The 2015 Civil Rules Package As Transmitted to Congress

Thomas Y. Allman[1]

The Duke Amendments

Rule 37(e)

I. Introduction

This Memorandum describes the "package" of amendments to the Federal Rules of Civil Procedure which were collectively forwarded to Congress by the Supreme Court on April 29, 2015.[2] A copy of the text of each of the proposals is included in the Appendix to this Paper.[3] The Amendments will become effective on December 1, 2015 if Congress does not adopt legislation to reject, modify, or defer them.[4]

Background

The amendments transmitted to Congress culminated a four year effort by the Civil Rules Advisory Committee (the "Rules Committee") operating under the supervision of the Committee on Rules of Practice and Procedure of the Judicial Conference (the "Standing Committee").

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[1] © 2015 Thomas Y. Allman. Mr. Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® WG 1 on E-Discovery and the E-Discovery Committee of Lawyers for Civil Justice.

[2] Transmittal Memo and Exhibits, Chief Justice Roberts, April 29, 2015 (collectively referred to as the "Rules Transmittal"), copy at http://www.uscourts.gov/file/document/congress-materials. Citations to the text and Committee notes are to the internally numbered pages of the Exhibit (dated September 26, 2014) which commences at (unnumbered) page 45 (containing the "redline" version of text and notes).

[3] A minor unrelated amendment to Rule 55 is also included but is not separately discussed herein..

[4] 28 U.S.C. § 2074 (if transmitted to the Congress not later than May 1, they "shall take effect no earlier than December 1 of the year in which . . . transmitted unless otherwise provided by law").

The amendment process began with the 2010 Conference on Civil Litigation held by the Rules Committee at the Duke Law School (the "Duke Conference"). Key "takeaways" from the Conference were the need for improved case management, application of the long-ignored principle of "proportionality" and an emphasis on the role of cooperation among parties in discovery.[5] In addition, an E-Discovery Panel "reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure."[6]

The task of developing individual rule proposals was split between the "Duke" Subcommittee, chaired by the Hon. John Koeltl, who had organized and led the Conference, and the Discovery Subcommittee, chaired by the Hon. Paul Grimm.[7] Both Subcommittees vetted interim draft rule proposals at "mini-conferences" of experts, interested parties and committee members.

An initial "package" of the proposals from both efforts was released for public comment in August, 2013.[8] After the close of the public comment period, the subcommittees developed revisions to some of them. Based on those recommendations, including last minute changes to proposed Rule 37(e),[9] revised proposals were adopted by the Rules Committee at its April 10-11, 2014 meeting in Portland, Oregon.

The Standing Committee approved the revised proposals (and a new Rule 37(e) Committee Note)[10] at its May 29, 2014 meeting. The Standing Committee in turn submitted the proposals and a revised Rules Committee Report (the "June 2014 RULES REPORT") [11] to the Judicial Conference, which approved and forwarded them to the Supreme Court.

The Supreme Court approved the full package, after suggesting certain minor changes discussed below,[12] and transmitted it, together with certain exhibits, to Congress on April 29, 2015.

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[5] An excellent description of the Conference is contained in the Report to the Chief Justice issued in September, 2010. Memo, Rules Committee to The Chief Justice, September 10, 2010, copy at file:///C:/Users/PC/Downloads/report_to_the_chief_justice_0.pdf.

[6] John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010).

[7] The Discovery Subcommittee was originally chaired by Judge David Campbell prior to his becoming Chair of the Rules Committee.

[8] The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules ("2013 PROPOSAL") is found at http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf.

[9] Advisory Committee Makes Unexpected Changes to 37(e), April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/.

[10] The Note was contained in a May 2014 Rules Committee Report ("May 2014 REPORT"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf.

[11] The Report may be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf. References to its contents appear throughout this Paper as appropriate.

[12] *See* Section (7). The only changes suggested by the Supreme Court after its review involved recommendations for the Committee Notes for Rules 4 and 84 (and in regard to the Abrogation of the Appendix of Forms).

Public Participation

The Rule Committee conducted Public Hearings on the initial proposals in late 2013 and early 2014 that involved 120 testifying witnesses.[13] In addition, the Committee received over 2300 written comments.[14]

Expansive comments on the initial proposals were provided by Lawyers for Civil Justice ("LCJ")[15] and the American Association for Justice ("AAJ," formerly "ATLA").[16] The AAJ urged rejection of rules that added proportionality factors to the scope of discovery, imposed reduced presumptive limits and "made sanctions less likely in instances of spoliation" whereas LCJ supported limiting sanctions, adding proportionality to the scope of discovery, acknowledging cost-allocation and making reductions in presumptive numerical limits.

In addition, the Federal Magistrate Judges Association ("FMJA"), the Association of Corporate Counsel ("ACC"), the Department of Justice ("DOJ"), the Sedona Conference® WG1 Steering Committee ("Sedona") and a cross-section of state bar associations also dealt comprehensively with the proposals.

Support for the most controversial of "Duke" amendments (Rules 26(b)(1) and [subsequently dropped] changes to Rules 33, etc.) came from corporate entities, affiliated advocacy groups and corporate-oriented law firms. Opposition was expressed by representatives of individual claimants and members of the academic community. The replacement for Rule 37(e) was both supported and opposed by a cross-section of witnesses and comments. These comments are summarized in more detail in Section III, below.

II. The "Duke" Amendments

The Rules Committee viewed the "Duke" amendments [all proposals except Rule 37(e)] as an integrated package.[17] The replacement for current Rule 37(e) was seen as independent of the Duke proposals, but necessary to deal with failures to preserve ESI in a more satisfactory manner.

We treat the Duke Amendments first.

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[13] The first hearing was held by the Rules Committee in Washington, D.C. on November 7, 2013 and was followed by a second hearing on January 9, 2014 in Phoenix and a third and final hearing on February 7, 2014 at the Dallas (DFW) airport. Transcripts of the three are available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees.

[14] The written comments are archived at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

[15] LCJ Comments, August 30, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267, as supplemented.

[16] AAJ Comments, December 19, 2013, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372.

[17] June 2014 RULES REPORT, B-14 ("the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process").

(1) Cooperation (Rule 1)

Rule 1 speaks of the need to achieve the "just, speedy, and inexpensive determination of every action and proceeding." It is proposed that Rule 1 should be amended so that it will be "construed, ~~and~~ administered and employed by the court and the parties to secure" those goals.

The Committee seriously considered but ultimately refused to recommend that Rule 1 require that parties "should cooperate to achieve these ends."[18] Cooperation was heavily emphasized at the Duke Conference and has assumed prominence as a result of the Sedona Conference® Cooperation Proclamation.[19] Many Local Rules[20] and other e-discovery initiatives[21] invoke cooperation as an aspirational standard.

The concern with adding "cooperation" to the text of Rule 1 was that the addition could have "collateral consequences."[22] It would have added "one more point on which parties can disagree and blame the other when it is to their advantage."[23] A similar attempt was rejected in 1978.[24]

According to the Committee Note, the amendment emphasizes that "the parties share the responsibility to employ the rules" in that matter. The Note further observes that "most lawyers and parties cooperate to achieve those ends" and that it is important to discourage "over-use, misuse, and abuse of procedural tools that increase cost and result in delay."

The Note also states that "[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."[25]

Public Comments

Concerns were raised during the public comment period about the references to "cooperation" in the Committee Note. As Lawyers for Civil Justice put it, "[u]ntil the concept of 'cooperation can be defined so as to provide objective ways to evaluate a

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[18] *See* Duke Subcommittee Initial Sketch for Rule 1, at 27 (171 of 732), copy at file:///C:/Users/PC/Downloads/ST2012-06_Revised.pdf.
[19] The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009).
[20] *See, e.g.,* Local Rule 26.4, Southern and Eastern District of N.Y. (the expectation of cooperation of counsel must be "consistent with the interests of their clients").
[21] *See* [MODEL] STIPULATED ORDER (N.D. CAL), ¶ 2, ("[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the [litigation]).
[22] Minutes, November 2, 2012 Rules Committee Meeting, at lines 616-622.
[23] LCJ Comment, The Need for Meaningful Rule Amendments, June 5, 2012, 4; copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_duke_proposals_060512.pdf.
[24] Steven S. Gensler, Some Thoughts on the Lawyer's E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 547 (2009)(language was proposed in 1978 authorizing sanctions for failure to have cooperated in framing an appropriate discovery plan).
[25] Committee Note, 1-2.

party's compliance – including the proper balance between cooperative actions and the ethics rules and professional requirements of effective representation – the Committee Note should not be amended to include an unlimited exhortation to cooperation."[26]

One problem is the uncertainty as to whether "cooperation" means something more than a willingness to take opportunities to discuss defensible positions in good faith[27] – in short, whether it mandates compromise.[28]

Revised Committee Note

Ultimately, at the May 2014 Standing Committee meeting, it was announced that the Committee Note would be further amended to clarify that the change to the rule was not intended to serve as a basis for sanctions for a failure to cooperate.[29]

The final version of the Note thus adds that "[t]his amendment does not create a new or independent source of sanctions" and "neither does it abridge the scope of any other of these rules."[30]

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

A series of amendments are proposed in order to see that cases are "resolved faster, fairer, and with less expense" by ensuring that judges "manage them early and actively."[31]

Timing (Service of Process)(Rule 4(m))[32]

The time limits in Rule 4(m) governing the service of process are to be reduced in number from 120 to 90 days. The intent is to "reduce delay at the beginning of litigation."[33] The subdivision does not apply to service in a foreign country "or to service of a notice under Rule 71.1(d)(A)."

In response to a request by the Supreme Court, the final version of the applicable Note included in the Rules Transmittal package sent to Congress no longer makes the

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[26] LCJ Comment, *supra*, n. 15, August 30, 2013, at 20.
[27] Gensler, *supra*, at 546 (the correctness of the inference "turn[s] on the definition of cooperation").
[28] *Id*. (the view that cooperation means "a willingness to move off of defensible positions – to compromise – in an effort to reach agreement" is not what Rules 26(f), 26(c) or 37(a) actually demand).
[29] Minutes, Standing Committee Meeting, May 29-30, 2014, at 5 ("[t]he added language would make it clear that the change was not intended to create a new source for sanctions motions"); *see also* June 2014 RULES REPORT at B-13 ("[o]ne concern was this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate").
[30] Committee Note, 2.
[31] June 2014 RULES REPORT, B-12.
[32] For changes to Rule 4(d), see Subsection (7).
[33] Committee Note, 4 (acknowledging that shortening the presumptive time will increase the frequency of occasions to extend the time for good cause).

observation that shortening the presumptive time for service will increase the occasions to extend the time ~~for good cause~~.[34]

Default Judgment

The interplay between Rules 54(b), 55(c) and 60 (b) is to be clarified by inserting the word "final" in front of the reference to default judgment in Rule 55(c). This change was not discussed at the Public Hearings and has not garnered discussion beyond that of the proposed Committee Note.

Discovery Requests Prior to Meet and Confer

A new provision (Rule 26(d)(2)("Early Rule 34 Requests")) will be added to allow delivery of discovery requests prior to the "meet and confer" required by Rule 26(f). The response time will not commence, however, until after the first Rule 26(f) conference. Rule 34(b)(2)(A) will be amended by a parallel provision as to the time to respond "if the request was delivered under 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference."

The Committee Note explains that this relaxation of the existing "discovery moratorium" is "designed to facilitate focused discussion during the Rule 26(f) Conference," since discussion may produce changes in the requests.[35]

Scheduling Conference

Rule 16(b)(1) will be modified by striking the reference to conducting scheduling conferences by "~~telephone, mail, or other means~~" so as to encourage direct discussions among the parties and the Court. The Rule will merely refer to the duty to issue a schedule order after consulting "at a scheduling conference." The Committee Note observes that the conference may be held "in person, by telephone, or by more sophisticated electronic means" and "is more effective if the court and parties engage in direct simultaneous communication."[36]

Scheduling Orders: Timing

In the absence of "good cause for delay" a judge will be required by an amendment to Rule 16(b)(2) to issue the scheduling order no later than 90 days after any defendant has been served or 60 days after any appearance of a defendant, down from 120 and 90 days, respectively, in the current rule.

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[34] The April 3, 2015 Memorandum from the Judicial Conference to the Supreme Court acknowledged receipt of the request and approval of the change without explaining the reason for doing so. Rule Transmittal, *supra*, n. 2 (at unnumbered page 129 of 144).
[35] Committee Note, 25.
[36] *Id.*, 7 (excluding the use of "mail" as a method of exchanging views).

The Committee Note provides that in some cases, parties may need "extra time" to establish "meaningful collaboration" between counsel and the people who may provide the information needed to participate in a useful way.[37]

Scheduling Orders: Pre-motion Conferences

Rule 16(b)(3)(B)("Contents of the Order") will be amended in subsection (v) to permit a court to "direct that before moving for an order relating to discovery the movant must request a conference with the court." The Committee Note explains that "[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion."[38]

Scheduling Orders: Preservation

In parallel with changes to Rule 26(f)(3)(C) requiring that parties state their views on "disclosure, ~~or~~ discovery, or preservation" of ESI, Rule 16(b)(3)(B)(iii) will permit an order to provide for "disclosure, ~~or~~ discovery, or preservation" of ESI.

The Committee Note to Rule 16 observes that "[p]arallel amendments of Rule 37(e) [will] recognize that a duty to preserve discoverable information may arise before an action is filed."[39] The Note to Rule 37(e) states that "promptly seeking judicial guidance about the extent of reasonable preservation may be important" if the parties cannot reach agreement about preservation issues.[40] The Note also opines that "[p]reservation orders may become more common" as a result of the encouragement to address preservation.[41]

Scheduling Orders: FRE 502 Orders

In parallel to changes in Rule 26(f)(3)(D) requiring parties to discuss whether to seek orders "under Federal Rules of Evidence 502" regarding privilege waiver, Rule 16(b)(3)(B)(iii)(iv) will permit an order to include agreements dealing with asserting claims of privilege or of protection as trial-preparation materials, "including agreements reached under Federal Rule of Evidence FRE 502."

The unrestricted sequence of discovery specified under Rule 26(d)(3) will apply unless "the parties stipulate or" the court orders otherwise, and the requirement that a party act "~~on motion~~" is stricken.

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[37] *Id*., 8.
[38] *Id*., 9. *See also* Steven S. Gensler and Lee H. Rosenthal, The Reappearing Judge, 61 U. KAN. L. REV. 849, 861 (2013)(" Many judges – indeed many districts – have moved to a system of premotion conferences to resolve discovery disputes").
[39] *Id*., 8.
[40] *Id*., 40. The Note does not explain how pre-litigation guidance may be secured. *Cf.* May 2014 RULES REPORT, 59 ("[u]ntil litigation commences, reference to the court [for guidance on preservation requirements] may not be possible."). *See e.g.*, Texas v. City of Frisco, 2008 WL 828055 (E.D. Tex. 2008).
[41] Committee Note, 40.

(3) Scope of Discovery/ Proportionality (Rule 26(b))

Since 1983, Rule 26(b)(2)(C)(iii) and its predecessors have required federal courts to act to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit," considering "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues." The advent of e-discovery brought new prominence to this "proportionality" requirement and the related certification provisions applicable to counsel in Rule 26(g).

Discussions about the role of proportionality – and the widespread conviction that it had not reached its full potential - played a prominent role at the Duke Conference. There was "near-unanimous agreement" that the disposition of civil actions could be improved by advancing, *inter alia*, "proportionality in the use of available procedures."[42]

The Initial Proposal

After considering alternatives,[43] the Duke Subcommittee recommended moving the proportionality factors from their current location into Rule 26(b)(1), thus modifying the stated scope of discovery. Rule 26(b)(2)(C)(iii) would be amended to require courts to limit the frequency or extent of discovery when "the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)."

The initial proposal included deletions from the balance of Rule 26(b)(1). Perhaps the most important was the abrogation of the statement that "[r]elevant information need not be admissible at trial if [it] appears reasonably calculated to lead to admissible evidence." This language was deleted because it had been incorrectly used, in the eyes of the Committee, as a definition of the scope of the discovery.[44]

Also deleted was authority to order discovery of any matter "relevant to the subject matter" for good cause since the Committee "this language is rarely invoked."[45]

Similarly, examples of types of discoverable information were deleted as unnecessary, since their discovery is "deeply entrenched in practice."[46]

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[42] June 2014 RULES REPORT, B-2 & B-5 (describing "widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case"); *see also* The Sedona Conference® Principles, at Principles 2 and 5 and The Sedona Conference® Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010)(*Public Comment Version)* and January 2013 Version *(Interim Final).*

[43] *See* Amended Initial Sketch (undated), at 20; as modified after the October 8, 2012 Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.

[44] Committee Note, 24 ("[t]he phrase has been used by some, incorrectly, to define the scope of discovery"). It was replaced by the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."

[45] *Id.*, 23 ("[p]roportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense").

Public Comments

The initial proposal kicked off a firestorm of opposition by those who saw it as an unfair attempt to restrict discovery which might be important to constitutional and individual civil rights or employment claims.

The AAJ,[47] for example, expressed concern that the change would "fundamentally tilt the scales of justice in favor of well-resourced defendants" because a producing party could "simply refuse reasonable discovery requests" and force requesting parties to "*prove* that the requests are not unduly burdensome or expensive."[48] (emphasis in original).

Prof. Arthur Miller criticized the proposal as erecting "stop signs" to discovery without having empirical evidence of a need to restrict discovery. He described the inclusion of proportionality in the 1983 rules ("on his watch") as based on merely "impressionistic" evidence of discovery abuse.[49] He also argued that the original formulation intentionally treated proportionality as a "safety valve."

Other comments predicted a massive increase in assertions of disproportionality and in motions to compel, which would unfairly increase costs and likely deter filings in federal courts.[50]

Finally, it was argued that by moving proportionality factors into discovery scope, the rule was "putting the cart before the horse," since an informed proportionality analysis is best accomplished by a court only after the issues are developed and there is more information available.[51]

The Revised Proposal

After close of the public comment period, the Rules Committee confirmed its determination to relocate the proportionality factors into Rule 26(b)(1), but made a number of modifications relating to them in the text and the Committee Notes.

First, the "amount in controversy" factor was moved to a secondary position behind "the importance of the issues at stake in the action." A second change was to add a new factor to require consideration of "the parties' relative access to relevant information" in order to provide "explicit focus" on the need to deal with "information

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[46] *Id*., 23 ("[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples").
[47] AAJ Comment, *supra*, n. 16, December 19, 2013.
[48] *Id*., at 11.
[49] Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U.L. REV. 286, 354 & n. 261 (April 2013).
[50] Hon. Shira A. Scheindlin Comment, January 13, 2014, at 3.
[51] Testimony by Larry Coben, January 9, 2014.

asymmetry." Witnesses had complained of the unfairness of restricting discovery where asymmetry of information existed.[52] The Committee Note was also amended to explain that "the burden of responding to discovery lies heavier on the party who has more information, and properly so."[53]

Thus, as revised, Rule 26(b)(1) will permit a party to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

The Committee Note was also revised to explain that the proposed amendment "does not change the existing responsibilities" of the court and parties to consider proportionality nor does it "place on the party seeking discovery the burden of addressing all proportionality concerns."[54] The parties and the court have a "collective responsibility" to consider the proportionality of discovery in resolving discovery disputes.[55]

The Note also states that the amended rule is "not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." Concerns about possible negative inferences from deletion of examples of discoverable information also prompted the addition of a comment in the Committee Note that discovery of that nature should be permitted as required.[56]

Assessment

The impact of the relocation of the "proportionality" factors does not change the existing responsibilities of the court and the parties to consider proportionality nor the burdens of proof involved.[57]

It has been accurately described a "modest" adjustment which will not make a material change in existing obligations,[58] but will send "a clear message to the courts and

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[52] *See* Student Comment, "The Perfect is the Enemy of the Good": The Case for Proportionality Rules, 43 CAP. U. L. REV. 153, 191, at n. 283 & 286 (2015)(quoting from Transcript of November, 2013 Public Hearing).
[53] Committee Note, 21.
[54] *Id*., 19.
[55] *Id*.
[56] *Id*.
[57] *See, e.g.,* Nkemakolam v. St. John's Military School, 2013 WL 5551696 (D. Kan. Dec. 3, 2013) at *2 ("once facial relevance is established, the burden shifts to the party resisting discovery"). While party seeking discovery must demonstrate a facially relevant showing of proportionality if challenged, the party asserting disproportionality must demonstrate it by specific proof.

litigants that pretrial discovery is subject to inherent limitations."[59] The intent is to force parties and the courts to confront questions of discovery cost containment at the outset of litigation and thereby lessen the likelihood that pretrial costs will spin out of control.[60]

A Utah State trial Judge, testifying at one of the hearings, described the contemporaneous Utah rule changes integrating proportionality into the scope of discovery[61] as part of a shift to "proportional discovery."[62]

Minnesota and Pennsylvania have also taken similar steps to emphasize that the scope of discovery limited by proportionality standards, including, in the case of Minnesota, articulating the principle in its equivalent of Rule 1. Minnesota amended its Rule 1 to require "the process and the costs [of civil actions] are proportionate to the amount in controversy and complexity and importance of the issues involved.[63]

Pennsylvania has added an explanatory comment to its 2011 revisions emphasizing that discovery is "governed by a proportionality standard" in order to achieve the "just, speedy and inexpensive" determination of litigation.

However, some in the academy remain critical of the Committee Note as failing to adequately deal with concerns about unfairly placing the burden of addressing proportionality considerations on requesting parties.[64]

Computer Assisted Review

A last minute addition to the proposed Committee Note to Rule 26 endorses use of "computer-based methods of searching" information to address proportionality concerns in cases involving large volumes of ESI.

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[58] Craig B. Shaffer and Ryan T. Shaffer, Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure, 7 FED. CTS. L. REV. 178, 195 (2013)(the proposal will not "materially change obligations already imposed upon litigants, their counsel, and the court").

[59] Edward D. Cavanagh, The 2015 Amendments to the [FRCP]: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?, 13-APR ANTITRUST SOURCE 1, *9 (April 2014).

[60] *Id.*

[61] Utah Rule 26(b)(1)(Discovery Scope in General)("Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below").

[62] Testimony by Hon. Derek Pullan, January 9, 2014.

[63] MN. ST. RCP Rule 1 (2013). The scope of discovery is limited to "matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including [as listed]." MN. ST. RCP Rule 26.02(b)(2013).

[64] Patricia Moore, FRCP Will Narrow (Once Again) the Scope of Discovery, Civil Procedure & Federal Cts. Blog, Sep. 5, 2014 (questioning efficacy of explanation in the Advisory Committee Note in dealing with burden of proof issue); copy at http://lawprofessors.typepad.com/civpro/2014/09/frcp-amendments-will-narrow-once-again-the-scope-of-discovery.html.

The addition "encourage[s] courts and parties to consider computer-assisted searches" as means of reducing the cost of producing ESI thereby addressing "possible proportionality concerns that might arise in ESI-intensive cases."[65]

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

The initial Package of proposed amendments included recommendations to lower the presumptive limits on the use of discovery devices in Rules 30, 31, 33 and 36[66] in order to "decrease the cost of civil litigation, making it more accessible for average citizens."[67]

An earlier proposal to presumptively limit the number of requests for production in Rule 34 was dropped during the drafting process.[68]

The proposed changes would have included:

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

However, the proposals encountered "fierce resistance"[69] on grounds that the present limits worked well and that new ones might have the effect of limiting discovery unnecessarily.[70] As a result, the Duke Subcommittee recommended[71] and the Rules Committee agreed to withdraw the proposed changes, including the addition of Rule 36 to the list of presumptively limited discovery tools.

Accordingly, the only proposed changes to Rules 30, 31 and 33 are cross-references to the addition of "proportionality" factors to Rule 26(b)(1).[72]

At the Rules Committee Meeting where the withdrawal of the proposal was announced, the hope was expressed that most parties "will continue to discuss reasonable

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[65] Committee Note, 22; *see* Minutes, Standing Committee Meeting, May 29-30, 2014, 4.
[66] 2013 PROPOSAL, *supra*, n. 8 at 300-304, 305 & 310-311 [of 354].
[67] *Id.*, at 268 of 354.
[68] *Id.*, at 267 of 354.
[69] June 2014 RULES REPORT, B-4 ("[t]he intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect").
[70] A detailed CCL Report of May, 2014 summarizes the objections. *See* CCL Preliminary Report on Comments on Proposed Changes to [FRCP], May 12, 2014, 5; copy at http://www.cclfirm.com/files/Report_050914.pdf.
[71] The Duke Subcommittee Report is in the April 2014 Rules Committee Meeting Agenda Book, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.
[72] *See, e.g.*, Proposed Rule 30(a)(2)("the court must grant leave [for additional depositions] to the extent consistent with Rule 26(b)(1) and (2)").

discovery plans at the Rule 26(f) conference and with the court initially, and if need be, as the case unfolds."[73] The Committee expects that it will be possible to "promote the goals of proportionality and effective case management through other proposed rule changes" without raising the concerns spawned by the new presumptive limits.[74]

(5) Cost Allocation (Rule 26(c))

At the Duke Conference, it was suggested by some that Rules 26 and 45 should be amended to make reasonable costs of preserving, collecting, reviewing and producing electronic and paper documents the responsibility of requesting parties – and that Rule 54(d) should be revised to make them taxable costs as well.[75]

While a partial draft along those lines[76] was circulated to participants at the Subcommittee Mini-Conference for discussion, "[t]he subcommittee [was] not enthusiastic about cost-shifting, and [did] not propose adoption of new rules." It was agreed that a proposal making cost-shifting a more "prominent feature of Rule 26(c) should go forward."[77] Accordingly, Rule 26(c)(1)(B) will be amended so that a protective order issued for good cause may specify terms, "including time and place or the allocation of expenses, for the disclosure or discovery."

The Committee Note explains that the "[a]uthority to enter such orders [shifting costs] 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."[78] There is well-established Supreme Court support for the statement.[79]

Revised Committee Note

After criticism that the addition to Rule 26(c) should "not be given any undue weight,"[80] language was added stating that "[r]ecognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice" and

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[73] Minutes, Rules Committee Meeting, April 10-11, 2014, at lines 308-314.
[74] June 2014 RULES REPORT, B-4.
[75] LCJ Comment, Reshaping the Rules of Civil Procedure for the 21st Century, May 2, 2010, at 55-60.
[76] Initial Rules Sketches, at 29, Addendum to Agenda Materials for Rules Committee Meeting, March 22-23, 2012 (requiring a requesting party to "bear part or all of the expenses reasonably incurred in responding [to a discovery request]"); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.
[77] Initial Rules Sketches, at 37, as modified after Mini-Conference, copy at https://ralphlosey.files.wordpress.com/2012/12/rules_addendumsketchesafterdallas12.pdf.
[78] Committee Note, 25.
[79] June 2014 RULES REPORT, B-10 (citing Oppenheimer Fund v. Sanders, 437 U.S. 340,358 (1978) and explaining that a court has authority to "allow discovery only on condition that the requesting party bear part or all of the costs of responding").
[80] *See* AAJ Comments, *supra*, n. 16, December 19, 2013, at 17-18 (noting that "AAJ does not object to the Committee's proposed change to Rule 26(c)(1)(B) per se" but suggesting amended Committee Note); *cf.* LCJ Comment, *supra*, n. 15, August 30, 2013, at 19-20 (endorsing proposal as "a small step towards our larger vision of reform").

that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[81] The Committee has recently stated that it "continues to have the 'requester pays' topic on its agenda."[82]

`(6) Production Requests/Objections (Rule 34, 37)

It is proposed to amend Rule 34 and 37 to facilitate requests for and production of discoverable information and to clarify some aspects of current discovery practices.

The changes include:

First, Rule 34(b)(2)(B) will be modified to confirm that a "responding party may state whether it will produce copies of documents or [ESI] instead of permitting inspection." Rule 37(a)(3)(B)(iv) will also be changed to authorize motions to compel for *both* failures to permitting inspection and failures to produce.[83] As the Committee Note observes, it is a "common practice" to produce copies of documents or ESI "rather than simply permitting inspection."[84]

Rule 34 (b)(2)(B) will also be amended to require that if production is elected, it must be completed no later than the time specified "in the request or another reasonable time specified in the response."

Second, Rule 34(b)(2)(B) will require that an objection to a discovery request must state "~~an objection~~ with specificity the grounds for objecting to the request, including the reasons." The Committee Note explains that "if the objection [such as over-breadth] recognizes that some part of the request is appropriate, the objection should state the scope that is not [objectionable]."[85]

Third, Rule 34(b)(2)(C) will require that any objection must state "whether any responsive materials are being withheld on the basis of [an] objection."[86] This is intended to "end the confusion" when a producing party states several objections and still produces information.[87] A producing party need not provide a detailed description or log

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[81] Committee Note, 25.
[82] May 2, 2015 Report of the Rules Committee, 27(noting that "[t]he Discovery Subcommittee continues to have the 'requester pays' topic on its agenda" and outlining questions which involved in further information gathering efforts); copy at . FILE:///C:/USERS/PC/DOWNLOADS/2015-05-STANDING-AGENDA-BOOK_1%20(2).PDF (scroll to 171 of 504).
[83] Committee Note, 38 ("[t]his change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling 'production, or inspection'").
[84] *Id.*, 34 ("the response to the request must state that copies will be produced"). For a useful summary of the evolution of the process, *see* Anderson Living Trust v. WPX Energy Production, 298 F.R.D. 514, 521-527 (D. Mass. Sept. 17, 2014).
[85] Committee Note, 33.
[86] The new language continues to be followed by the current requirement that "[a]n objection to part of a request must specific the part and permit inspection of the rest."
[87] Committee Note, 34.

but must "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion."[88]

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" on the basis of the objection.[89]

(7) Forms (Rule 4(d), 84, Appendix of Forms)

The Rules Committee has recommended and the Supreme Court has agreed to abrogate Rule 84 and the Appendix of Forms appended to the Civil Rules and to integrate certain of the abrogated forms into Rule 4(d) (Waiving Service).

Thus, Rule 4(d) (Waiving Service) will be amended to incorporate former Forms 5 and 6 (as "appended to this Rule 4"). The Committee Note states that "[a]brogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4."

In addition, the text of Rule 84 will be stricken; i.e., the rule will no longer provide that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate," and in its place will appear the phrase "[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]" As the Committee Report put it, it is time "to get out of the forms business."[90]

In addition, the separate page reference to Appendix of Forms in the Civil Rules will be followed by the provision "[Abrogated (Apr. __, 2015, Eff. Dec. 1, 2015).

Committee Note

The Committee Note to Rule 84 explains that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled." Thus, alternative sources of civil procedure forms will be available from a number of sources.[91] At the Supreme Courts' suggestion, the reference to the Administrative Office was expanded in the Note was expanded to include reference to websites of district courts and local law libraries.[92]

Also at the Courts' suggestion, the expanded Note now states that the "abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8."[93]

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[88] *Id.*
[89] *Id.*
[90] June 2014 RULES REPORT, B-19.
[91] Committee Note, 49.
[92] Memorandum, April 2, 2015, Judicial Conference to Supreme Court, Rules Transmittal, *supra*, n. 2, at 129 of 144.
[93] Id.

The Rules Committee had rejected concerns that the abrogation of Rule 84 and the forms was inappropriate under the Rules Enabling act. According to an excerpt in the Rules Transmittal, "[m]embers of the academic community" had reasoned that since the forms became an "integral" part of the rules illustrated, abrogating the form also abrogated the rule. However, Committee determined that "the publication process and the opportunity to comment" fully satisfied the Rules Enabling Act."[94]

III. Rule 37(e)

(8) Failure to Preserve/Spoliation (Rule 37(e))

The duty to preserve potential evidence in light of pending or reasonably foreseeable litigation is well established in the common law. A pre-litigation breach – by far the most frequent basis for allegations of "spoliation" – is typically remedied by courts exercising their inherent authority to avoid litigation abuse.[95]

By the time of the 2010 Duke Conference, "significantly different [Federal Circuit] standards for imposing sanctions or curative measures" had caused litigants to expend excessive efforts on preservation to avoid the risk of severe sanctions "if a court finds they did not do enough."[96] Accordingly, the E-Discovery Panel at the Duke Litigation Conference recommended adoption of a new rule addressing preservation.[97] Implicit in that recommendation was an acknowledgment that existing Rule 37(e), adopted in 2006,[98] would have to be supplemented, expanded or replaced.[99]

The Discovery Subcommittee considered alternative proposals, including a proposal which would have explicitly governed preservation obligations.[100] The primary

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[94] Excerpt, September 2014 Report of the Judicial Conference to the Chief Justice, at (unnumbered) page 107 of 144 of Rules Transmittal, *supra*, n. 2.

[95] Relief under Rule 37(b) and (d), the most likely applicable rules for spoliation sanctions, is unavailable unless a prior order had been violated. *cf.* Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72 (S.D. N.Y. 1991)(acts of spoliation prior to issuance of discovery orders violate Rule 37(b) because the inability to comply "was self-inflicted").

[96] Committee Note, 38.

[97] *See* "Elements of a Preservation Rule," E-Discovery Panel, copy at file:///C:/Users/PC/Downloads/elements_of_a_preservation_rule.pdf.

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

[99] A pithy summary of the perceived limitations is found in Phillip Favro, The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments, 21 RICH. J. L. & TECH. 8, ¶¶ 4-9 (2015).

[100] Proposed Rule 26.1 provided that parties should take "actions that are reasonable" considering proportionality, but "presumptively" excluding certain forms of information [ESI] and limited to a reasonable number of key custodian. Compliance with the requirements would have barred sanctions even if discoverable information was lost.

alternative was a "sanctions-only" approach which evolved from a draft first presented at a February, 2011 Subcommittee meeting.[101]

The Initial Proposal

After vetting the alternatives at a Mini-Conference on the topic, the Committee decided to adopt the "sanctions-only" approach, which was released for public comment in August, 2013. It applied to all forms of discoverable information which "should have been" preserved, invoking the common law standard for breach of duty.

The proposal required that a court not impose any "sanction" listed in rule 37(b)(2)(A) or "give an adverse-inference jury instruction" unless it found that a party's actions caused "substantial prejudice" in the litigation *and* was the result of "willful or bad faith" conduct *or* "irreparably deprived" a party of a "meaningful" ability to present or defend against claims in the litigation.

The proposal also authorized courts to require a party to undertake additional discovery, "curative measures" or pay attorney fees caused by the failure to preserve. No showing of prejudice or culpability was required.[102] The proposal also listed five "factors" for use in assessing conduct.

Public Comments

The need for a uniform national rule on culpability was widely accepted, but opinions differed sharply about the details. Many questioned the broad restrictions on court discretion[103] and urged an alternative focus on "curative measures" in the absence of bad faith.[104] The use of "willfulness" as a test for heightened culpability came under particularly severe criticism.

Concerns were also expressed about the "murky" distinction between "curative measures" and "sanctions" and the lack of a predicate requirement of prejudice. Some argued that the proposal was, in effect, "a strict liability standard [which was not] explicitly required to be proportional to the harm caused."[105]

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[101] Possible Rule 37(g), Appendix, Discovery Subcommittee, February 20, 2011, Agenda Book CV2011-04, April 4-5, 2011 Rules Meeting, at 229 (requiring that sanctions issue only if the failure to preserve was "willful, in bad faith, or caused irreparable prejudice in the litigation"), copy at the April 2011 Agenda Book, which is found at file:///C:/Users/PC/Downloads/CV2011-04%20(1).pdf.

[102] The draft Committee Note described these as "measures that are not sanctions."

[103] A District Judge opined that enactment of the proposal would "encourage[s] sloppy behavior Sekisui American v. Hart, 945 F.Supp.2d 494, 504, n.51 (S.D. N.Y. Aug. 15, 2013)(the proposed rule "creates perverse incentives")(Scheindlin, J).

[104] Letter Comment, January 10, 2014, Hon. James C. Francis IV, at 5-6 (proposing that Rule 37(e) authorize remedies "no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith").

[105] Gibson Dunn, 2014 Mid-Year Electronic Discovery Update, July 16, 2014.

The exception from the culpability requirements for "irreparable" deprivation[106] also drew criticism, including suggestions that given its limited focus, it should be dropped and the rule limited to ESI.[107]

Questions were also raised about the fairness of imposing sanctions without any showing of fault given the potential for exaggeration to fit that criteria.[108]

The Revised Proposal

After the public comment period, the proposal was unceremoniously scrapped in favor of a revised version developed by the Discovery Subcommittee. As later explained by the Subcommittee Chair, the initial proposal was "not the best that we can do."[109] As revised, Rule 37(e) provides:

"[Rule 37](e) Failure to ~~Produce~~ Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment."

The Proposed Rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[110] It applies only to the loss of ESI, not all forms of discoverable information.

Breach of Duty to Preserve

The Proposed Rule applies only when ESI is lost which "should have been preserved." That determination relies upon existing common law precedent, although aspects of duty are alluded to in the Committee Note, both as to the trigger and the scope of the duty involved.

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[106] The exception typically applies where the alleged injury-causing instrumentality (tangible property) has been lost. *See, e.g.*, Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001)(automobile).
[107] 2013 PROPOSAL, *supra*, n.8, at 275 of 354 ("Q. 2 Should [the exception] be retained in the rule?)
[108] The Committee considered (but eventually dropped) a required minimal showing of "negligent or grossly negligent" conduct for the exception to apply. Thomas Y. Allman, Digital Discovery & e-Evidence, 13 DDEE 9, April 25, 2013, copy at http://www.theediscoveryblog.com/wp-content/uploads/2013/06/2013RulePackageBLOOMBERGBAsPublished1.pdf.
[109] Minutes, Rules Committee Meeting, April 10-11, 2014, lns. 507-508 (quoting Grimm, J.).
[110] Committee Note, 38. *See* Chambers v. NASCO, 501 U.S. 32, 50-51 (1991)(where the rules are "up to the task" courts should rely on them to the exclusion of inherent authority).

The Committee Note also alludes to the possibility of increased use of preservation orders due to the proposed amendments to Rules 16(b)(3)(B)(iii) and 26(f)(3)(C).[111] However, the impact of the amended scope of discovery Rule 26(b)(1) is ignored. This contrasts with the approach taken in the analogous Committee Note prepared for the (then) proposed Rule 37(f) in 2004.[112]

The Note acknowledges that proportionality plays an important role in assessing the reasonableness of a "preservation regime."[113]

Safe Harbor

In a last minute change before adoption,[114] the revised proposal was amended to provide that if a party can show that it took "reasonable steps" to preserve, no sanctions or other remedies are available under the Proposed Rule, even if some ESI has been lost.[115] This reflects the fact that it "should not be a strict liability rule" that would automatically apply if information is lost.[116]

This *de facto* safe harbor seeks to incentivize reasonable preservation behavior by providing assurance that a party that acts in accordance with such practices will escape measures under Subdivision (1) or (2). Whether the party acted in "good faith" – determined by the absence of bad faith – is relevant, as is the proportionality of the preservation efforts undertaken.[117]

The revised proposal does not necessarily require adherence to the "best" or most burdensome practices.[118] A "party may act reasonably by choosing a less costly form of information preservation."[119]

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[111] *Id*., 40.
[112] Committee Note, Civil Rules Advisory Committee Report, May 17, 2004, Revised, August 3, 2004, at 34 ("[t]he outer limit [of the duty to preserve] is set by the Rule 26(b)(1) scope of discovery"); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf.
[113] Committee Note, 42. ("[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").
[114] *See* Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDiscovery Resource Center, April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/. The revised draft of Proposed Rule 37(e) was distributed to the Committee and attendees immediately prior to the discussion and vote on April 11, 2014 (copy on file with Author).
[115] Committee Note, 41 ("[b]ecause the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve").
[116] Minutes, May 2014 Standing Committee Meeting, 6, (Campbell, J.); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST05-2014-min.pdf.
[117] Rimkus v. Cammarata, 699 F. Supp.2d 508, 613 (S.D. Tex. Feb. 19, 2010)("[w]hether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done – or not done – was proportional to that case and consistent with clearly established applicable standards").
[118] Marc Resnick, What is "Reasonable Conduct," July 11, 2011 (reasonable practices are not "best practices," but ones that are considered to be common, acceptable, decent practices); copy at http://iieblogs.org/2011/07/22/what-is-reasonable-conduct/.
[119] Committee Note, 42.

The proposal was also revised to make it clear that courts should first use their case management authority under Rule 16 and 26 to secure any missing information through "additional discovery," before imposing the measures available in Subdivisions (1) or (2) (or both).[120] However, "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."[121]

Assessment

The "reasonable steps" modification to the revised proposal will achieve its intended effect only if Courts are prepared to accept that the loss of ESI does not, *per se*, signal a breach of duty of the duty to preserve. Relevant analogies based on undertaking "reasonable steps" exist in other compliance contexts.[122] The Sedona Conference® *Commentary on Legal Holds: The Trigger and the Process* may provide useful procedural guidance to "navigate to the safe harbor described in the rule."[123]

In *Pension Committee*,[124] in contrast, the court famously held that anything less than perfection is "likely to result in the destruction of relevant information."[125] However, that logic has been rejected not only by the terms of the proposed Rule (as well as the Second Circuit),[126] but also by emerging case law. In *Automated Solutions v. Paragon Data Systems*, the Sixth Circuit also noted that "[t]here is reason to doubt *Pension Committee's* persuasive effect."[127]

Subdivision (e)(1): Addressing Prejudice

When a breach of the duty to preserve which cannot be addressed by additional discovery causes prejudice in the litigation, Subdivision (e)(1) authorizes courts to "order measures no greater than necessary to cure the prejudice." No additional showing of

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[120] *Id*. ("Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery").
[121] *Id.*
[122] Thomas Y. Allman, 'Reasonable Steps': A New Role for a Familiar Concept, December 18, 2014, 14 DDEE 591 (parties that take "reasonable steps" to make compliance programs effective are entitled to benefits under the U.S. Sentencing Guidelines even when efforts fail to prevent breaches).
[123] James S. Kurz et al, The Long-Awaited Proposed FRCP Rule 37(e), Its Workings and Its Guidance for ESI Preservation, White Paper Series 2014, 6 (Sedona "distills the requirements to 'reasonable and good faith' with recognition of proportionality" to "navigate to the safe harbor described in the rule"), copy at http://www.rpb-law.com/images/pdf%20folder/RPB_Rule37%28e%29_WhitePaper.pdf.
[124] Pension Comm. v. Banc. of Am. Sec., 685 F. Supp.2d 456, 478 (S.D. N.Y. May 28, 2010).
[125] *Id*., 465; 480 ("it is "fair to presume [that] responsive documents were lost or destroyed").
[126] Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. July 12, 2012)("[we] reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*. *Contra* Pension Comm. of Univ. of Montreal Pension Plan").
[127] Automated Solutions v. Paragon Data, 756 F.3d 504, 516 (6th Cir. June 25, 2014). In parallel with the treatment of "prejudice" under Subdivision (2), *infra*, a finding of an "intent to deprive" may justify inferring that the missing ESI lost by the party is relevant. *See* Committee Note, 47.

culpability is required beyond that implicit in finding that the ESI "should have been preserved."[128]

However, if prejudice is lacking, the court may not act. In *Vincente v. Prescott*, the court held that the mere "possibility" that relevant email was lost did not constitute sufficient prejudice to justify relief.[129] When information is available from other sources, no measures may be required.

The Committee Note leaves the issue to court discretion. It cautions that while it may sometimes be "unfair" to put the burden of demonstrating prejudice on the party that did not lose it, "[r]equiring the party seeking curative measures to prove prejudice may be reasonable" on other occasions.[130]

Measures Available

The range of possible measures available to address prejudice is quite broad. Courts may select from the options listed in 37(b)(2)(A),[131] deploy one of the traditional "evidentiary" remedies or craft a case-specific remedy. However, because of Subdivision (e)(2), some measures are unavailable unless the court *also* makes a finding under that the party acted with the requisite intent, including those remedies which may have "the effect" of listed measures.

Thus, courts will be precluded from use of jury instructions such as those used in *Zubulake V*,[132] *Pension Committee*[133] and *Sekisui v. Hart.*[134] The Committee Note also explains that it would be inappropriate to strike pleadings or preclude evidence "in support of the central or only claim or defense in the case" given their case-terminating potential.[135]

It is likely that courts will rely on awards of attorney's fees and reasonable expenses where heightened culpability is lacking. Monetary awards or other remedies related to reducing prejudice may also be viable under the rule or in reliance on other provisions of Rule 37.[136] Ironically, the virtually automatic award of attorney's fees and

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[128]Minutes, Rules Committee Meeting, April 10-11, 2014, lines, 631-633 (the rule "is limited to circumstances in which a party failed to take reasonable steps to preserve, thus embracing a form of 'culpability'").

[129] Vicente v. Prescott, 2014 WL 3939277, at *12 (D. Ariz. Aug. 13, 2014)(Campbell, J).

[130] Committee Note, 43.

[131] Rule 37(b)(2)(A) includes (i) establishing designated facts as established; (ii) precluding support of claims or defenses or introduction of evidence; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing the action in whole or in part; (vi) rendering default judgment; or treating failure to obey an order as contempt of court.

[132] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).

[133] Pension Committee v. Banc of America, *supra*, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010).

[134] Sekisui American v. Hart, 945 F.Supp.2d 494, 509-510 (S.D. N.Y. Aug. 15, 2013).

[135] Committee Note, 44.

[136] Use of inherent power to award attorney's fees would be precluded both by the stated preemptive impact of the Rule and by the independent requirements of the American Rule. *See* Chambers v. NASCO, *supra*,

reimbursement of expenses in such cases may actually *increase* the incentives for filing spoliation motions for strategic purposes.

Exception

The Committee Note suggests that a court may give "instructions to assist a jury in its evaluation of [previously introduced spoliation] evidence or argument, other than instructions to which subdivision (e)(2) applies." (Subdivision (e)(2) requires that a court not instruct a jury that it "may or must" presume that missing ESI was "unfavorable" without a finding that the party acted with "intent to deprive" the other party of the information's use).

According to the Note, such an instruction merely allows a jury to consider such evidence "along with all the other evidence in the case" and does "not involve instructing a jury it may draw an adverse inference from loss of information."[137] An early post-public comment draft of the Committee Note explained that such an instruction was acceptable as long as it was "not drawn from the loss of information alone."[138]

This appears to embrace current practice whereby courts admit evidence of spoliation and allow arguments by counsel when the level of culpability by the spoliator does not justify an adverse inference instruction.[139] Great care will be required to ensure that this technique does not have the prohibited impact of Subdivision (e)(2). FRE 403 cautions that exclusion of evidence is necessary where there is a danger of undue prejudice, confusing the issues and misleading the jury.

Subdivision (e)(2): Cabining Severe Measures

Subdivision (e)(2) definitively resolves the inter-Circuit split on the culpability required to permit inferences or presumptions that lost information was unfavorable to the spoliating party. As one Subcommittee Member put it, it provides a "rifle shot" aimed at replacing *Residential Funding*[140] in order to "take some very severe measures of[f] the table" without a showing of intent equivalent to bad faith.[141]

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501 U.S. 32, 45-46 (1991)(attorney fees available under inherent powers only when "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons").

[137] Committee Note, 46.

[138] Discovery Subcommittee Report, Rule 37(e)(undated) at 22; April, 2014 Rules Committee Agenda Book, beginning at 369 of 580.

[139] *See* Russell v. U. of Texas, 234 F. Appx. 195, 208 (5th Cir. June 28, 2007)("the jury heard testimony that the documents were important and that they were destroyed. The jury was free to weigh this information as it saw fit"); *accord*, Wandner v. American Airline, __ F.Supp.3d __, 2015 WL 145019, at *2,*18 (S.D. Fla. Jan. 12, 2015)(permitting remedies despite an inability to justify an adverse inference).

[140] Residential Funding Corp v. DeGeorge, 306 F.3d 99, 108 (2nd Cir. Sept. 26, 2002)(an adverse inference may be drawn when a party "knowingly, even if without intent to [breach a duty to preserve it] or *negligently*") (emphasis in original).

[141] Discovery Subcommittee Notes, March 4, 2014.

Accordingly, the rule rejects the view of the Second Circuit (and other Circuits) that adverse inferences can be based on a showing of merely negligence or grossly negligence conduct.[142] It does so by requiring a prior showing that "the party acted with the intent to deprive another party of the information's use in the litigation" before a court may:

- "presume" that lost ESI was unfavorable or
- instruct a jury that it "may or must presume" that lost ESI was unfavorable or
- dismiss the action or enter a default judgment.

As discussed in the context of Subdivision (e)(1), above, the Committee Note states that (e)(2) "does not apply to jury instructions that do not involve such an inference [that the missing evidence was unfavorable]." [143] Moreover, the so-called "missing evidence" instruction retains viability despite (e)(2).[144]

Be that as it may, the Committee has not endorsed the routine use of permissive adverse jury instructions, contrary to what may currently be the case in the Second Circuit in *Mali v. Federal Insurance*.[145] Subdivision (e)(2) does not differentiate between the culpability required for permissive and mandatory adverse inferences. To the extent that *Mali* holds otherwise, it is inconsistent with the Proposed Rule.[146]

It would be counterproductive to admit spoliation evidence and issue permissive instructions without a finding of requisite culpability on the theory that there is no intent to punish, but merely to remediate. Instructions permitting or encouraging jury inferences have consequences.[147] It would not be surprising under those circumstances if otherwise compliant parties were loath to reduce over-preservation and accept the risk of sanctions for imperfection.

Intent to Deprive

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[142] Committee Note, 45.
[143] Committee Note, 46.
[144] *Id. See, e.g.,* Ill. Pattern Jury. Instr. – Civ. 5.01 [IL-IPICIV 5.01](a jury may infer that evidence not offered which could have been produced would be adverse to the party if it was under its control, is not equally available to an adverse party and a reasonable prudent person should have produced it and no reasonable excuse has been shown for the failure).
[145] 720 F.3d 387, 393 (2nd Cir. 2013)("[s]uch an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers").
[146] *Cf.* Hon. Shira A. Scheindlin and Natalie M. Orr, The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal, 83 FORDHAM L. REV.1299, 1315 (2014)("courts may [despite (e)(2)] issue a Mali-type permissive instruction that leaves all factual findings, including whether spoliation occurred, to the jury" but also suggesting enactment of an "evidentiary rule" to guide trial courts).
[147] Gorelick et al., Destruction of Evidence §. 2.4 (2014)("DSTEVID s 2.4)(Once "a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterably changed," regardless of the intent of the Court).

While some form of intentionality is required to show "intent to deprive," it is not alone sufficient. Subdivision (e)(2) clearly requires more.[148] The Committee intended to require conduct "akin to bad faith, but [which is] defined even more precisely."[149]

It may be tempting for some courts to hold the "intent to deprive" requirement to be satisfied by a showing of "reckless" or "willful" conduct. The limitations on the efficacy of "willfulness" are self-evident.[150] In some contexts, "willfulness" has been established by showing that a party merely acted knowingly - quite apart from the intended purpose of the action.[151]

If such an interpretation is applied here, it would "gut" the rule and could render Subdivision (e)(2) meaningless. That would be ironic given the criticism that the requirement of a specific intent to deprive "is the toughest standard to prove that the Advisory Committee could have adopted."[152]

Prejudice

Subdivision (e)(2) does not explicitly call for a showing of prejudice as a precondition for harsh measures. Some have asked if an incompetent spoliator who possesses the requisite intent but fails to inflict actual prejudice is subject to those remedies.

According to the Committee Note, the finding of intent to deprive can support "not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position."[153] Presumably a spoliator that can rebut the inference of prejudice would be in a position to avoid consideration of a Subdivision (e)(2) remedies.

The Committee Note cautions that "severe measures" should not be used if lesser measures "would be sufficient to redress the loss."[154] This observation is consistent with the long-standing principle that "[t]he choice of sanction should be guided by the 'concept of proportionality' between offense and sanction."[155]

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[148] Schmid v. Milwaukee Elec. Tool Corp, 13 F.3d 76, 79 (3d Cir. 1994).
[149] June 2014 RULES REPORT, B-17.
[150] Letter Comment, February 12, 2014, Steven M. Puiszis, Hinshaw & Culbertson LLP, at 1, copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1139.
[151] Safeco Insur. v. Burr, 551 U.S. 47, 57 (2007)("willful" is a "word of many meanings" depending on context and "reckless" conduct is sometimes treated as an indication of a "willful" violation).
[152] Patricia W. Moore, Civil Procedure & Federal Courts Blog, September 12, 2014.
[153] Committee Note, 47. As noted earlier in discussing the threshold requirement that the missing evidence be shown to be relevant, it would be logical that a court finding that a party had the requisite 'intent to deprive' may also support a finding that the missing information was relevant.
[154] *Id.*
[155] Bonds v. District of Columbia, 93 F.3d 801,808 (D.C.A. 1996)(reversing and remanding dismissal as abuse of discretion).

Assessment

The adoption of a uniform culpability standard in Subdivision (e)(2) should make it possible to convince compliant parties that they will not be harshly sanctioned if they undertake reasonable steps. This should eventually reduce "over-preservation" and help reduce the incentive to assert "gotcha" motions as litigation tactics.

It has been argued, however, that achieving that goal comes at too high a price. Specifically, it is argued that while the rule will "resolve the circuit split" on the required level of culpability for adverse inferences, it will also "deprive a court of an important tool" needed to address spoliation in many cases.[156] It is the contention of those commentators that the rule does not otherwise "adequately address the evidentiary purpose" of the adverse inference instruction.[157]

That concern is misplaced. Jury instructions which permit or mandate inferences about missing evidence do not restore the evidential balance "except by serendipity."[158] An adverse inference "may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have," which imposes a "heavy penalty for losses" of ESI and, if based on negligence alone, "creates powerful incentives to over-preserve, often at great cost."[159]

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[156] Hon. Shira A. Scheindlin and Natalie M. Orr, The Adverse Inference Instruction After Revised Rule 37(e): An evidence-Based Proposal, 83 FORDHAM L. REV.1299, 1301 (2014). ("[A] high standard of mental culpability deprives judges of an important tool for combating unfairness in many cases involving the loss of evidence").

[157] *Id*., 1315)(arguing for a new Rule of Evidence mandating availability of permissive adverse inferences which focus on "restoring the evidentiary balance" but requires no predicate showing of culpability).

[158] Dale A. Nance, Adverse Inference About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering By Parties to Litigation, 90 BOSTON U. LAW REV. 1089, 1128 (2010)(courts confuse the deterrent and protective functions of sanctions with the almost invariably ephemeral goal of eliminating the unknowable evidential damage from negligent destruction of evidence).

[159] June 2014 RULES REPORT, B-18 ("in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely become increasingly frequent as ESI multiplies").

APPENDIX

Approved Rules Text (as transmitted to Congress)

Rule 1 Scope and Purpose

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

Rule 4 Summons

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

Rule 4 Summons

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

Rule 16 Pretrial Conferences; Scheduling; Management

(b) SCHEDULING.

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

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

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

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

defendant has been served with the complaint or ~~90~~ ***60*** days after any defendant has appeared.

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

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

* * *

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

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

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

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

(b) DISCOVERY SCOPE AND LIMITS.

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

* * *

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

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

* * *

(c) PROTECTIVE ORDERS.

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

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

(d) TIMING AND SEQUENCE OF DISCOVERY.

(2) Early Rule 34 Requests.

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

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

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

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

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

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

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

* * *

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

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

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

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order ***under Federal Rule of Evidence 502***;

Rule 30 Depositions by Oral Examination

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

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

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

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

Rule 31 Depositions by Written Questions

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

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

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

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

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

* * *

(b) PROCEDURE. * * *

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

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

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

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

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

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

(3) *Specific Motions.* * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an

answer, designation, production, or inspection. This motion may be made if: * * *

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

* * * *

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

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

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

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

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

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

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

Rule 55. Default; Default Judgment

* * *

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

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

* * *

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015.]

* * *

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015.]