasp of likely litigation needs in the presumptive times allowed.

These concerns persuaded the Subcommittee to relax its initial proposal, which would have cut the present times in half, to 60 days after service or 45 days after an appearance. They also were responsible for adding the new provision that authorizes the court to delay the scheduling order beyond the specified times. This provision would provide more time than the current rule, but only in appropriate cases, and seems protection enough, both for complex cases in general and for the special needs of the Department of Justice.

Rule 16(b): Actual Conference: Present Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference by telephone, mail, or other means."

The Committee believes that an actual conference by direct

communication among the parties and court is very valuable. It considered a proposal that would require an actual conference in all actions, except those in exempted categories. This proposal was rejected in the end after hearing from several judges and lawyers at the miniconference hosted by the Subcommittee in Dallas that there are cases in which the judge is confident that a Rule 26(f) report prepared by able lawyers provides a sound basis for a scheduling order without further ado. But if there is to be a scheduling conference, the Committee believes it should be by direct communication; "mail, or other means" are not effective. This change is effected by requiring consultation "at a scheduling conference," striking "by telephone, mail, or other means." The Committee Note makes it clear that a conference can be held face-to-face, by telephone, or by other means of simultaneous communication.

A separate issue has been held in abeyance. Rule 16(b)(1) exempts "categories of actions exempted by local rule" from the scheduling order requirement. It may be attractive to substitute a uniform national set of exemptions, uniform not only for Rule 16(b) but integrated with the exemptions from initial disclosure. Actions exempt from initial disclosure also are exempt from the discovery moratorium in Rule 26(d) and the parties' conference required by Rule 26(f). Exempting the same categories of actions from the scheduling order requirement would simplify the rules and should respond to similar concerns. But it has seemed better to await further inquiry into the categories now exempted by local rules, and to explore the reasons for exemptions not now made in Rule 26(a)(1)(B). This topic is being developed for possible future action.

Rules 16(b)(3), 26(f): Additional Subjects: Three subjects are proposed for addition to the Rule 16(b)(3) list of permitted contents of a scheduling order. Two of them are also proposed for the list of subjects in a Rule 26(f) discovery plan. Those two are described here; the third is noted separately below.

The proposals would permit a scheduling order and discovery plan to provide for the preservation of electronically stored information and to include agreements reached under Rule 502 of the Federal Rules of Evidence. Each is an attempt to remind litigants that these are useful subjects for discussion and agreement. The Evidence Rules Committee is concerned that Rule 502 remains underused; an express reference in Rule 16 may promote its more effective use.

Rule 16(b)(3): Conference Before Discovery Motion: This proposal

would add a new Rule 16(b)(3)(v), permitting a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court."

Many courts, but less than a majority, now have local rules similar to this proposal. Experience with these rules shows that an informal pre-motion conference with the court often resolves a discovery dispute without the need for a motion, briefing, and order. The practice has proved highly effective in reducing cost and delay.

The Subcommittee considered an alternative that would have required a conference with the court before any discovery motion. In the end, it concluded that at present it is better simply to encourage this practice. Many judges do not require a pre-motion conference now. It is possible that local conditions and practices in some courts establish effective substitutes. Absent a stronger showing of need, it seems premature to adopt a mandate, but the consideration of this practice should encourage its use.

Rule 26(d)(1): Early Rule 34 Requests: The Subcommittee considered at length a variety of proposals that would allow discovery requests to be made before the parties' Rule 26(f) conference. The purpose of the early requests would not be to start the time to respond. Instead, the purpose is to facilitate the conference by allowing consideration of actual requests, providing a focus for specific discussion. In the end, the proposal has been limited to Rule 34 requests to produce.

The proposal adds a new Rule 26(d)(2), better set out in full than summarized:

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on any 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.

A corresponding change would be made in Rule 34(b)(2)(A),

setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties' first Rule 26(f) conference.

Some participants in the miniconference — particularly those who typically represent plaintiffs — said they would take advantage of this procedure to advance the Rule 26(f) conference and early discovery planning. Concrete disputes as to the scope of discovery could then be brought to the attention of the court at a Rule 16 conference. Others expressed skepticism, wondering why anyone would want to expose discovery strategy earlier than required and fearing that initial requests made before the conference are likely to be unreasonably broad and to generate an inertia that will resist change at the conference.

After considering these concerns, the Subcommittee concluded that the opportunity should be made available to advance the Rule 26(f) conference by providing a specific focus for discussion of Rule 34 requests, which often involve heavy discovery burdens. Little harm will be done if parties fail to take advantage of the opportunity, and real benefit may be gained if they do.

Proportionality: Discovery Proposals

Several proposals seek to promote responsible use of discovery proportional to the needs of the case. The most important address the scope of discovery directly by amending Rule 26(b)(1), and by promoting clearer responses to Rule 34 requests to produce. Others tighten the presumptive limits on the number and duration of depositions and the number of interrogatories, and for the first time add a presumptive limit of 25 to the number of requests for admission other than those that relate to the genuineness of documents. Yet another explicitly recognizes the present authority to issue a protective order specifying an allocation of expenses incurred by discovery.

Rule 26(b)(1): Proportionality By Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: In 1983 the Committee thought to have solved the problems of disproportionate discovery by adding the provision that has come to be lodged in present Rule 26(b)(2)(C)(iii). This rule directs that "on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that * * * (iii) 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."

Although the rule now directs that the court "must" limit discovery, on its own and without motion, it cannot be said to have realized the hopes of its authors. In most cases discovery now, as it was then, is accomplished in reasonable proportion to the realistic needs of the case. This conclusion has been established by repeated empirical studies, including the large-scale closed-case study done by the Federal Judicial Center for the Duke Conference. But at the same time discovery runs out of proportion in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate particularly contentious adversary behavior. The number of cases and the burdens imposed present serious problems. These problems have not yet been solved.

Several proposals were considered to limit the general scope of discovery provided by Rule 26(b)(1) by adding a requirement of "proportionality." Addition of this term without definition, however, generated concerns that it would be too open-ended to support uniform or even meaningful implementation. Limiting it to "reasonably proportional" did not allay those concerns. At the same time, many participants in the miniconference expressed respect for the principles embodied in Rule 26(b)(2)(C)(iii), finding it suitably nuanced and balanced. The problem is not with the rule text but with its implementation — it is not invoked often enough to dampen excessive discovery demands.

These considerations frame the proposal to revise the scope of discovery defined in Rule 26(b)(1) by transferring the analysis required by present Rule 26(b)(2)(C)(iii) to become a limit on the scope of discovery, so that discovery must be

> proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties's resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to cross-refer to (b)(1): the court remains under a duty to limit the frequency or extent of discovery that exceeds these limits, on motion or on its own.

Other changes as well are made in Rule 26(b)(1). The rule was amended in 2000 to introduce a distinction between party-controlled discovery and court-controlled discovery. Party-controlled discovery is now limited to "matter that is relevant to any party's claim or defense." That provision is carried forward in proposed

Rule 26(b)(1). Court-controlled discovery is now authorized to extend, on court order for good cause, to "any matter relevant to the subject matter involved in the action." The Committee Note made it clear that the parties' claims or defenses are those identified in the pleadings. The proposed amendment deletes the "subject matter involved in the action" from the scope of discovery. Discovery should be limited to the parties' claims or defenses. If discovery of information relevant to the claims or defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate.

Rule 26(b)(1) also would be amended by revising the penultimate sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This provision traces back to 1946, when it was added to overcome decisions that denied discovery solely on the ground that the requested information would not be admissible in evidence. A common example was hearsay. Although a witness often could not testify that someone told him the defendant ran through a red light, knowing who it was that told that to the witness could readily lead to admissible testimony. This sentence was amended in 2000 to add "Relevant" as the first word. The 2000 Committee Note reflects concern that the "reasonably calculated" standard "might swallow any other limitation on the scope of discovery." "Relevant" was added "to clarify that information must be relevant to be discoverable * * *." Despite the 2000 amendment, many cases continue to cite the "reasonably calculated" language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery.

To offset the risk that the provision addressing admissibility may defeat the limits otherwise defining the scope of discovery, the proposal is to revise this sentence to read: "Information within this scope of discovery need not be admissible in evidence to be discoverable." The limits defining the scope of discovery are thus preserved. The purpose of the amendment is to carry through the purpose underlying the 2000 amendment, with the hope that this further change will at last overcome the inertia that has thwarted this purpose.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "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." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples.

Several discovery rules cross-refer to Rule 26(b)(2) as a reminder that it applies to all methods of discovery. Transferring the restrictions of (b)(2)(C)(iii) to become part of (b)(1) makes it appropriate to revise the cross-references to include both (b)(1) and (b)(2). The revisions are shown throughout the proposed rules.

Proportionality: Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery. This power is implicit in present Rule 26(c), and is being exercised with increasing frequency. The amendment will make the power explicit, avoiding arguments that it is not conferred by the present rule text. The Committee soon will begin to focus on proposals advanced by some groups that greater changes should be made in the general presumption that the responding party should bear the costs imposed by discovery requests. It will be some time, however, before the Committee determines whether any broader recommendations might be made.

Proportionality: Rules 30, 31, 33, and 36: Presumptive Numerical Limits: Rules 30 and 31 establish a presumptive limit of 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. Rule 30(d)(1) establishes a presumptive time limit of 1 day of 7 hours for a deposition by oral examination. Rule 33(a)(1) sets a presumptive limit of "no more than 25 written interrogatories, including all discrete subparts." There are no presumptive numerical limits for Rule 34 requests to produce or for Rule 36 requests to admit. The proposals reduce the limits in Rules 30, 31, and 33. They add to Rule 36, for the first time, presumptive numerical limits. A presumptive limit of 25 Rule 34 requests to produce was studied at length but ultimately abandoned.

The proposals would reduce the presumptive limit on the number of depositions from 10 to 5, and would reduce the presumptive duration to 1 day of 6 hours. Rules 30 and 31 continue to provide that the court must grant leave to take more depositions "to the extent consistent with Rule 26(b)(1) and (2)."

Reducing the presumptive limit on the number of depositions was considered at length. Some judges at the Duke Conference expressed the view that civil litigators over-use depositions,

apparently holding the view that every witness who testifies at trial must be deposed beforehand. These judges noted that they regularly see lawyers effectively cross-examine witnesses in criminal trials without the benefit of depositions, a practice widely viewed as sufficient to satisfy the demands of due process. The judges also observed that they rarely, if ever, see witnesses effectively impeached with deposition transcripts. At the same time, many parties are opting to resolve their disputes through private arbitration or mediation services that are less expensive than civil litigation because they do not involve depositions, and yet these alternatives are thought sufficient to reach resolution of important disagreements.

Research by the FJC further supports these concerns, and also suggests that a presumptive limit of 5 depositions will have no effect in most cases. Emery Lee returned to the data base compiled for the 2010 FJC study to measure the frequency of cases with more than 5 depositions by plaintiffs or by defendants. The data base itself was built by excluding several categories of actions that are not likely to have discovery. The data for numbers of depositions were further limited by counting only cases in which there was at least one deposition. Drawing from reports by plaintiffs of how many depositions the plaintiffs took and how many depositions the defendants took, and parallel reports by defendants, the numbers ranged from 14% to 23% of cases with more than 5 depositions by the plaintiff or by the defendant. With one exception, the estimates were that 78% or 79% of these cases had 10 or fewer depositions. Other findings are that each additional deposition increases the cost of an action by about 5%, and that estimates that discovery costs were "too high" increase with the number of depositions.

On the other hand, many comments say that the present limit of 10 depositions works well — that leave is readily granted when there is good reason to take more than 10, and that parties do not wantonly take more than 5 depositions simply because the presumptive limit is 10. More pointedly, some lawyers who represent individual plaintiffs in employment discrimination cases have urged that they commonly need more than 5 depositions to establish their claims.

In short, it appears that less than one-quarter of federal court civil cases result in more than five depositions, and even fewer in more than ten. The question is whether it will be useful to revise Rules 30 and 31 to establish a lower presumptive threshold for potential judicial management. Setting the limit at 5 does not mean that motions and orders must be made in every case

that deserves more than 5 — the parties can be expected to agree, and should manage to agree, in most of these cases. But the lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and — when those avenues fail — in securing court supervision. The Committee Note addresses the concerns expressed by those who oppose the new limit by stressing that leave to take more than 5 depositions must be granted when appropriate. The fear that lowering the threshold will raise judicial resistance seems ill-founded. Courts are willing now to grant leave to take more than 10 depositions per side in actions that warrant a greater number. The argument that they will become reluctant to grant leave to take more than 5, or more than 10, is not persuasive.

Considering judicial experience and the FJC findings, and aiming to decrease the cost of civil litigation, making it more accessible for average citizens, the Committee is persuaded that the presumptive number of depositions should be reduced. Hopefully, the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.

Shortening the presumptive length of a deposition from 7 hours to 6 hours reflects revision of earlier drafts that would have reduced the time to 4 hours. The 4-hour limit was prompted by experience in some state courts. Arizona, for example, adopted a 4-hour limit several years ago. Judges in Arizona federal courts often find that parties stipulate to 4-hour limits based on their favorable experience with the state rule. But several comments have suggested that for many depositions, 4 hours do not suffice. At the same time, several others have observed that squeezing 7 hours of deposition time into one day, after accounting for lunch time and other breaks, often means that the deposition extends well into the evening. Judges also have noted that 6 hours of trial time makes for a very full day when lunch and breaks are considered. The reduction to 6 hours is intended to reduce the burden of deposing a witness for 7 hours in one day, but without sacrificing the opportunity to conduct a complete examination.

The proposal to reduce the presumptive number of Rule 33 interrogatories to 15 has not attracted much concern. There has been some concern that 15 interrogatories are not enough even for some relatively small-stakes cases. As with Rules 30 and 31, the Subcommittee has concluded that 15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number.

Rule 36 requests to admit are an established part of the rules, whether they be regarded as true "discovery" devices or as a device for framing the issues more directly than is accomplished even by contention interrogatories. The proposal to add a presumptive limit of 25 expressly exempts requests to admit the genuineness of documents, avoiding any risk that the limit might cause problems in document-heavy litigation. This proposal did not draw much criticism from those who commented on Subcommittee deliberations. (The Subcommittee also considered provisions that would generally defer the time for admissions to the completion of other discovery, but in the end decided that early requests can be useful.)

Proportionality: Rule 34 Objections and Responses: Discovery burdens can be pushed out of proportion to the reasonable needs of a case by those asked to respond, not only those who make requests. The Subcommittee considered adding to Rule 26(g) a provision that signing a discovery request, response, or objection certifies that it is "not evasive." That proposal was put aside in the face of concerns that "evasive" is a malleable concept, and that malleability will invite satellite litigation.

More specific concerns underlie Rule 34 proposals addressing objections and actual production. Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. This language is borrowed from Rule 33(b)(4), where it has served well. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision responds to the common lament that Rule 34 responses often begin with a "laundry list" of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld. Providing that information can aid the decision whether to contest the objections. The Committee Note also explains that it is proper to state limits on the extent of the search without further elaboration — for example, that the search was limited to documents created on or after a specified date, or maintained by identified sources.

Actual production is addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). Present Rule 34 recognizes a distinction between permitting inspection of documents, electronically stored information, or tangible things, and actually producing copies. The distinction, however, is not clearly developed in the rule. If a party elects to

produce materials rather than permit inspection, the current rule does not indicate when such production is required to be made. The new provision directs that a party electing to produce must state that copies will be produced, and directs that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. The Committee Note recognizes the value of "rolling production" that makes production in discrete batches. Rule 37 is amended by adding authority to move for an order to compel production if "a party fails to produce documents."

Cooperation

Reasonable cooperation among adversaries is vitally important to successful use of the resources provided by the Civil Rules. Participants at the Duke Conference regularly pointed to the costs imposed by hyperadversary behavior and wished for some rule that would enhance cooperation.

It would be possible to impose a duty of cooperation by direct rule provisions. The provisions might be limited to the discovery rules alone, because discovery behavior gives rise to many of the laments, or could apply generally to all litigation behavior. Consideration of drafts that would impose a direct and general duty of cooperation faced several concerns. Cooperation is an open-ended concept. It is difficult to identify a proper balance of cooperation with legitimate, even essential, adversary behavior. A general duty might easily generate excessive collateral litigation, similar to the experience with an abandoned and unlamented version of Rule 11. And there may be some risk that a general duty of cooperation could conflict with professional responsibilities of effective representation. These drafts were abandoned.

What is proposed is a modest addition to Rule 1. The parties are made to share responsibility for achieving the high aspirations expressed in Rule 1: "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Note observes that most lawyers and parties conform to this expectation, and notes that "[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

As amended, Rule 1 will encourage cooperation by lawyers and parties directly, and will provide useful support for judicial efforts to elicit better cooperation when the lawyers and parties fall short. It cannot be expected to cure all adversary excesses,

but it will do some good.

Package

These proposals constitute a whole that is greater than the sum of its parts. Together, these proposals can do much to reduce cost and delay. Still, each part must be scrutinized and stand, be modified, or fall on its own. The proposals are not interdependent in the sense that all, or even most, must be adopted to achieve meaningful gains.

Duke Rules Package

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.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

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 for the failure, the court must extend the time for service for an appropriate period. This subdivision 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).

Committee Note

The presumptive time for serving a defendant is reduced from 120 days to 60 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(C) when "the plaintiff has already taken title, a lesser interest, or possession as to any part of" the property.

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;

[present (v) and (vi) would be renumbered] * * *

Committee Note

The provision for consulting at a scheduling conference by

"telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed, and may be shaped by prefiling requests to preserve and responses to them.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

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~~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;

Committee Note

The scope of discovery is changed in several ways. Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii). Although the considerations are familiar, and have measured the court's duty to limit the frequency or extent of discovery, the change incorporates them into the scope of discovery that must be observed by the parties without court order.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. Proportional discovery relevant to any party's claim or defense suffices. Such discovery may support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears reasonably calculated to lead to the discovery of admissible evidence is also amended. Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery. Hearsay is a common illustration. The qualifying phrase — "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" — is omitted. Discovery of inadmissible information is limited to matter that is otherwise 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. The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is "reasonably calculated" to lead to the discovery of admissible evidence. Deleting the "reasonably calculated" phrase will further the purpose of the 2000 amendment that revised this sentence out of concern that, as expressed in the 2000 Committee Note, it "might swallow any other limitation on the scope of discovery."

Rule 26(b)(2)(A) is revised to reflect the addition of presumptive limits on the number of requests for admission under

Rule 36. The court may alter these limits just as it may alter the presumptive limits set by Rules 30, 31, and 33.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1). Rule 26(b)(2)(C) is further amended by deleting the reference to discovery "otherwise allowed by these rules or local rule." Neither these rules nor local rules can "otherwise allow" discovery that exceeds the scope defined by Rule 26(b)(1) or that must be limited under Rule 26(b)(2)(C).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that specify terms allocating expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.

Rule 26(d)(1)(B) is amended to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Former Rule 26(d)(2) is renumbered as (d)(3) and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan — issues about preserving electronically stored information and court orders on agreements to protect against waiver of privilege or work-product protection under Evidence Rule 502. Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed, and may be shaped by prefiling requests to preserve and responses to them.

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.

Committee Note

Rule 30 is amended to reduce the presumptive number of depositions to 5 by the plaintiffs, or by the defendants, or by the third-party defendants. Rule 30(a)(2), however, continues to direct that the court must grant leave to take more depositions to the extent consistent with Rule 26(b)(1) and (2). And Rule 30(a)(2)(A) continues to recognize that the parties may stipulate to a greater number. Just as cases frequently arise in which one or all sides reasonably need more than 10 depositions, so there will be still more cases that reasonably justify more than 5. First-line reliance continues to rest on the parties to recognize the cases in which more depositions are required, acting in accord with Rule 1. But if the parties fail to agree, the court is responsible for identifying the cases that need more, recognizing that the context of particular cases often will justify more. The court's determination is guided by the scope of discovery defined in Rule 26(b)(1) and the limiting principles stated in Rule 26(b)(2).

Rule 30(d) is amended to reduce the presumptive limit of a deposition to one day of 6 hours. Experience with the present 7-hour presumptive limit suggests that a deposition begun in the morning often runs into evening hours after accounting for breaks. Six hours should suffice for most depositions, and encourage efficient use of the time while providing a less arduous experience

for the deponent.

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 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

Committee Note

Rule 31 is amended to adopt for depositions by written questions the same presumptive limit of 5 depositions by the plaintiffs, or by the defendants, or by the third-party defendants as is adopted for Rule 30 depositions by oral examination.

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).

Committee Note

Rule 33 is amended to reduce from 25 to 15 the presumptive limit on the number of interrogatories to parties. As with the reduction in the presumptive number of depositions under Rules 30 and 31, the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices. There is no change in the authority to increase the number by stipulation or by court order. As with other numerical limits on discovery, the court should recognize that some cases will require a greater number of interrogatories, and set a limit 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. . * * *

Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(1)(B). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to make it clear that objections to Rule 34 requests must be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection stated in the request or by a later reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld." Examples would be a statement that the search was limited to materials created during a defined period, or maintained by identified sources.

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). * * *

[Present (2), (3), (4), (5), and(6) would be renumbered]

Committee Note

For the first time, a presumptive limit of 25 is introduced for the number of Rule 36(a)(1)(A) requests to admit the truth of facts, the application of law to fact, or opinions about either. "[A]ll discrete subparts" are included in the count, to be

determined in the same way as under Rule 33(a)(1). The limit does not apply to requests to admit the genuineness of any described document under Rule 36(a)(1)(B). As with other numerical limits on discovery, the court should recognize that some cases will require a greater number of requests, and set a limit consistent with the limits of 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.

Committee Note

Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Rules Text

Rule 1 Scope and Purpose

* * * [These rules] should be construed, 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 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 for the failure, the court must extend the time for service for an appropriate period. 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.

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

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

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

(iii) provide for disclosure, 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 502 of Evidence 502;

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

[present (v) and (vi) would be renumbered] * * *

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.

(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, interrogatories, and requests for admissions, or on the length of depositions under Rule 30.

* * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery if it determines that: * * *

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

* * *

(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 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, 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 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 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 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the 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 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 additional requests to the extent consistent with Rule 26(b)(1) and (2). * * *

[Present (2), (3), (4), (5), and(6) would be renumbered]

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.

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B. Rule 37(e): Action to Recommend Publication of Revised Rule 37(e)

In January, the Standing Committee preliminarily approved proposed amendments to Rule 37(e) for publication in August, 2013, on condition that the Advisory Committee consider the issues raised during the January meeting and make appropriate revisions in the draft rule and Note, returning for approval by the Standing Committee during the June meeting. The Advisory Committee's Discovery Subcommittee has carefully considered possible revisions responsive to the concerns raised by the Standing Committee. The Subcommittee's revisions were submitted to the Advisory Committee during its Spring meeting and -- with further revisions -- unanimously approved by the Advisory Committee.

The fundamental thrust of the proposal is as presented during the Standing Committee's January meeting -- to amend the rule to address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions. Rule amendments for this purpose were unanimously proposed by the E-Discovery Panel at the May, 2010, Duke Conference, and the Discovery Subcommittee set to work on developing amendments soon thereafter. A mini-conference was convened in September, 2011, to evaluate the various proposed approaches the Subcommittee had identified. From that point, the Subcommittee refined the approach that was presented in January.

The proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation. But it provides guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures should not be subject to sanctions. In addition, the amendment provides a uniform national standard for culpability findings to support imposition of sanctions. Except in exceptional cases in which a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions may be imposed only on a finding that the party acted willfully or in bad faith. So the amendment rejects the view adopted in some cases, such as Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), that would permit sanctions for negligence.

Below is the revised rule and Note, along with a list of questions that the Advisory Committee feels should be published with the draft of the rule amendment, in order to focus public comment on issues that have been raised, including those raised by members of the Standing Committee. There follows an

overstrike/double underline version of the rule (and similar version of the Note) showing changes to the restyled rule since the Standing Committee's January meeting.

It seems simplest to address separately the various issues raised during the January meeting.

Displacement of Other Laws

Concern was expressed in January about draft Note language saying that amended Rule 37(e) "displaces any other law that would authorize imposing litigation sanctions in the absence of a finding of willfulness or bad faith, including state law in diversity cases."

The Note language concerning the origin of the obligation to preserve has been revised as follows:

> This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. ~~arises from the common law, and~~ It may in some instances be triggered or clarified by a court order in the case.

In addition, further revisions removed "displacement" from the Note:

> The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). ~~displaces any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases.~~

Use of the Term "Sanction"

Concern was expressed about use of the word "sanction," which might have adverse significance when applied to the conduct of a lawyer, such as requiring that the attorney report the imposition of this "sanction" to the state bar.

The following additional sentence was added to the Note:

> It [the new rule] borrows the term "sanctions" from Rule 37(b)(2), and does not attempt to prescribe whether such measures would be so regarded for other purposes, such as an attorney's professional responsibility.

"Irreparable Prejudice" provision

Standing Committee members expressed concern that the proposed rule language would permit imposition of litigation sanctions whenever the loss of information prevented a party from presenting "a claim or defense" even when the claim or defense is of minor significance in the litigation. In addition, as a matter of style some members urged that the Advisory Committee reconsider using the word "meaningful" in the rule.

Rule 37(e)(1)(B)(ii) has been revised to authorize imposition of sanctions in the absence of a finding of willfulness or bad faith only when the court finds that the party's actions:

> irreparably deprived a party of any meaningful opportunity to present or defend against the ~~a~~ claims ~~or defense~~ in the litigation.

A party seeking sanctions under this revised provision must show that it was disabled from presenting its side in the litigation. The word "meaningful" has been retained because the committee concluded that it most accurately reflects the narrow nature of this exception.

In order to make clearer the narrowness of this authorization for sanctions, the Note has been substantially revised as follows:

> This subdivision ~~Rule 37(e)(2)(B)~~ permits the court to impose sanctions in narrowly limited circumstances without making a finding of either bad faith or willfulness. The need to show bad faith or willfulness is excused only by finding an impact more severe than the substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown that a party failed to preserve discoverable information that should have been preserved. In addition, it must be shown that the failure irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. ~~As under Rule 37(e)(2)(A), the threshold for sanctions is that the court find that lost information reasonably should have been preserved by the party to be sanctioned.~~
>
> The first step in determining whether a party's failure to preserve discoverable information that should have been preserved has irreparably deprived another party of any meaningful opportunity to present or defend against the claims in the litigation is to examine carefully the apparent

importance of the lost information. Particularly with electronically stored information, alternative sources may often exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A) can reduce the adverse impact. If a party loses readily accessible electronically stored information, for example, the court may direct the party to attempt to retrieve the information by alternative means. If such measures are not possible or fail to restore important information, the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The "irreparably deprived" test is more demanding than the "substantial prejudice" that permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff's failure to preserve an automobile claimed to have defects that caused injury without affording the defendant manufacturer an opportunity to inspect the damaged vehicle may be an example. Such a situation led to affirmance of dismissal, as not an abuse of discretion, in Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically important event. But even such losses may not irreparably deprive another party of any meaningful opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the evidence presented by the party who lost discoverable information that should have been preserved, along with possible presentation of evidence and argument about the significance of the lost information, should often afford a meaningful opportunity to litigate.

The requirement that a party be irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation is further narrowed by looking to all the claims in the action. Lost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed — or should be limited to the affected claims or defenses — if those claims or defenses are not central to the litigation.

It should also be noted that the first two questions in the list of questions for public comment invite input on issues related to those raised by the Standing Committee discussion:

1. Should the rule be limited to sanctions for loss of

electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

Acts of God

Standing Committee members raised concerns about whether proposed (B)(ii) was meant to authorize imposition of sanctions when information was lost without any fault by the party that lost it.

The Discovery Subcommittee spent considerable time evaluating this issue. It even considered proposing that an alternative amendment be published as an appendix to the main proposal, eliminating (B)(ii) and limiting the rule to loss of electronically stored information, on the theory that loss of that sort of evidence would rarely, if ever, have the cataclysmic consequences that (B)(ii) addresses.

Eventually, the Advisory Committee decided that changing proposed Rule 37(e)(1)(B) to focus on "the party's actions" rather than "the party's failure" afforded a solution to this problem. The proposed version of the rule therefore will permit sanctions in the absence of willfulness or bad faith only if "the party's actions" irreparably deprive the opponent of any meaningful opportunity to litigate the case. This will preclude sanctions when information is lost through causes other than the party's actions, such as a natural disaster. This point is made by the following new Note language:

> A special situation arises when discoverable information is lost because of events outside a party's control. A party

may take the steps that should have been taken to preserve the information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious computer attacks. Curative measures may be appropriate in such circumstances – this is information that should have been preserved – but sanctions are not. The loss is not caused by "the party's actions" as required by (e)(1)(B).

Preservation of current Rule 37(e) Language

During the January meeting, concern was expressed about the absence of any explanation in the Note for the abrogation of Rule 37(e). The Discovery Subcommittee had obtained a thorough research memo from Andrea Kuperman showing that current Rule 37(e) has been used only very rarely. It concluded that there was no circumstance that would be covered by current Rule 37(e) but would not be protected under the proposed revision.

The Note has been amended to provide this explanation:

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule provides: "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 information system." The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

In addition, the Advisory Committee proposes that the invitation for public comment highlight this issue:

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

This treatment is intended both to make a suitable record showing that abrogation of current Rule 37(e) is not intended in any way to remove protection it provided, and to permit the public comment period to illuminate whether there is reason for worry

about abrogating the current rule.

Expanded definition of "Substantial Prejudice"

In January, it was suggested that the term "substantial prejudice in the litigation" in Rule 37(e)(1)(B)(i) might profitably be given further definition, and the Advisory Committee was urged to invite public comment on this topic. The Note to Rule 37(e)(1)(B)(i) already provides:

> [T]he court must find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

In addition, the Advisory Committee proposes to raise this issue during the public comment period with the following invitation to comment:

> 4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Added flexibility on Curative Measures

Another topic raised by some members of the Standing Committee in January was that the rule might unduly limit curative measures the court might deem desirable. Reflecting on this concern, the Discovery Subcommittee concluded that the rule could be improved by removing the phrase "the party to undertake" from Rule 37(e)(1)(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

The removal of this phrase means that curative measures are not limited to orders directed to the party that failed to preserve information. Additional Note material addresses this possibility:

Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.

Role of Other Preservation Duties

Another concern raised during the January meeting was the role of preservation duties imposed by other bodies of law, such as statutes or regulations. Note language has been added addressing this issue:

Although the rule focuses on the common law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation.

Removal of "reasonably" from Rule 37(e)(1)

Rule 37(e)(2) focuses on the reasonableness and proportionality of parties' conduct in preserving information in the anticipation or conduct of litigation. A redundant invocation of "reasonably" also appeared in Rule 37(e)(1) and has been removed.

"Clean" version of Rule 37(e) amendment

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 information 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 in the litigation.

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

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

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

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

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

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

COMMITTEE NOTE

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. The amended rule is not limited, as is the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on

a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule provides: "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 information system." The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

Amended Rule 37(e) applies to loss of discoverable information "that should have been preserved in the anticipation or conduct of litigation." This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. It may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been preserved.

Except in very rare cases in which a party's actions cause the loss of information that irreparably deprives another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.

The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by the applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court's scheduling order may address preservation. These amendments may prompt early attention to matters also addressed by Rule 37(e).

Subdivision (e)(1)(A). When the court concludes that a party failed to preserve information that should have been preserved in the anticipation or conduct of litigation, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(1) and (2)(C).

In addition to, or instead of, ordering further discovery, the court may order curative measures, such as requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve. The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts caused by the failure to preserve information. Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.

Subdivision (e)(1)(B)(i). This subdivision authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for willful or bad-faith failure to preserve information, whether or not there was a court order requiring such preservation. Rule 37(e)(1)(B)(i) is designed to provide a uniform standard in federal court for sanctions for failure to preserve. It rejects decisions that have authorized the imposition of sanctions -- as opposed to measures authorized by Rule 37(e)(1)(A) -- for negligence or gross negligence. It borrows the term "sanctions" from Rule 37(b)(2), and does not attempt to prescribe whether such measures would be so regarded for other purposes, such as an attorney's professional responsibility.

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality. Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss of information may affect other decisions about discovery, such as those under Rule 26(b)(1), (b)(2)(B) and (b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the exceptional circumstances described in Rule 37(e)(2)(B) are shown.

The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, the court must find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

Second, it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(2).

Subdivision (e)(1)(B)(ii). This subdivision permits the court to impose sanctions in narrowly limited circumstances without making a finding of either bad faith or willfulness. The need to show bad faith or willfulness is excused only by finding an impact more severe than the substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown that a party failed to preserve discoverable information that should have been preserved. In addition, it must be shown that the failure irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The first step in determining whether a party's failure to preserve discoverable information that should have been preserved has irreparably deprived another party of any meaningful opportunity to present or defend against the claims in the litigation is to examine carefully the apparent importance of the lost information. Particularly with electronically stored information, alternative sources may often exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A) can reduce the adverse impact. If a party loses readily accessible electronically stored information, for example, the court may direct the party to attempt to retrieve the information by alternative means. If such measures are not possible or fail to restore important information, the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The "irreparably deprived" test is more demanding than the "substantial prejudice" that permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff's failure to preserve an automobile claimed to have defects that caused injury without affording the defendant manufacturer an opportunity to inspect the damaged vehicle may be an example. Such a situation led to affirmance of dismissal, as not an abuse of discretion, in Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically important event. But even such losses may not irreparably deprive another party of any meaningful opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the evidence presented by the party who lost discoverable information that should have been preserved, along with possible presentation of evidence and argument about the significance of the lost information, should often afford a meaningful opportunity to litigate.

The requirement that a party be irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation is further narrowed by looking to all the claims in the action. Lost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed — or should be limited to the affected claims or defenses — if those claims or defenses are not central to the litigation.

A special situation arises when discoverable information is lost because of events outside a party's control. A party may take the steps that should have been taken to preserve the information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious computer attacks. Curative measures may be appropriate in such circumstances — this is information that should have been preserved — but sanctions are not. The loss is not caused by "the party's actions" as required by (e)(1)(B).

Subdivision (e)(2). These factors guide the court when asked to adopt measures under Rule 37(e)(1)(A) due to loss of information or to impose sanctions under Rule 37(e)(1)(B). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these

events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation. Although the rule focuses on the common law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

The fourth factor emphasizes a central concern -- proportionality. The focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(1) is amended to make proportionality

a central factor in determining the scope of discovery. Rule 37(e)(2)(D) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts. A party may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the fifth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature resort to the court; amendments to Rule 26(f)(3) direct the parties to address preservation in their discovery plan, and amendments to Rule 16(c)(3) invite provisions on this subject in the scheduling order. Ordinarily the parties' arrangements are to be preferred to those imposed by the court. But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court.

Questions for invitation to comment

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It

has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

"Dirty" version of 37(e) amendment

(Showing changes since January Standing Committee meeting)

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 information system.~~

(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

~~failure~~:

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

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

(2) *Factors to be considered in assessing a party's conduct* ~~*Determining reasonableness and willfulness or bad faith*~~. The court should consider all relevant factors i~~n~~ 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 ~~, the court should consider all relevant~~ factors~~,~~ include~~ing~~:

(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 ~~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.

DRAFT COMMITTEE NOTE

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that

might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. The amended rule ~~It~~ is not limited, as is the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule provides: "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 information system." The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

Amended Rule 37(e) applies to loss of discoverable information "that ~~reasonably~~ should have been preserved in the anticipation or conduct of litigation." This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. ~~arises from the common law, and~~ It may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been ~~be~~ preserved.

Except in very rare cases in which a party's actions cause the loss of information that irreparably deprives~~d~~ another party of any meaningful opportunity to present or defend against the ~~a~~ claims in the litigation, ~~or defense,~~ sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.

The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). ~~displaces any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases.~~ But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by the applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court's scheduling order may address preservation. These amendments may prompt early attention to matters also addressed by Rule 37(e).

~~Unlike the 2006 version of the rule, amended Rule 37(e) is not limited to "sanctions under these rules." It provides rule-based authority for sanctions for loss of all kinds of discoverable information, and therefore makes unnecessary resort to inherent authority.~~

Subdivision (e)(1)(A). When the court concludes that a party failed to preserve information that should have been preserved in the anticipation or conduct of litigation, ~~it reasonably should have preserved,~~ it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(1) and (2)(C).

In addition to, or instead of, ordering further discovery, the court may order ~~the party that failed to preserve information to take~~ curative measures, such as requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information that the court would not have

ordered the party to create but for the failure to preserve. The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts caused by the failure to preserve information. Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.

Subdivision (e)(1)(B)(i). This subdivision authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for willful or bad-faith failure to preserve information, whether or not there was a court order requiring such preservation. Rule 37(e)(1)(B)(i) is designed to provide a uniform standard in federal court for sanctions for failure to preserve. It rejects decisions that have authorized the imposition of sanctions -- as opposed to measures authorized by Rule 37(e)(1)(A) -- for negligence or gross negligence. It borrows the term "sanctions" from Rule 37(b)(2), and does not attempt to prescribe whether such measures would be so regarded for other purposes, such as an attorney's professional responsibility.

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality. Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss of information may affect other decisions about discovery, such as those under Rule 26(b)(1), (b)(2)(B) and ~~26~~(b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the exceptional circumstances described in Rule 37(e)(2)(B) are shown.

The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information ~~reasonably~~ should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, ~~it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(3).~~

~~Second,~~ the court must ~~also~~ find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if these measures

can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

Second, it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(2).

Subdivision (e)(1)(B)(ii). This subdivision ~~Rule 37(e)(1)(B)(ii)~~ permits the court to impose sanctions in narrowly limited circumstances without making a finding of either bad faith or willfulness. The need to show bad faith or willfulness is excused only by finding an impact more severe than the substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown that a party failed to preserve discoverable information that should have been preserved. In addition, it must be shown that the failure irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. ~~As under Rule 37(e)(2)(A), the threshold for sanctions is that the court find that lost information reasonably should have been preserved by the party to be sanctioned.~~

The first step in determining whether a party's failure to preserve discoverable information that should have been preserved has irreparably deprived another party of any meaningful opportunity to present or defend against the claims in the litigation is to examine carefully the apparent importance of the lost information. Particularly with electronically stored information, alternative sources may often exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A) can reduce the adverse impact. If a party loses readily accessible electronically stored information, for example, the court may direct the party to attempt to retrieve the information by alternative means. If such measures are not possible or fail to restore important information, the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The "irreparably deprived" test is more demanding than the "substantial prejudice" that permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff's failure to preserve an automobile claimed to have defects that caused injury without affording the defendant manufacturer an opportunity to inspect the

damaged vehicle may be an example. Such a situation led to affirmance of dismissal, as not an abuse of discretion, in Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically important event. But even such losses may not irreparably deprive another party of any meaningful opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the evidence presented by the party who lost discoverable information that should have been preserved, along with possible presentation of evidence and argument about the significance of the lost information, should often afford a meaningful opportunity to litigate.

The requirement that a party be irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation is further narrowed by looking to all the claims in the action. Lost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed — or should be limited to the affected claims or defenses — if those claims or defenses are not central to the litigation.

A special situation arises when discoverable information is lost because of events outside a party's control. A party may take the steps that should have been taken to preserve the information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious computer attacks. Curative measures may be appropriate in such circumstances — this is information that should have been preserved — but sanctions are not. The loss is not caused by "the party's actions" as required by (e)(1)(B).

~~Even if bad faith or willfulness is shown, sanctions may only be imposed under Rule 37(e)(2)(A) when the loss of information caused substantial prejudice in the litigation. Rule 37(e)(2)(B) permits sanctions in the absence of a showing of bad faith or willfulness only if that loss of information deprived a party of any meaningful opportunity to present a claim or defense. Examples might include cases in which the alleged injury-causing instrumentality has been lost before the parties may inspect it, or cases in which the only evidence of a critically important event has been lost. Such situations are extremely rare.~~

~~Before resorting to sanctions, a court would ordinarily consider lesser measures, including those listed in Rule 37(e)(1), to avoid or minimize the prejudice. If such measures substantially cure the prejudice, Rule 37(e)(2)(B) does not apply. Even if such prejudice persists, the court should employ the least severe sanction.~~

Subdivision (e)(2). These factors guide the court when asked to adopt measures under Rule 37(e)(1)(A) due to loss of information

or to impose sanctions under Rule 37(e)(1)(B). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation. Although the rule focuses on the common law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light

of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

The fourth factor emphasizes a central concern -- proportionality. The focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(1) is amended to make proportionality a central factor in determining the scope of discovery. ~~Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime.~~ Rule 37(e)(2)(D) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts. A party may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the fifth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature resort to the court; amendments to Rule 26(f)(3) directs the parties to address preservation in their discovery plan, and amendments to Rule 16(c)(3) invite provisions on this subject in the scheduling order. ~~discuss and to attempt to resolve issues concerning preservation before presenting them to the court.~~ Ordinarily the parties' arrangements are to be preferred to those imposed by the court. But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court.

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