Recent And Proposed Amendments To The FRCP

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Changing the Rules of Engagement: An Overview of Recent Amendments & Proposed Amendments to the Federal Rules of Civil Procedure

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Litigants Are Facing Significant Changes to Critical Rules

- Federal Rules of Civil Procedure that are **critical** to navigating the federal litigation landscape, include rules governing **subpoenas**, **discovery**, **case management**, and preservation of **electronically stored information** ("ESI").
- Long-awaited changes to **Rule 45** have **streamlined** the use of **subpoenas** in federal civil actions.
- Proposed amendments to rules governing **discovery**, **case management**, and **ESI Preservation** seek to address the challenges of managing the **scope of discovery** in the digital age and the attendant consequences for a party's **failure to meet** its discovery **obligations**.

Litigants Are Facing Significant Changes to Critical Rules

- Amended Rule 45 re: Subpoenas

  Effective December 1, 2013

- Proposed Amendments to Rules re: Discovery, Case Management and ESI Preservation

  To become effective December 1, 2015

Amended Rule 45

THE SUBPOENA

Old Rule 45: The "Three-Ring Circus"

The Advisory Committee for the Federal Rules of Civil Procedure referred to the framework created by the old Rule 45 as "**a 'three-ring circus'** of challenges for the lawyer seeking to use a subpoena" because:

- It required the lawyer
  - to **choose** the right **issuing court**;
  - to **ensure** that the subpoena **was served** within that district, or outside of the district but within 100 miles of where performance was required, or within the state if state law allowed; and
  - to **determine where compliance** could be required.

AND

- Requirements regarding place of compliance were **located in different provisions** of the Rule.

Amended Rule 45

- The **first** significant changes to Rule 45 **in twenty years**.
- The amendments stemmed from a **multi-year study** of subpoena practice.
- The Advisory Committee adopted a **"modest form of rule simplification"** and only some of the specific rule amendments proposed.

Amended Rule 45

- Rule 45 proposed amendments originally **circulated for public comment** in August 2011.
- A modified version of the Rule 45 proposed amendments was **adopted** by the Judicial Conference in late 2012 and **submitted to the U.S. Supreme Court** for consideration.
- The U.S. Supreme Court **adopted** the proposed amendments and **submitted them to Congress** for consideration on April 16, 2013.
- The proposed amendments **took effect Dec. 1, 2013**.

Amended Rule 45

The major changes to Rule 45 include:

(1) simplifying the rules regarding the **court issuing** a subpoena and **where** subpoenas may be **served**,

(2) highlighting the **notice requirements** for document-only subpoenas,

(3) clarifying the circumstances under which an **officer of a party** may be **compelled to testify** at trial, and

(4) permitting the **transfer of motions** regarding **enforcement** of a subpoena.

The Issuing Court & Service

The amendments simplified Rule 45 by:

- Making the **court where the action is pending** the issuing court for all subpoenas, instead of the old rule under which the issuing court varied depending upon the purpose of the subpoena.
- Permitting **service** of a subpoena **throughout the United States**, which is consistent with Federal Rule of Criminal Procedure 17(e).
- Combining the provisions on **"the place of compliance,"** (*i.e.* limits on where one must appear, produce, etc.) into **new subsection Rule 45(c)**, which preserves the place-of-compliance provisions of the old rule except the reference to state law.

The Issuing Court & Service: Rule 45(a)(2)

(2) *Issuing ~~Issued from Which~~ Court.* A subpoena must issue from the court where the action is pending. ~~as follows:~~

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

The Issuing Court & Service: Rule 45(a)(2)

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides.~~

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to

The Issuing Court & Service: Rule 45(a)(2)

(c) Place of compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) ~~the person~~ is a party or a party's officer; or

(ii) ~~the person~~ is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, ~~tangible things, or~~ electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person ~~reasonably convenient for the person who is commanded to produce~~; and

(B) inspection of premises; at the premises to be inspected.

The Issuing Court & Service

The Civil Rules Advisory Committee noted that:

- These amendments received **broad support** in the public comments.
- The Committee Note was **modified** to recognize that the amendments **do not limit the ability of parties to agree** on the place of production.

The Issuing Court & Service

The Committee Note also was clarified to explain that **no subpoena is required for depositions of parties** or party officers, directors, or managing agents, and that the **geographical limits** that apply to subpoenas **do not apply** to noticed **depositions**.

Notice Required Before Serving Documents Only Subpoena

The Documents Only subpoena was created in 1991 amendments to the Civil Rules, with a **requirement that parties be given notice** of a subpoena requiring document production.

In 2007, the rules were clarified to require **notice *before* service** of the subpoena.

However, lawyers **repeatedly failed** to give the required notice.

Notice Required Before Serving Documents Only Subpoena

To remedy counsel's repeated failure to comply with the requirement, the amendment to Rule 45 created **a new Rule 45(a)(4)** with the following heading:

"Notice to Other Parties Before Service."

The new subsection modified the old requirement by requiring a **copy** of the subpoena to **accompany the notice**.

Rule 45(a)(4)

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party ~~before the subpoena is served on the person to whom it is directed.~~

No Additional Notice Requirements

The Advisory Committee noted that **additional notice** of the ***receipt*** of documents produced in response to a subpoena was **not required** because:

- Requiring notice of receipt of documents could create **new complications**.
- Production of documents is often done on a **"rolling" basis**, and requiring a notice every time additional documents are received could be **burdensome**.
- **Failure** to give notice would likely give rise to **"satellite litigation"** on the impact of the missed notice and parties seeking to exclude documents that hadn't been noticed.

Compelling Testimony of a Party/Officer:

The new Rule 45(c) contains language meant to **resolve "conflicting interpretations**…as to whether a **party or party officer** can be **compelled** by subpoena to **travel more than 100 miles to attend trial**."

- ***In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006):** established view that **geographical limits** that apply to non-party witnesses **do not apply to a party or party officer**. In *Vioxx*, an officer of the defendant lived and worked in New Jersey, was served outside of Louisiana, but was required to testify at trial held in New Orleans.

- **Contrary case law:** supported the view that the **geographical limitations** in the old rule **applied to all trial witnesses**.

Compelling Testimony of a Party/Officer:

The Advisory Committee explained its **concerns** with the **expanded power** under *Vioxx:*

- Possible tactical use of a subpoena to **apply inappropriate pressure** to the adverse party.

- Party officers might be able to obtain protective orders, but **motions would burden the courts/parties**.

- With large companies, the **best employee witnesses often are not officers** and there are **alternatives to attending trial**, such as **Rule 30(b)(3)** (authorizing audiovisual recording of deposition testimony) and **43(a)** (permitting the court to order testimony by contemporaneous transmission).

Compelling Testimony of a Party/Officer:

The advisory committee **resolved conflicting caselaw**, concluding that the 1991 amendments to the rule were **not meant to expand subpoena power** as recognized in the *Vioxx* line of cases.

To restore the **original meaning**, Rule 45(c)(1) in the **amended Rule provides** that the **limits on subpoenaing a witness to testify apply equally to any person**, including a **party or party officer**.

The Committee Note was **clarified**: **no subpoena is required for depositions** of parties or party officers, directors, or managing agents, and **geographical limitations** that apply to subpoenas **do not apply to noticed depositions.**

Rule 45(c)

(c) **Place of compliance.**

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) the person is a party or a party's officer; or

(ii) ~~the person~~ is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, ~~tangible things, or~~ electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person ~~reasonably convenient for the person who is commanded to produce~~; and

(B) inspection of premises; at the premises to be inspected.

Committee Note Subdivision (c)

state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts ~~conducts~~ business in person in the state.

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition can lead to Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

Transfer of Enforcement Motions

Amended Rule 45(c) essentially requires that **motions to quash or enforce** a subpoena be made in the district **where compliance is required**.

Therefore, the **"enforcement court"** may be **different** from the **"issuing court."**

The amendments **added Rule 45(f)** to explicitly authorize the **transfer of subpoena-related motions** (motions for protective order and motions to enforce the subpoena) from the enforcement court **to the issuing court**.

Transfer of Enforcement Motions

The Advisory Committee noted the following points:

- The published draft had permitted transfer **only upon consent** of the **nonparty** and **the parties**, or in **"exceptional circumstances."**
- Significant attention in **public comments** was paid to whether the **"exceptional circumstances" standard** should be retained when the **nonparty** witness **does not consent**.
- After public comment, the advisory committee **concluded** that **party consent should not be required**, as it opens the door to parties withholding consent to **manipulate judge choice**.
- The advisory committee decided to **keep the "exceptional circumstances" standard**, based on its concern that a lower standard could result in frequent transfers that force nonparties to litigate their interests at a distance.

Transfer of Enforcement Motions

The Advisory Committee further noted:

- The Committee Note was revised to **clarify** that the **primary concern** should be avoiding **undue burden** on the local **nonparty**.
- The Note identifies **considerations** that might warrant transfer, but only if they **outweigh the interests** of the local **nonparty**.
- The Note also suggests that the **compliance court** might **consult** with the **issuing court**, and encourages the **use of telecommunications** to minimize the burden on the nonparty when there is a transfer.

Rule 45(f)

(f) **Transferring a Subpoena-Related Motion.** When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if ~~the parties and~~ the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(~~g~~e) **Contempt.** The court for the district where compliance is required ~~under Rule 45(c)~~ — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. ~~A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

Rule 37(b) Modified to Conform w/ Rule 45(f)

Rule 37(b) Failure to Comply With a Court Order was amended to conform to amendments made to Rule 45:

- A second sentence was added to Rule 37(b)(1) to address **contempt of orders entered after a transfer of a subpoena-related motion** to the court where the action is pending pursuant to Rule 45(f).
- **Failure to comply** with an order of the **issuing court** may be **treated as contempt of either** the court where the discovery is taken or the court where the action is pending.

Rule 37(b)(1)

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

* * * * *

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

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Proposed Amendments

CASE MANAGEMENT, COOPERATION, DISCOVERY & ESI PRESERVATION

The Joys of Discovery

The Duke Conference

In 2010, the Judicial Conference Advisory Committee on Civil Rules sponsored a Conference on Civil Litigation at the Duke University School of Law (the "Duke Conference") to address **possible solutions** for **reducing the costs of civil litigation**, particularly with respect to **discovery**.

The August 2013 Proposed Amendments

On **August 15, 2013**, the Advisory Committee on Civil Rules published for **public comment** Proposed Amendments addressing:

- the challenges of managing the **scope of discovery** in the digital age

and

- the attendant **consequences** for a party's **failure** to meet its discovery obligations.

The August 2013 Proposed Amendments

The Advisory Committee posted proposed amendments to Civil **Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84**, and the Rules' Appendix of Forms.

The majority of the proposed revisions are described and presented as "**a package developed in response to the central themes that emerged from the [Duke Conference]**."

The August 2013 Proposed Amendments

The proposed amendments to **Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, and 36** were presented in **three categories** targeted to address recurring themes that arose during the Duke Conference:

1. **Early** and **active judicial case management**,
2. **Proportionality** in discovery, and
3. **Cooperation** among lawyers.

The August 2013 Proposed Amendments

The **initial** proposed revisions to **Rule 37** were focused on **broad spoliation sanctions**.

They resulted from discussion initiated at the Duke Conference and developed through subsequent efforts.

The August 2013 Proposed Amendments

The proposed revisions seek:

(1) to foster **more cooperation** between the parties and court involvement in managing litigation,

(2) to implement a requirement that the **scope** of permissible discovery be **proportional** to the litigation at issue,

(3) to pare down the **presumptive number** of **discovery requests**, and

(4) to provide **additional safeguards** for parties **against sanctions** for the failure to preserve discoverable information when the failure was **not willful or in bad faith**.

The Published Proposed Amendments Were Modified Based on Public Comment

- A total of **2,345 written comments** were received.
- **Three public hearings** were held - more than 120 witnesses spoke:
  - Dallas, TX (February 7, 2014)
  - Phoenix, AZ (January 9, 2014)
  - Washington, D.C. (November 7, 2013)
- **Advisory Committee met in April, 2014** and submitted **revised** proposed amendments **to the Standing Committee** in a **May 2, 2014** report.

The Published Proposed Amendments Were Modified Based on Public Comment

- **Duke Package Proposal – Little Changed:**
  - According to the Advisory Committee, the recommendations were "**little changed**" from the proposals that were published for comment in August 2013.
  - The most obvious change is the **withdrawal of amendments** that would **reduce presumptive numerical limits** on some forms of **discovery**.

- **Rule 37(e) Proposal – Substantially Revised:**
  - There were **numerous concerns** raised in extensive testimony and comments filed during **public comment** period.
  - The rule text went through **substantial revision in response** to testimony and comments, and then **was further revised** during the April Committee meeting based on the draft that appeared in the meeting's agenda book.
  - According to the Advisory Committee, the **core of the published rule, however, remained the same**.

Cooperation: Rule 1

Duke Conference discussions regarding "costs imposed by **hyperadversary behavior**" led to the Advisory Committee proposing a "modest addition to Rule 1" under which "parties are made to **share responsibility** for achieving the high aspirations expressed in Rule 1."

The August 2013 Proposed Revision:

"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."

The May 2014 Proposal:

The proposed revision was not changed

Case Management: Rules 4, 16, 26

August 2013 Proposal

- **Rule 4(m):** **shorten time** to serve a summons and complaint **from 120 days** to **60 days**.
- **Rule 16(b)(2):** currently provides that judge must issue a scheduling order within earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. Revision **cuts times** to 90 days after any defendant is served or 60 days after any defendant appears, allowing judge to extend time on finding of good cause for delay.
- **Rule 16(b)(1)(B):** currently authorizes issuance of scheduling order after receiving parties' Rule 26(f) report or after consulting "at a scheduling conference by telephone, mail, or other means." Revision **requires conference by direct communication** and strikes "mail, or other means," because they are not effective.

May 2014 Proposal

- **Rule 4(m):** August 2013 Proposal encountered **substantial opposition**. Advisory Committee **changed proposal** to reduce time for service of subpoena **from 120 days** to **90 days rather than to 60 days**, as originally proposed.

  Text was **added to Committee Note** to address occasions to extend time, and to call attention to relationship b/w Rule 4(m) and related rule.
- **Rule 16(b)(2):** Proposal rule text not changed

  Language was **added to Committee Note** to address examples of circumstances that may establish good cause to delay issuing scheduling order.
- **Rule 16(b)(1)(B):** Proposal unchanged

Case Management: Rules 4, 16, 26

August 2013 Proposal

- **Rule 16(b)(3) and 26(f):** proposals would permit a scheduling order and discovery plan to **provide for preservation of electronically stored information** and to include agreements reached under Rule 502 of Federal Rules of Evidence.
- **Rule 16(b)(3)(v):** The proposal adds a new section which permits a scheduling order to "direct that **before moving** for an order relating to discovery the movant must **request a conference** with the court."
- **Rule 26(d)(1):** revision allows for **early Rule 34 document requests** to facilitate scheduling conference by allowing consideration of actual requests. Although delivered early, requests will not be considered served until date of the first Rule 26(f) conference, which starts the clock for determining due date of responses.

May 2014 Proposal

- **Rule 16(b)(3) and 26(f):** proposal unchanged
- **Rule 16(b)(3)(v):** proposal unchanged
- **Rule 26(d)(1):** changes made to **move** the proposed revision allowing for early Rule 34 document requests **to Rule 26(d)(2)**.

Discovery Proportionality: Rules 26, 30, 31, 33, 34, 36

The Advisory Committee noted that surveys produced in connection with the Duke Conference showed that **excessive discovery** occurs "in a **worrisome number of cases**, particularly those that are complex, involve high stakes, and generate contentious adversary behavior."

The Advisory Committee proposed revisions to Rules 26, 30, 31, 33, 34, and 36 "**to promote responsible use of discovery proportional to the needs of the case**."

Discovery Proportionality: Rules 26, 30, 31, 33, 34, 36

Rule 26(b)(1) August 2013 Proposal:

- Requires that "**discovery 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 [sic] resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."
- **Narrows** the **scope** of party controlled discovery to "matter that is relevant to any party's claim or defense," rather than current rule's "subject matter involved in the action."
- Language in current Rule stating "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," is **revised to read** "Information within this scope of discovery need not be admissible in evidence to be discoverable."

Rule 26(b)(1) May 2014 Proposal:

- August 2013 proposal remained largely the same, but was revised to **reorder list of factors** considered in measuring proportionality, placing "the importance of the issues at stake" first. Also a **new factor was added**: "the parties' relative access to relevant information." Committee Note also revised to address proportionality concerns.

Discovery Proportionality: Rules 26, 30, 31, 33, 34, 36

August 2013 Proposal

- **Rule 26(c)(1)(B):** revision adds explicit recognition of authority to enter a protective order that **allocates expenses of discovery**.
- **Rules 30 and 31:** revisions **reduce presumptive limit** on number of **depositions** from 10 to 5 and **reduce presumptive duration** to 1 day of 6 hours, providing that the court must allow additional depositions "to the extent consistent with Rule 26(b)(1) and (2)."
- **Rule 33:** revision **reduces presumptive number** of Rule 33 **interrogatories** from 25 to 15.
- **Rule 36:** revision **adds presumptive limit** of 25 **requests for admission** and expressly exempts requests to admit genuineness of documents.

May 2014 Proposal

- **Rule 26(c)(1)(B):** proposal unchanged
- **Rules 30 and 31:** proposals to reduce presumptive number of depositions and to shorten presumptive length of an oral deposition **were withdrawn**. Committee Note was changed accordingly.
- **Rule 33:** proposal to reduce presumptive number of interrogatories **was withdrawn**. Committee Note was changed accordingly.
- **Rule 36:** The published proposal to add a presumptive limit of 25 requests to admit, **was withdrawn**.

Discovery Proportionality: Rules 26, 30, 31, 33, 34, 36

Rule 34 August 2013 Proposal:

- Revisions address **objections** and **responses** to **document requests**:
  - **Rule 34(b)(2)(B):** would require that the **grounds** for objecting to a request be **stated with specificity**.
  - **Rule 34(b)(2)(C):** would require that an objection "**state whether** any responsive materials are **being withheld** on the basis of that objection."
  - Additional revisions address **timing** of the production of documents.

Rule 34 May 2014 Proposal:

- Only **stylistic changes** were made in the August 2013 text of Rule 34(b)(2)(B).
- Committee Note was **expanded** to emphasize the **interplay** between a **specific objection** that defines the scope of the search made for responsive information and the **requirement to state** whether any **responsive materials are being withheld**.

Rule 37(e): Spoliation Sanctions vs. ESI Preservation

The proposed Rule 37(e) revisions seek to **rectify** the **divergent standards** for preservation and imposition of sanctions established by **various jurisdictions**.

BUT

Based on public comment, the Advisory Committee recognized the **need to permit broad trial court discretion** in dealing with increasing challenges related to increased generation of ESI.

Rule 37(e): Spoliation Sanctions vs. ESI Preservation

The August 2013 Proposal:

- Established a **national standard** for the imposition of sanctions, **eliminating** the court's ability to impose sanctions under the **court's "inherent authority" or state law**.

- Sought **to expand** current Rule's application by applying **to all discoverable information** and not only to electronically stored information.

Rule 37(e): Spoliation Sanctions vs. ESI Preservation

August 2013 Proposal:

- **Rule 37(e)(1)(B)(i):** Permitted sanctions or an adverse inference jury instruction "**only** on a finding that the party to be sanctioned has **acted willfully or in bad faith**" **AND** if the loss caused "**substantial prejudice**" to the opposing party.
- **Rule 37(e)(1)(B)(ii):** Permitted sanctions in **absence of a willful or bad faith** act only when loss of information "**irreparably deprived** a party of any meaningful opportunity to present or defend against the claims in the litigation" **AND** "only if the affected claim or defense was **central to the litigation**."

Advisory Committee noted that the proposed new rule **rejected case law from the 2d Circuit**, which allowed sanctions in the event of **negligence**, but **accommodated case law** (e.g., 11th and 4th Cir. cases) that supports sanctions in the **absence of willfulness or bad faith in exceptional circumstances**.

5 Specific Questions Presented for Comment

- Should the rule be **limited to** sanctions for loss of **electronically stored information**?
- Should Rule 37(e)(1)(B)(ii) (Sanctions in **absence of willful or bad faith** act) **be retained** in the rule?
- Should the provisions of **current Rule 37(e)** be **retained** in the rule?
- Should there be an **additional definition** of "**substantial prejudice**" under Rule 37(e)(1)(B)(i)?
- 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?

Rule 37(e): Spoliation Sanctions vs. ESI Preservation
August 2013 Proposal

APPENDIX
Published Rule 37(e) Amendment Proposal

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.

Rule 37(e): Spoliation Sanctions vs. ESI Preservation

Key Concerns Raised During Comment Period

- **Law re: spoliation for non-ESI** is **well developed** and l**ong-standing**, and should not be supplanted without good reason.
- The use of the **term "sanctions"** may be inappropriate and **raise professional responsibility issues**.
- Both the **"willful"** and **"bad faith"** standards for sanctions were **questioned**.
- The **"irreparably deprived"** provision might "swallow the rule" by **permitting judges to circumvent the culpability requirements** for sanctions.
- The **"substantial prejudice"** standard for cases in which actions were proven to be "willful or in bad faith" was **too demanding** and **too difficult to satisfy**.

Advisory Committee Conclusions Based on Comments

- Committee concluded that the **rule should be limited to ESI**.
- Committee concluded that the approach of **limiting these "sanctions"** to a showing of both **substantial prejudice** and **willfulness or bad faith** was **too restrictive**.
- Committee concluded that **reference to "sanctions,"** or to Rule 37(b)(2)(A) as a source of sanctions, **should be deleted** – it's **too complicated to distinguish curative measures** from sanctions, and sanctions listed in Rule 37(b)(2)(A) are **rightly called sanctions** because they result from **disobeying a court order**.
- Committee also concluded that **the list of "factors"** specified in Rule 37(b)(2) of the published proposal was **unnecessary and might cause confusion**.

Rule 37(e): Spoliation Sanctions vs. ESI Preservation

Rule 37(e) May 2014 Proposal was a **Substantial Revision** of Published Proposal:

- The revised rule **applies if ESI** "that **should have been preserved** in the anticipation or conduct of litigation of litigation **is lost** because a party **failed to take reasonable steps** to preserve it."
- If reasonable steps were not taken, and information was lost as a result, **the next question is whether the lost information can be restored or replaced through additional discovery**.
- The court may **upon finding prejudice** to another party from loss of the information, **order measures no greater than necessary** to **cure the prejudice**.
- Proposed (e)(2) provides that the court may **only** upon finding that the party **acted with the intent** to deprive another party of the information's use in the litigation:
  (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 37(e): Spoliation Sanctions vs. ESI Preservation

Summary of Rule 37(e) May 2014 Proposal Differences:

1. Applies **only** to **electronically stored information**;
2. **Removes** provision in the August 2013 draft that **authorized "sanctions"** against a party **that lacked a culpable state of mind** if the loss of information caused **"irreparable prejudice"** to another party's ability to litigate;
3. It **removes references to "sanctions"** and the **list of sanctions** contained in Rule 37(b)(2)(A);
4. It **focuses** on measures **to restore or replace lost** electronically stored information;
5. It **authorizes** the court to **order measures "no greater than necessary" to cure** prejudice;
6. It **replaced the culpability standard** of "**willful or bad faith**" with "**acted with the intent to deprive another party of the information's use in the litigation**";
7. Only when the **"intent" standard is met**, can the **court presume** that the lost **information was unfavorable** to the party that lost it, **instruct the jury** it may so infer from the loss of the information, or **dismiss the action** or **enter a default judgment**;
8. **Deleted** the **list of factors** for the court's consideration in applying the rule.

Rule 37(e): Spoliation Sanctions vs. ESI Preservation May 2014 Proposal

PROPOSED RULE 37(e)

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

* * *

(e) Failure to Preserve ~~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.~~ 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 may:

(1) upon finding prejudice to another party from loss of the information, 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:

(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 Process – What's Next?

At its May 29-30, 2014, the **Standing Committee on Rules of Practice and Procedure approved** the Advisory Committee's **May 2014 Proposed Amendments**.

- The **Judicial Conference** will consider the Proposed Amendments in **September 2014**.
- Proposed Amendments **adopted by the Judicial Conference** will be **submitted to the U.S. Supreme Court** for review, and **if adopted in full or in part**, will be **submitted to Congress** prior to **May 1, 2015**.

Proposed Amendments that pass all stages will become effective on December 1, 2015.

The Process – Resources

- Transcripts of hearings
- Link to comments
- Status of the proposed amendments
- Link to redlined proposed amendments

  Available at:

  http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx

May 2014 Standing Committee Agenda Book w/ Advisory Committee May 2014 Proposed Amendments:
http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks

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Tony Lathrop is a seasoned corporate trial lawyer who partners closely with his clients to handle trials, litigation and disputes in ways that maximize value for their businesses. He uses his experience as a trial attorney and certified mediator to develop strategies for obtaining optimal trial results or other resolutions in high-stakes cases and to advise his clients regarding strategies to reduce future risk.

As a recognized leader within the legal community of North Carolina and nationwide, Mr. Lathrop has developed relationships and credibility that add value for the firm's clients. He currently serves as the Immediate Past Chair of The Network of Trial Law Firms, which is an organization of 7,000 attorneys in 25 separate and independent trial law firms practicing in over 140 offices throughout the United States and Canada. In his nearly thirty years of service to the North Carolina legal community, Mr. Lathrop also has served as the President of the Mecklenburg County Bar (2006-2007), the Chair of the Merit Selection Panels for two U.S. Magistrate Judges in North Carolina's Western District (2003-2004), a member of the Advisory Committee on Local Patent Rules for the U.S. District Court for the Western District of North Carolina (2010), an Aide to Governor James B. Hunt, Jr. (1983-1985), and an appointed member of Governor Hunt's Crime Commission (1982-1985). He currently serves on the Charlotte Mecklenburg Planning Commission.

Practice Areas

- Class Actions & Multi-District Litigation
- Commercial Litigation & Alternative Dispute Resolution
- Employment & Labor
- Employment Litigation
- Environmental Litigation & Toxic Torts
- Intellectual Property Litigation
- Litigation
- Public Affairs
- Workers Compensation & Workplace Safety

Of Note

- Selected for inclusion to the North Carolina Super Lawyers list in 2006 - 2014. His primary area of practice is Business Litigation.
- Selected as a North Carolina Top Rated Lawyer by Martindale-Hubbell
- Chairman, Network of Trial Law Firms (2011)
- Included in Best Lawyers in America for Commercial Litigation and Workers' Compensation Law (2010-2014)
- Vice-Chair, Charlotte-Mecklenburg Planning Commission (2013-)
- Chair, Planning Committee of the Charlotte-Mecklenburg Planning Commission (2013-2016 term)
- Member, Charlotte-Mecklenburg Planning Commission (2011 -)

Education

- B.A., University of North Carolina at Chapel Hill, 1983
- J.D., University of North Carolina at Chapel Hill, 1988